

  
DIGEST

OF THE

167  
**Laws of England.**

BY

THE RIGHT HONOURABLE

SIR **JOHN COMYNS**, KNIGHT,

LORD CHIEF BARON OF HIS MAJESTY'S COURT OF EXCHEQUER.

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THE FOURTH EDITION, CORRECTED,  
AND CONTINUED TO THE PRESENT TIME,  
By **SAMUEL ROSE**,

BARRISTER AT LAW, OF LINCOLN'S INN.

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IN SIX VOLUMES.

VOL. V.

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# LIBERTIES

## (A) The Several Species of them.

**H**OW liberties may be claimed, *vide Franchises*, (A 1, 2.)

All liberties and franchises are derived from the king. *Vide Prærogative*, (D 30, &c.)

As to the counties palatine, *Cinque-Ports*, and corporations, *vide Franchises*, (D 30, &c.)—E 1, &c.—F 1, &c.)

As to liberties to have consueance, or to hold pleas, *vide Courts*, (F 1, &c.)

As to liberties to hold courts, *vide County*, (C 1, &c.)—*Courts*.—*Hundred* (B).—*Leet*.

As to liberty to make justices, or officers, *vide Justices*.—*Justices of Peace*.—*Officers*.—*Prærogative*, (D 29. 37.)

As to the liberty of a chase, forest, park, warren, &c. *vide Chases*.

## (B) How granted.

**I**F the king grants a liberty to another, he may make the grant by words expressly denoting what liberty is intended.

Or, the king may grant by general words, which relate and have reference to some specialty; as, if the king grants to a town, that they shall have justices, who shall have such authority and power as any other justices in the county have, it will be good; for the specialty, to which the general words refer, is well known. 20 H. 7. 6. b. 7. a.

If the king incorporate a town, and grant that it shall have such liberties as *London*, it will be good; for it sufficiently appears what liberties *London* has. *Per two J.* 20 H. 7. 6. b. 7. b.

## (C) How lost.

(C 1.) By *Nonuser*.

(C 1.) *When it shall be a forfeiture.* **H**OW they may be destroyed by coming back to the king, *vide Franchises*, (G 1, &c.)

When forfeited by breach of a condition in law annexed, *vide Condition*, (S 1, 2.)—*Franchises*, (G 3.)

Liberties in which the subject has an interest for common justice, or the common profit, may be forfeited by *nonuser*: as, a liberty of courts may be lost by *nonuser*.

So, a liberty of a fair, or market. *Manw.* 81.

## LIBERTIES.

So, a forfeiture of any franchise or liberty is a forfeiture of every other incident or subordinate claim by the same grant. *Pal. 82.*

As, if a man lose a market, or fair, he shall lose also the court of piepowders. *Ibid.*

But where the franchises in the same grant are several, the forfeiture of one does not lose the others. *Ibid.*

(C 2.) *When not.*] But a liberty for the profit or pleasure of the owner, shall not be lost or forfeited *non user*: as, if a man can shew a title to a park, warren, &c. by grant or prescription, he shall not lose it by *non user*. *Manw. 81.*

## L I C E N S E.

*Vide Alienation*, (A 1, 2.)—*Capacity*, (B 3.)—*Chafe*, (H 3.)—*Fine*, (E 8.)—*Justices of Peace*, (B 26. 100.)—*Pleader*, (D 1, &c.)—*Trespass* (D).

## L I E N.

**E**A Customer lodges bills of exchange in the hands of a banker generally, and when the banker advances money for him, he applies it to the discount of such of the bills as happen to be nearest in value to the sum advanced, but without any special agreement to that effect. This does not invalidate the banker's general lien upon all the other bills in his hands, but he may retain them in order to secure the payment of his general balance. *Davis v. Bowsher*, B. R. H. 34 Geo. 3. 5 T. R. 488.]

[An agreement entered into by a number of dyers, pressers, &c. at a public meeting, that they would not receive any more goods to be dyed, but on condition that they should respectively have a lien on those goods for their general balance, is good in law; and any one who after notice of it delivers goods to either of those persons, must be considered as having assented to those terms, and cannot demand his goods until he has paid the balance of his general account. *Kirkman v. Shawcross*, B. R. M. 35 Geo. 3. 6 T. R. 14. *Vide Merchant* (B).]

## L I F E.

Estate for Life.

*Vide Copyhold*, (C 10.)—*Devise*, (N 7.)—*Estates*, (E 1, &c.)—*Officers*, (B 9.)—*Waste*, (F 2.)

## L I G E A N C E.

*Vide Allegiance.*

## L I M I T A T I O N.

Limitation of Actions.

*Vide Action upon the Case upon Assumpsit*, (D—H 6, 7.)—*Chancery*, (I 1.)—(4 W. 17.)—*Prerogative*, (D 86.)—*Temps*, (G 1, &c.)



## Limitation of the Crown.

*Vide Parliament*, (H 18, 19.)

## Limitation on Estates and Uses.

*Vide Condition* (T).—*Chan.* 37, (4 W 19, &c.)—*Uses*, (K 1, &c.)

## INDEMNITIES.

*Vide Abatement* (H 4, &c.)—*Chan.* 37, (4 W 19, &c.)—*Maintenance*, (A 5.)

## LIVERY-MAN.

*Vide Franchises*, (F 26.)

## LIVERY OF SEISIN.

*Vide Feoffment*, (B 1, &c.)

## LONDON.

### (A) Its Antiquity and Extent.

*TACITUS* says of London, *quod tempore Neronis fuit copia negotiorum, & compectu maxime celebre.* 4 *Inst.* 247.

The city of London being destroyed by the Danes, an. 839, was restored and encompassed with walls by king Alfred, an. 886, which having been often repaired were rebuilt an. 1477, from the Tower to Aldgate, and so to Bishopsgate, and so to Cripplegate, then Aldersgate, Newgate, Ludgate, and to Fleet-ditch, and so to the Thames, 643 perches, viz. above two miles in circuit. 1 *Stow*, 9. 11, 12.

The antient wall passed thro' the Tower, for which reason all within the Tower that lies upon the West part of the wall is within the city of London, and all upon the East part lies in the county of Middlesex. 3 *Inst.* 136.

Before the time of H. 3. the city was divided into 24 wards, whereof Portoken lies extra murum, Bishopsgate, Cripplegate, Aldersgate, and Farringdon, in part extra, in part intra murum. 1 *Stow*, 347.

By parliament, 17 R. 2. Farringdon extra was severed from Farringdon intra, and made a distinct ward. 1 *Stow*, 347.

By charter 1 Ed. 3. made and approved in parliament, the king granted to the citizens and their successors the vill of Southwark cum pertinentiis, solvendo the usual farm. 2 *Stow*, 3. (*Vide Priv. Lond.* 14.)

By patent 4 Ed. 6. the king granted to them his manor and borough of Southwark cum pertinentiis in com. Surry, the messuages and lands near the borough of Southwark purchased by H. 8. of Ch. duke of Suffolk, except Southwark place and park, the prisons of the King's Bench and Marshalsea; et quod inhabitantes de Southwark sint sub gubernatione, &c. of the city as citizens and inhabitants of London. 2 *Stow*, 4. 6. (*Vide Priv. Lond.* 20.)

After that grant, by an order of the court of mayor and aldermen

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INDEPENDENT.

*Vide Abatement* (H 42, &c.)—*Chancery*, (11. 24 C 3, 4)—*Main-tenance*, (A 5.)

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After that grant, by an order of the court of mayor and aldermen confirmed



## L O N D O N

confirmed by the court of common-council, the last *Ed. 6.* *Southwark* was constituted the twenty-sixth ward, by the name of *Bridge Ward without.* 2 *Stow*, 6.

By agreement with the earl of Cornwall confirmed by charter 26 Feb. 31 *H. 3.* *Queenhithe* with all liberties, is granted to the mayor and commonalty of London, and their successors, rendering 50 *l.* per annum. (Vide 1 *Stow*, 699, & *Priv. Lond.* 1.)

By charter 18th October 12 *Car.* is granted to the mayor, commonalty, and citizens of London, the *Moorfields* outer and inner, and *West Smithfield.* (Vide *Priv. Lond.* 1.)

### (B) Extent of its Jurisdiction.

*Poole* ward (which extends from *Aldgate* to the bars near *Whitechapel*, and from the house of Lord *Bourchier* near *Bishopsgate* to that place in the *Thames*, to which an horseman, riding into it at low-water, can throw his spear) imports the franchise *ad portam.* 1 *Stow*, 348.

This ward was granted *temp. Edgar* to thirteen knights to have the land, with liberty of a guild in perpetuum, and was by them granted to the canons of the *Holy Trinity*, *temp. H. 1.* within the walls of the city. 1 *Stow*, 348.

The prior of that house was from thence admitted an alderman of the city to have the government of that ward and suburbs. Since the dissolution, the alderman is elected, as other aldermen, by the citizens. 1 *Stow*, 349.

And therefore, the East part of the *Tower*, *St. Katherine's*, *East Smithfield*, (*Qu.* as to *St. Catherine's*, *East Smithfield*, and part of *Tower-hill*), *Tower-hill*, the *Minories*, storehouses, and *St. Botolph's* parish, which lie in that ward, are within the liberty of the city towards the East. (Vide 1 *Stow*, 349, &c.)

So, in *Bishopsgate* ward, from the gate to the bars *juxta St. Mary Spittle* and half *Houndsditch*, in this ward, is part of the suburbs, and within the liberty of the city. (Vide 1 *Stow*, 421.)

In *Cripplegate* ward, *Fore-street* from the North of *St. Giles's* church thro' *Moor-lane* to *Peckers-lane* End near *Moorgate*, with all houses, gardens, and alleys to *Moorfields* near *Finsbury-court*, the alleys and buildings about *Moor-lane*, part of *Grub-street*, *Whitecross-street*, to the end of *Beech-lane*, *Redcross-street* up to the posts in *Golden-lane*, and part of *Barbican* are extra murum. (Vide 1 *Stow*, 582.)

In *Aldersgate* ward, extra murum are *Aldersgate street* as far as *Barbican* and *Long-lane*, and *Goswell-street*, to the bars. (Vide 1 *Stow*, 601.)

*Farringdon* ward extra *Newgate* and *Ludgate* extends towards the West to the bars in *St. John-street*, the bars in *Holborn*, and *Temple Bar.* (Vide 1 *Stow*, 711.)

By charter 4 *Ed. 6.* the mayor, commonalty, and citizens of London, shall have like jurisdiction, &c. in *Southwark*, &c. as in London. (Vide 2 *Stow*, 4. 6. and *Priv. Lond.* 22.) Vide ante (A).

By charter 20 September 6 *Jac.* the jurisdiction of the mayor, commonalty, and citizens of London, shall extend thro' the several circuits, &c. of *Duke's-place*, *Great St. Bartholomew*, and *Little St. Bartholomew*, *Blackfriars*, *Whitefriars*, and *Cold Harbour.* (Vide *Priv. Lond.* 24.)

So,

So, by grants from antient kings the mayor, commonalty, and Citizens of London have the property of the Thames, *tam soli quam aquae*, (*Vide 1 Stow, 35.*)

By charter 8 R. 1. and 1 John, all weirs, &c. in the Thames and Medway shall be amover. (*Vide 1 Stow, 36. and Priv. Lond. 5, 6.*)

And the mayor and commonalty of London, time out of mind, have had the conservation and regulation of the Thames, and the lands thereby overlaid, from Staines bridge in the county of Middlesex, to the waters of the wall and Medway, and the punishment of unlawful engines, &c. and this confirmed by charter 3 Jac. &c. 1 Stow, 34. 4 Inst. 250. 12 Id. 148.

[Stat. 14 E. 2. c. 91. and 1 R. 3. c. 18. grant powers to the lord mayor, &c. to improve the navigation of the Thames westward, and to purchase tolls, and to lay a toll.]

*Vide Com. (O 1, &c.)*

### (C) Mayor.

By charters 16 John and 11 H. 3. the barons of London may yearly choose a mayor fit for the government of the city, so as he be presented to the king, or, if absent, to our justices, and sworn to be faithful to us. (*Vide 1 Stow, 186, &c. 450, &c. and (Priv. Lond. 6, 7.)*)

By charter 11 H. 3. to the king, or, if absent, to the barons of the Exchequer in Westminster. And by charter 26 Ed. 1. if the king and barons be absent, to the governor of the Tower. (*Vide 2 Stow, 186, &c. 450, &c. and Priv. Lond. 9. 11.*)

Before and since the Conquest, to the time of R. 1. London was governed by a port-reeve, and 1 R. 1. by two bailiffs, and afterwards by a mayor appointed by the king, but 10 John the king granted *quod eligant* a mayor *de seipsis* annually. 2 Inst. 253. (*Vide 2 Stow, 450.*)

By charter 1 Ed. 3. the mayor of London shall be named in every commission for gaol-delivery of Newgate: and shall do the office of escheator within the liberties of the city, so as he take oath to exercise the office, and to answer to the king as he ought. (*Vide Priv. Lond. 12, 13.*)

By charter 2 Ed. 4. the mayor, recorder, and aldermen that have been mayors, shall be conservators of the peace within the city; and they or four of them, *quorum* the mayor to be one, shall be justices of oyer and terminer there. (*Vide Priv. Lond. 16.*)

By charter 14 Car. they, or the aldermen, not mayors, shall be justices, and four of them, *quorum* the mayor, or recorder to be one, may hold a sessions. (*Vide Priv. Lond. 26.*) *Vide post. (K 6.)*

[The jurisdiction by 1 J. 1. c. 22. concerning leather-cutters, is not in the mayor personally, but as the head of the court of sessions. *Rex v. Williams, T. 30 & 31 E. 2. 1 B. M. 385.*]

[The lord mayor's watermen are not, as such, privileged from being impressed; but tho' not exempted, it would be an abuse of the right, to press them, if they were in the act of rowing the lord mayor in his barge. *Cowp. 512. 518.*]



## L O N D O N.

## (D) Aldermen.

**T**HE aldermen of *London* are annually chosen, till by charter 28 *Ed.* 3. it was granted, that they should not be removed without assent; and by the *st.* 13 *R.* 2. it was enacted, that they should not be (vide the *st.* 11 *Geo.* 18. as to their election) chosen annually, but remain till removed for cause. 4 *Inst.*

But the king by charter may exempt the officers of the mint, that they shall not be aldermen, or officers there, and then they cannot be fined for default. *R.* 1 *Sid.*

## (E) Recorder.

**I**F the custom of *London* be denied, it shall be certified by the mayor and aldermen by the mouth of the recorder, and a writ goes to the mayor to certify, except where the city is concerned in interest. 2 *Inst.* 126.

Vide Certificate (B).

## (F) Common-Council.

**A** Court is held at *Guildhall* before the mayor, aldermen, and common-council, (vide the *st.* 11 *Geo.* as to their election, &c.) whenever the mayor appoints. (Vide *Priv. Lond.* 350.)

The mayor and aldermen sit by themselves, and the others, who represent the commons of the city, by themselves. 4 *Inst.* 249.

The court of common-council makes all bye-laws, which bind within the city and the liberties. *Ibid.*

So, they annually choose a committee of six aldermen and twelve commoners for leasing the lands of the city; four aldermen and eight commoners for the management of the lands given by Sir *Thomas Gresham*; a governor, deputy governor, and assistants for the management of the city lands at *Ulster* in *Ireland*. (Vide *Priv. Lond.* 350, 351.)

So, they elect to the offices of common-serjeant, town-clerk, and common crier. (Vide *Priv. Lond.* 352.)

No alien shall be admitted to the freedom of the city, without their assent. (Vide *Priv. Lond.* 352.)

## (G) Sheriffs.

**B**Y charter *H.* 1. the citizens of *London* shall hold *Middlesex* in farm at 300*l.* per annum, so as they place as sheriff, whom they will, of themselves. (Vide 2 *Stow*, 450, &c. and *Priv. Lond.* 3.)

By charter 1 *John*, the king grants and confirms to them the sheriffwick of *London* and *Middlesex*, with all customs belonging within the city and without, by land and by water, paying 300*l.* per annum at the *Easter* and *Michaelmas Exchequer*. (Vide 2 *Stow*, 450, &c. and *Priv. Lond.* 5.)

But by charter 11 *H.* 3. *vicecomites respondeant ad Scaccarium de hiis qua ad dictum vicecomitatum pertinent.* 4 *Inst.* 252.



## LONDON.

7

(H.) *London* is a County, and a Corporation by Prescription.

**L**ONDON is a county of itself. 4 *Inst.* 248.

So, *London* is a corporation by prescription, known by several names. 4 *Inst.* 330. 2 *vo. W. & A.* 1.

### (I.) Chamberlain.

**T**HE chamberlain of *London* is an officer elected annually [by the livery]. (*Vide Priv. Lond.* 302.)

And this officer is a corporation sole by custom, who may take a recognizance, obligation, &c. for money when it belongs to an orphan, or to a matter under his care; which goes in succession, and not to his executor or administrator. R. 4 Co. 65. *Vide Guardian*, (G 1, &c.) *Biens* (C).

And the treasurer by custom may sue the obligation, or upon such a recognizance direct a precept, in the nature of an *elegit*, to a serjeant at mace of his court; who shall thereupon do execution according to the *stat. W.* 2. 18. R. 4 Co. 65.

By charter of 28 *Ed.* 3. the serjeants at mace in the city may bear their staffs of gold or silver, or silvered, with our arms, in the cite or suburbs in *London* and other places belonging to the liberties of the city. (*Vide Priv. Lond.* 14. 4 *Inst.* 252.)

### (K.) Offices granted.

#### (K 1.) Office of Package.

**B**y charter 18 *Ed.* 4., confirmed by parliament 3 *H.* 8., the king granted, for a debt of 7000 *l.* remitted to the king by the city, to the mayor and commonalty and their successors, the offices of packing all clothes, skins, and other merchandizes within the liberties of the city, as well denizens as aliens, and the oversight of opening all merchandizes customable, brought to the port of safety by land, or water. (*Vide Priv. Lond.* 19.)

#### (K 2.) Portage.

So, by the same charter, *Ed.* 4. granted to them the carriage and portage of all wools and other merchandizes carried in *London* from the *Thames* to any strangers' houses, *vel retro.*, and of other merchandizes to be carried, being in any house for a time. (*Vide Priv. Lond.* 19.)

#### (K 3.) Garbling.

So, by the same charter, *Ed.* 4. granted to them the garbling of all spices, and other merchandizes that ought to be garbled. (*Vide Priv. Lond.* 19.)

#### (K 4.) Gauger.

So, by the same charter, and by charter 20 *H.* 7., was granted to them the office of gauger within the city; and the ordering

and corrected in of the same, with all fees, &c. without charge. (*Priv. Lond. 19.*)

(K 5.) Wine-Drawers.

By the charter 18 *Ed. 4.* the king granted to them the office of wine-drawers, to provide for carrying all wines brought to the port of the city, and land on land, or elsewhere to be carried. (*Vide Priv. Lond. 19.*)

(K 6.) Offices of Peace, &c.

By the same charter *Ed. 4.* granted to them, that they make coroner of the city whom they please. (*Vide Priv. Lond. 19.*)

So, by charter 2 *Ed. 4.*, the mayor, recorder, and aldermen that have been mayors, shall be conservators of the peace of the city, as well by land as by water. So, by charter 6 *Jac. 3.* & 1 *Car. 1.*, they and the aldermen who have not been mayors, &c. (*Vide ante (C).*)

And they or four of them (*Qu.* one is mayor) shall be justices of oyer and terminer within the city and liberties, to determine all things belonging to justices of peace. (*Vide Priv. Lond. 16.*)

So, by charters 6 *Jac. 3.* & 14 *Car. 1.* they and the aldermen, not mayors, whereof four (of whom the mayor or recorder to be one) may hold sessions. And the sheriffs, &c. shall be attendant, &c. (*Vide Priv. Lond. 24. 26.*)

(K 7.) Office of the Great Beam, Weights, and Measures.

So, by charter 22 *H. 8.* the king granted the office of keeper of the great beam and common balance or weight within the city of London, for weighing all merchandizes of *Avoirdupois*, and also all weights, to the mayor, commonalty, and citizens of London, and their successors; and they shall have tronage, *viz.* the weighing wax, lead, pepper, &c. and like wares for ever. (*Vide Priv. Lond. 20.*)

And the charters 12 *Ed. 2.* and 1 *H. 4.*, to the same effect, are confirmed, and they seem to have had it time out of mind, &c.

By charter of *H. 3.* no stranger shall buy goods till weighed at the king's beam, on pain of forfeiture. (*Vide Priv. Lond. 10.*)

And therefore a bye-law, that a foreigner who sells goods usually sold by weight shall pay 13 *s.* 4 *d.* for every five hundred weight, if he does not bring them to the city-beam to be weighed, will be good. *R. 1 Lev. 15. 1 Keb. 32. 35. 39.*

So, by charter 1 *H. 4.* the citizens shall have the office of gathering the tolls and customs in *Cheap*, *Billingsgate*, and *Smithfield*; and tronage, *viz.* the weighing of lead, wax, pepper, &c. and like wares within the city for ever. (*Vide Priv. Lond. 15.*)

By charter 3 *Ed. 4.* the king granted to the mayor, commonalty, and citizens the tronage, weighing, measuring, and laying up of all wool which shall be at *Leadenhall*, and no other place within three miles. (*Vide Priv. Lond. 18.*)

(K 8.) Custody of the Gates, &c.

So, by charter 1 *H. 4.* the citizens of London shall have the custody of *Newgate*, *Ludgate*, and all other gates and posterns in the city. (*Vide Priv. Lond. 15.*)



## L O N D O N

### (L.) Exemptions granted.

#### (L. 1.) To be free of Toll, &c.

**B**Y charter *H. 1.* all the men of *London*, and all their goods, shall be free from scot and lot, Danegit, and murder; and from all toll, passage, and lading, and all other customs thro' all *England* and the ports of the sea. *1 H. 3. and 50 H. 3. Vide 4 Inst. 252.*

[But he who claims these privileges must only be a freeman, not an inhabitant of *London*. *H. Bl. 206. R. 144.*]

So, by charter *H. 2.* and *1 John*, and also that they shall be free from bridewite, childwite, jerech, and scotale. *(Vide Priv. Lond. 4.)*

So, by charter *26 Ed. 1.* from pontage, pannage, and murage thro' the kingdom, and all our dominions. *(Vide Priv. Lond. 11.)*

So, by charters *H. 1., H. 2., and 1 John*, none of the citizens of *London* shall wage battel. *4 Inst. 252.*

#### (L. 2.) Excused from Juries, &c.

So, by charter *2 Ed. 4.*, aldermen, while they continue so, and those that have been so and have also been mayor, shall not be put in assizes, juries, or attainments, recognizances, or inquisitions out of the city. *(Vide Priv. Lond. 10.)*

[A jury of citizens may waive their privilege, and consent to be sworn in a trial at bar in *Middlesex*. *Lockyer v. East-India Company, M. 2 G. 3. 2 W. 17. 136.*]

#### (L. 3.) And from Suits out of the City.

So, by charter *1 H. 1.* the citizens of *London* shall not plead out of the walls of the city in any plea.

So, by charter *H. 2. and 5 R. 1.*, except pleas of foreign tenures, the king's moneyers, and ministers.

So, by charters *1 John*, and *11 H. 3.*, and *1 Ed. 3.* *(Vide Priv. Lond. 3, 4, 5. 8. 14.)*

So, by charter *1 Ed. 3.* no freeman shall be impleaded at the *Exchequer*, or elsewhere, by bill, unless it concern us or our heirs. *(Vide Priv. Lond. 14.)*

#### (L. 4.) Excused from Offices.

So, by charter *1 Ed. 3. 9.* the citizens shall not be compelled to go or send to war out of the city. *(Vide Priv. Lond. 13.)*

Nor, by charter *2 Ed. 4.*, shall aldermen be made collectors, assessors, &c. of tenths, fifteenths, taxes, subsidies, or other impositions granted to us or our successors; and if elected, shall forfeit nothing by refusal, &c. *(Vide Priv. Lond. 16.)*

### (M) The Privileges and Customs of *London* are confirmed by Parliament.

**B**Y the *st. M. Ch. 9 H. 3.* *civitas London habeat omnes libertates suas antiquas & consuetudines suas.*

By the *st. 7 R. 2. Rot. Par. nu. 37.* (not printed) the citizens of *London* shall enjoy all their liberties whatsoever, *licet usi non fuerint vel abusi*, and notwithstanding any statute to the contrary: so that they



they may claim liberties by prescription, charter, or otherwise, notwithstanding any statute made before 7 R. 2.

But this is intended of franchises, that are by lawful title, and not of franchises and franchises and customs, which are by law, and not by prescription. 2 *Inst.* 20.

And therefore, a custom to assign for above, is not good. *R. Cro. El.* 609.

And tho' the customs and privileges of London are confirmed by parliament, the king's charter makes a parson from being an officer there: as the officers of the court, that none shall be mayor, escheator, sheriff, or other officer there. *R. 1 Sid.* 288.

But a custom, that the watchmen of the custom-house shall be exempt from the office of constable, is not good. 1 *Sid.* 282.

[This court cannot judicially take notice of a custom of London, there must be affidavit of it. *Thyer v. Eastwick*, H. 12 G. 2. *Argill v. Hunt*, T. 5 G. 1. *Driver v. Colgate*, H. 12 G. 2. *Argill v. Hunt*, P. 16 G. 2. 4 *B. M.* 2032.]

### (N) Customs of London.

(N 1.) In Actions and Suits.

BY the custom of London, an action of covenant lies, without a specialty. (*Vide* 22 *Ed.* 4. 2. a. and *Priv. Lond.* 149.) *Vide Courts*, (O 1, &c.)

So, debt lies in London upon a *concessit solvere*. (*Vide* *Priv. Lond.* 146. and 1 *H.* 7. 22. a.)

And lies against an executor upon a simple contract. (1 *Ed.* 4. 6. b. 8 *Co.* 126. a.)

And also against an administrator; for he was suable as executor before the *fl.* 31 *Ed.* 3. 11. *R. Cro. El.* 409. 5 *Co.* 82. b.

So, debt lies against pledges by parol. (43 *Ed.* 3. 11. b. 1 *Ed.* 4. 6. a.)

So, by the custom of London, after a plaint entred in the compters, a serjeant may arrest, without process. (9 *Co.* 68. *Cro. Car.* 196.)

After a debt levied before the sheriff in his court, the sheriff may direct the serjeant *ore tenus* to summon or attach the defendant without warrant, and upon *nihil* returned to arrest, *ad habendum corpus* at the next court.

So, by custom, debt lies by an obligor who pays the whole debt against the other obligor for his proportion. (*Vide* *Priv. Lond.* 148. and *Mo.* 136.)

So, for lands in London, an action lies in London, and not elsewhere. (4 *Inst.* 247.)

And it cannot be removed by *tolt*, or *pane*. 2 *Inst.* 324.

But upon a *foreign voucher* by the *fl.* *Glo.* 12. there shall be a summons *ad warrantizandum*. 2 *Inst.* 324. *Vide Courts*, (O 2.)

So, upon a plaint against A. in the sheriff's or mayor's court, upon a suggestion that B. is indebted to A., and process against B.; if he does not deny the debt, it shall be attached in his hands for satisfaction of the debt by A. 22 *Ed.* 4. 30. [2 *Bl.* 834. 3 *Wilf.* 297. *Dougl.* 378. 4 *T. R.* 312. *Vide Attachment* (A).]

And this recovery by foreign attachment may be pleaded by B. in an action against him for the debt, or given in evidence upon *non assumpsit*. *Vide Attachment* (H-1). So,

may be granted in the sheriff's court, on which  
upon this judgment is returned, and he is committed to the  
marshals of R. removed with judgment there, and in L. removed.  
pays the judgment of R., and the judgment in London is removed  
in the return. A. shall be removed to London to be discharged there,  
for B. has no knowledge of him in London, except by the  
return upon the habeas corpus, and shall remove the record from  
London by certiorari. *2 R. 120.*

[An action against a person as sole tenant cannot be removed  
by habeas corpus from the sheriff's court. *2 Bl. 120.*]

[In the city courts there is notice of their own customs without  
proof; but the superior courts in *Westminster Hall* cannot take notice  
of the customs of London, unless they are certified or proved. *Blac-  
quiere v. Blosse, B. R. E. 20 Geo. 3. Dougl. 378.*]

[And the manner in which such customs are certified, see *Plum-  
mer v. Blosse, B. R. H. 30 Geo. 2. 1 Burr. 248.*]

(N 2.) In regard to Apprentices.

By the custom of London, every one above 14, and under 21, may  
bind himself apprentice to a freeman of London, by indenture for  
seven years, and shall be compelled to serve. (*Pal. 361. 2 Rol.*  
*305.*)

That is, at *York*, or elsewhere out of the city. (*Mo. 136.*  
*Semb. 10th. Bul. 193.*)

So, the widow of a freeman may take for her apprentice any wo-  
man for seven years. (*Vide Priv. Lond. 307.*)

So, a sempstress, or other, the wife of a freeman; but she shall  
be bound by indenture to the husband. *Ibid.*

So, the apprentice may be bound for eight, nine, or ten years. *Ibid.*

If the apprentice departs from his service, or breaks the common  
covenants in the indenture, an action lies against him, tho' he be an  
infant, by the custom of London. (*Vide Priv. Lond. 108, 109. and*  
*Pal. 361. 2 Rol. 305.*)

So, by the custom of London, every indenture of apprenticeship  
ought to be inrolled within a year before the chamberlain. (*Vide*  
*Priv. Lond. 107. 303. Pal. 361. 2 Rol. 305.*)

And the apprentice ought to be present at the time of inrolment.  
(*Pal. 361. 2 Rol. 305.*)

If the apprentice refuse to appear to be inrolled, the master may  
record the indenture, which will be tantamount. (*Vide Priv. Lond.*  
*305.*)

If the master neglect the inrolment within the year, the apprentice  
may be discharged from his service. (*Vide Priv. Lond. 107. 303.*  
*Pal. 361. 2 Rol. 305.*)

So, by the custom of London, an apprentice may be assigned to an-  
other master of the same trade before his company, and afterwards  
before the chamberlain, and shall be bound to serve the second mas-  
ter for the whole residue of his term, and the first master shall be dis-  
charged. (*Vide Priv. Lond. 108. 304.*)

But if the apprentice be assigned before the company, and not be-  
fore the chamberlain, the second master is not bound to maintain,  
nor the apprentice to serve him. (*Vide Priv. Lond. 304.*)



If there be a difference between a master and his apprentice, it shall be determined by the chamberlain. (*Vide Priv. Lond. 302.*)

Or an action lies by the one or the other in the mayor's court, by reason of the indenture of apprenticeship. (*Vide Priv. Lond. 303.*)

If the master misuse the apprentice, or neglect to provide for him, or to find him necessaries, the chamberlain shall send a writ to the master to appear before him, and shall relieve the apprentice, or send him to his remedy in the mayor's court.

If the master does not appear to the chamberlain's writ, the mayor or recorder shall send his warrant for him. (*Ibid.*)

So, if the apprentice be disorderly, the chamberlain shall send the beadle for him, and afterwards shall send him to the beadle, or otherwise punish him according to the nature of the offence. (*Vide Priv. Lond. 303.*)

So, for a reasonable cause the apprentice may be discharged from his apprenticeship. (*Vide Priv. Lond. 306.*)

And for that intent, the apprentice brings his indenture, or copy, to an attorney in the mayor's court, who gives a writ or warrant to the master, to inform him of the intent, and for what cause; and after four courts shall make a summons to the master to appear, and shew cause to the contrary. (*Ibid.*)

If the master appears by attorney and traverses the charge, it shall be tried, and according to the verdict the apprentice shall be discharged or not, but without costs. (*Ibid. 307.*)

#### (N 3.) As to Disposition of their Lands, &c.

(N. 3.) *By bargain and sale.*] By the custom of London a citizen may make a bargain and sale by *parol* of his houses and lands in London, notwithstanding the *stat. 27 H. 8. 16.*

For cities, &c. are there excepted. (*2 Inst. 675.*) *Vide Bargain and Sale, (B 4.)*

So, a bargain and sale by husband and wife, of the wife's lands within London, binds the wife, being examined before the mayor. (*Vide Priv. Lond. 123. 148. Hob. 225. Cro. El. 869.*) *Vide Baron and Feme, (G 4.)*

(N 4.) *By devise.*] So, by the custom of London, a freeman may devise his lands, &c. in London. (*Vide Priv. Lond. 156.*)

By charter 1 Ed. 3. the king granted to the city of London liberty to devise lands in *mortmain*, as was used in time past; and therefore, they may devise in *mortmain*, without licence. (*2 Inst. 21. Cro. Car. 248. 455. 517. 576.*)

So, by custom, a joint-tenant may devise his purparty, and it will be a severance. (*Vide Priv. Lond. 156.*)

But a will of lands in London ought to be proved in the hustings, and there inrolled. (*Ibid.*)

So, it ought to be proved before the ordinary, and afterwards in the hustings. (*Cro. Car. 396, 7. Vide Devise (A).*)

As to the custom of London in respect to orphans, and to the distribution of a freeman's personal estate, *vide Guardian, (G 1, 2, &c.)*



## SECTION II. A Regulation of Houses.

By the custom of *London*, a man may rebuild his house or other edifice, upon the antient foundation to what height he pleases, and thereunto the antient owners are bound, if of an adjoining house, and not otherwise, as is written to the contrary. (*Vide Priv. Lond.* 9.)

(*Vide Priv. Lond. upon the Case for a Nuisance* (C).)

But no other erections are allowed, so as to stop his neighbour's lights. (*See* *Butt v. Bennet*, *H. 30*, *1 R. M.* 248.)

But he cannot stop his neighbour by building upon a new foil, beyond the antient foundation. (*Vide Priv. Lond.* 56.) *Vide Action upon the Case for a Nuisance* (C).

So, for the repair of his house, a man by custom in *London* may let his poles and ladders upon the foil, or house of another adjoining. (*Vide Priv. Lond.* 59.)

But he must not break the foil, or house. *Ibid.*

[Neither may a builder of an house in *London*, on a new foundation, enclose more than half of his flank or side wall on his neighbour's vacant ground. *Ibid.* 959.]

[By *Stat. 1. c.* 28. is confined to party-walls between houses, and not allowed to party-walls between stables. *Rex v. Pratt*, *P. 1 G. 2. B. 10* 2298.]

[By *Stat. 1. c.* 78. directs the thickness of party-walls, prohibits bow-windows, except for shops on the ground story, to project only five feet, and the coping 13 inches, in streets 30 feet wide; and only 10 inches, and the coping 18 inches, in wider streets: and contains many other regulations for buildings in the bills of mortality; and in *Marybone, Paddington, Pancras, and Chelsea*.]

## (N 6.) In regard to Trade.

(N 6.) *A citizen may trade where he pleases.*] By charter *H. 3.* the king granted, that the citizens of *London* may traffic with their merchandize where they please, as well by sea as land. (*Vide Priv. Lond.* 9.) *Vide Trade.*

By the custom of *London*, a freeman having served in *London*, apprentice to a trade for seven years, that uses buying and selling, may leave that and use another trade of buying and selling. *Cro. Car.* 361. 517.

And such custom shall be good, notwithstanding the *st. 5 El.* 4. *R. Cro. Car.* 347. 516. *Vide Prescription*, (F 3.)

But a freeman of *London* cannot use a trade, contrary to the *st. 5 El.* 4., when he never served as an apprentice for seven years. *R. 1 Sid.* 427.

[It is a good custom to the portorage of corn, roots, &c. belongs to the city from *Staines Bridge* to *Yendal* in *Kent*, and the bye-law is good, that none but the company of free porters shall carry it, on penalty of 20 s. *Fazakerley v. Wiltshire*, *T. 7 G.* *Ludlam v. Bradley*, *P. 13 G. in C. B.* *Robinson v. Webb*, *T. 2 G. 2. B. R. Str.* 462.]

[It is a good custom, that persons to be admitted to freedom be obliged to swear on the *New Testament*. *Rex v. Bosworth*, *T. 12 G. 2. Str.* 1112.]

[By *st. 14 G. 3. c.* 87. driver of cattle in the bills of mortality misbehaving, convicted before one justice, forfeits from 20 s. to 5 s.

to protect one or committed to hard labour for a month, or more, for sleeping.]

[As to the customary duty on corn imported into London, see *London and Fenchurch, B. R. T. 2 Geo. 3. 1791*.]

[*A wife may be a feme-sole merchant.*] So, a wife, even though a covert, may be a merchant, and trade in a different name from her husband, and buy and sell by herself, which she may be sued, the husband shall be joined only in conformity with the writ alone shall be in error. *Cro. Car. 10. Vide Baron and Feme (A 2.)*

[On this custom the feme-sole merchant can bring an action only in the city courts; but if she and her husband be sued in a superior court, the husband may plead the custom in bar. *1 Burr. 1784. Caudell v. Shaw, B. R. T. 31 Geo. 3. 4 T. R. 361.*]

[On this custom also a feme-sole merchant is liable in case of bankruptcy, and her assignees are entitled to her debts and credits due to her in the course of her trade. *3 Eurr. 1784. 570.*]

(N 8.) *A foreigner cannot buy or sell, within the liberties of London.* By the custom of London, no stranger to the liberties thereof may buy or sell to any stranger to the liberties thereof, (except the use of him and his family, and not to sell again,) any wares or merchandize or wares within the liberties of the city; and if they do, the same shall be forfeited to the mayor and commonalty. (*Vide Priv. 104. Cro. El. 352.*)

And this custom is explained and confirmed by charter 20 H. 7., and it is recited there, that it was confirmed by parliament. (*Vide Priv. Lond. 19.*)

### Right Patent in London.

*Vide Droit (D).*

### Tithes in London.

*Vide Dismes, (M 6, 7.)*

### L O R D.

#### Lord of a Leet.

*Vide Leet.*

#### Lord of a Manor.

*Vide Copyhold.—Dismes, (C 4.)*

### Lords Spiritual and Temporal.

*Vide Dignity.—Ecclesiastical Persons, (C 1, 2.)—Parliament.—Scotland, (D 4.)—Serement (C).*

### Lord's Day.

*Vide Temps, (B 3.)*

## LOTTERY

Let lottery be taken, and the lottery be considered, and the  
number be drawn, and the number be drawn, and the  
number be drawn. *Schinn v. B. R. E.*

A

*Vide Bar (B).*

## MAINTENANCE

*Vide Bar (B).*

## MAINTENANCE

Maintenance ; what shall be.

(A 1.) By the Common Law.

**M**AINTENANCE is when a man maintains a suit or quarrel to  
the disturbance or hindrance of right. *Co. L. 368. b. 2 Inst. 208.*  
212.

And it is general, or special. *Co. L. 369. a.*

And therefore, it will be maintenance in any one, who unlawfully  
sustains or supports a plaintiff or demandant, tenant or defendant, in  
a cause pending in suit, by word, writing, countenance, or deed.  
*2 Inst. 208.*

As, if a master fee counsel out of his own money, or speak at the bar  
for his servant. *R. Mo. 6.*

So, if a servant retain an attorney to prosecute a suit for his master,  
without the consent of the master. *D. 2 Rol. 77.*

(A 2.) *Champerty. What shall be.* If he who maintains another  
is to have by agreement part of the land, or debt, &c. in suit, it is  
called *Champerty*. *Co. L. 368. b. 2 Inst. 208. 563. Vide post. (A 5.*  
—C 1, 2.)

Or, if he agrees to have a rent or other profit out of the land.  
*Co. L. 368. b. 2 Inst. 209. 563.*

Tho' the agreement be by *parol*, or by deed. *2 Inst. 209.*

Tho' the agreement be with a disseisor, tho' he has no right in the  
land. *2 Inst. 563.*

*Champerty* is the most odious species of maintenance. *2 Inst. 208.*

And was an offence by the common law. *Ibid.*

And now by the *st. W. 1. 25. nul minister le roy maintaine per luy,*  
*ne per auter, les ples en la cour le roy, des terres, tenements, ou des auters*  
*choses, pur aver part de ceo, ou auter profit per covenant fait. Es que le*  
*sera, soit punie a le volunt le roy.*

Nor,



Nor, by *W. 1. clerke de justice, ne de vicont, ne de autres parties*  
 part. (H) *Na cour le roy*  
 Nor, by *ft. 1. de Defin. Confp. 33 Ed. 1.*

any other  
 erefore, a master of the law, or any other, who maintain  
 2. *ft. 1. de Defin. Confp. 33 Ed. 1.* depending in the king's court upon an agreement, or upon  
 the thing in suit, will be champertor. 2 *Inst.* 503.

So, by the *ft. 1. de Defin. Confp. 33 Ed. 1.* champertors be they  
 who move pleas or suits, or cause them to be moved, their own  
 procurement, or by others, and sue for proper costs to have part  
 of the land in variance, or part of the profits thereof.

Champerty shall be punished in all cases personal, real, or mixt.  
 2 *Inst.* 563.

(A 3.) *What shall not be champerty.*] But it will not be champerty  
 if *A.* contracts with *B.* for a manor, for which *B.* has already  
 pleaded, and *pendente lite B.* conveys it to *A.* 2 *Inst.* 503.  
*post.* (A 5.)

(A 4.) What shall be Maintenance by Statute.

By the *ft. W. 1. 28. clerke de justice, ne de vicont, ne de autres parties*  
*en quarels en la cour le roy, &c.*

So, by the *ft. de Defin. Confp. 33 Ed. 1. ft. 2.* who move themselves  
 by oath, covenant, &c. falsely to move or maintain a plea.

By the *ft. 1 Ed. 3. ft. 2. 14.* none of the king's counsellors, or  
 other great or small, by himself or other, by letter or otherwise, shall  
 maintain quarrels in the country to the let of the common law.

So, by the *ft. 20 Ed. 3. 4.* none about the king, queen, or prince,  
 or other great or small, shall maintain quarrels, &c.

Nor, by the *ft. 1 R. 2. 4.* any of the king's counsellors, officers or  
 servants, or other person within the realm.

So, by the *ft. 32 H. 8. 9.* all former statutes against maintenance,  
 champerty, &c. are confirmed.

And by the *same statute*, no person shall unlawfully maintain or  
 procure maintenance in any of the king's courts, &c. in any of his  
 dominions, which have authority to hold plea of land, &c. nor retain  
 for maintenance of any suit, &c. on pain of 10*l.*

(A 5.) *Buying a title, &c.*] So, by *ft. 32 H. 8. 9.* no person shall  
 buy or sell, or by any means obtain any pretended rights or titles, &c.  
 to any manors, lands, &c. unless he who sells, &c. his ancestor, or  
 they by whom he claims, have been in possession thereof, or of the  
 reversion or remainder, or taken the rents or profits, by the space of  
 a year before the bargain, on pain to forfeit the value of the lands,  
 &c. so bought or sold.

And therefore, if any one, who has a naked right to lands sells  
 them, it will be within the statute: as, if a disseisor before entry sell  
 his land, tho' he has a real right to it. *Co. L.* 369. *a.*

So, if a disseisor grant an estate to *A.* for life or years, remainder  
 to *B.* for life, in tail, or in fee, *B.* cannot contract with the disseisor,  
 that he shall enter, or recover, and then convey to him. *Co. L.*  
 369. *b.*

So, if a feoffment be by an husband to the use of himself for life,  
 and

and afterwards to his wife for life, and afterwards to the husband, who coverts a stranger, and dies, and the wife sells to B., tho' her contract is congeable. *R. 1 Leo. 166.*

201. *Moss. 166. Godb. 101.*

So, if a man, who has no colour of right or title, sells it to B. within the statute, tho' the conveyance by him be void.

*Co. L. 369.*

As, if A. had the right, and B. sells, as land which descended to him from D. his father. *R. 1 Mod. 67.*

So, if a man who has a title obtains possession wrongfully, he can sell within a year without danger: as, if a disseisor dispossess the heir of the disseisor. *Co. L. 369.*

But if a man recover in ejectment, and has an *habere facias possessionem*, but sells immediately, before he be possessed for a year, it will not be of maintenance. *R. Godb. 450.*

So, he who purchases a pretended right to a term for years, will be within the statute, which says, *any pretended right.* *Co. L. 369. a.*

2 *And. 57.*

Or, a pretended right to a copyhold. *Co. L. 369. b. 4 Co. 26.*

So, if a lease for years be accepted from A. having a right, and not in possession, tho' the lease be void. *R. 1 Leo. 166.*

So, the grantee, as well as the grantor of a pretended right, &c. if he knows it, will be within the *st. 32 H. 8.* and shall lose the value of the land. *Co. L. 369. a. Vide the words of the statute.*

But the jury must find, that the grantee of a pretended title knew of it. *R. 1 Leo. 166, 7.*

So, by *W. 2. 13 Ed. 1. 49. chancellor, treasurer, justices, ne nul de counceil le roy, ne clerke de la chancery, ne del eschequer, &c. ne puis resciver esglise, advowson, terre, &c. per dons, ne per achate, ne asermer, &c. tanque come le chose est en plee devant nous, &c. Et qui encounter cest chose face, soit punie a la volunt le roy, auxibien celuy qui le purchasera, come celuy qui le fra.*

And therefore, justices, king's counsel, or the clerk of a court cannot purchase, or take by gift, land, &c. in a suit *pendente lite*, tho' the purchase be *bonâ fide*, and not by champerty. *2 Inst. 484.*

So, if a ferjeant, counsel, or attorney take a feoffment of part of the land *pendente lite*, in lieu of their fees, it will be champerty. *2 Inst. 564.*

But a purchase *bonâ fide* by a stranger *pendente lite*, is no maintenance. *2 Inst. 484. 564.*

Or, if a father enfeoff his son of the land *pendente lite*, for his assistance. *2 Inst. 564.*

So, a purchase by a counsel after a recovery, or a gift for his fees, is not maintenance, if it was not upon an agreement *pendente lite.* *Ibid.*

So, a surrender or conveyance *pendente lite*, by a tenant for life, or in tail, to him in reversion or remainder, is not maintenance; for he is the next in estate. *Ibid.*

*Vide post. (B).*



## What shall not be Maintenance.

BY the *fl. Art. super Chart. 11. nest mye a entendre, que home ni poit aver counsaile des countours, et de ces gents pur son donant, ne de ses prochains amies. Vide ante, (A. 3.)*

And therefore, it is no maintenance, if a counsel takes fees for his advice and assistance. *2 Inst. 564.*

So, if an attorney expends his own money for his client to be paid. *Ibid.*

So, if the father pays fees for his son *vice versa*, without expectation of repayment. *Ibid.*

So, if a master pays fees to counsel for his servant out of wages due to the servant. *Mo. 6.*

So, if a lessor pays fees, or maintains the suit for his lessee in ejectment. *2 Rol. 181.*

[So, if a landlord sues in the name of his tenant to try a right. *Payne v. Rogers, B. R. E. 20 Geo. 3. Dougl. 407.*]

[If a mortgagee, not a party in a suit, advances money to support the title, it is not maintenance. *Sharp v. Carter, T. 1735. 3 P. W. 375.*]

So, if a man who has a lawful possession obtains conveyance, release, &c. from him who has the right, he will not be within the *fl. 32 H. 8. 9.*, whereby it is provided, that it shall be lawful for any, in lawful possession, to get by any means the pretended right or title which any person hath to the same lands, &c. *Co. L. 369. a.*

If he be possessed *in presenti*, or of a reversion, or remainder upon the estate of *A.* who has the lawful possession, tho' he never received the rents. *Co. L. 369. b.*

So, if a man has a tortious possession, and takes a release or conveyance from him who has the right, it is not within the statute, for it does not prejudice any one; as, if a disseisor takes a release, &c. from the disseisee. *Co. L. 369. a.*

So, if a mortgagor redeems a mortgage, and takes a re-assignment from the mortgagee, he may sell tho' he had not possession for a year. *Ibid.*

So, if a man who has the right recovers the estate, he may presently sell it. *Ibid.*

Or, if a man be remitted to his antient right. *Ibid.*

So, if tenant for life, or in tail, die without issue, and he in the remainder before entry leases to another. *R. 2 Leo. 48.*

So, a lease for years, to the intent to maintain an ejectment, is not within the statute; unless it be to a great man for countenance to the suit. *Co. L. 369. R. Sav. 95.*

Tho' the lease for years be not to his heir, who may maintain, but to a stranger. *R. cont. Sal. 96.*

## (C) Remedy for Maintenance.

(C 1.) By the Common Law.

BY the common law, champerty and maintenance were inquirable before the justices in *eyre*. *2 Inst. 208.*

So, by the common law, an action lay for champerty or maintenance. *Ibid.*

And

[M  
ought

## MAINTENANCE.

19

And that in the courts of *antient demesne*, and other inferior courts, as well as in the superior. 2 *Inst.* 208.

(C 2.) By Statute.

By the *st. W. 1. 25.* champerty shall be punished *a le volant du roy*, viz. at the suit of the king before his justices. 2 *Inst.* 208, 209.

By the *st. art. super chartas*, 28 *Ed. 1. 11.* a person attainted of champerty, *soit forfait en encens devers le roy des biens, et des terres le parrour, a la value de tant de sa part de son purchase pertiel emprise amountor.* (*Vide* 2 *Inst.* 563.)

By the *st. of Champerty*, 29 *Ed. 1. st. 3.* he shall be imprisoned for three years, and make fine at the king's pleasure.

By the *st. 1 R. 2. 4.* the king's counsellors and great officers shall suffer the pain ordained by the king himself with advice of his lords, the lesser officers or servants of the king, in the *Exchequer* or other courts, *Et* shall lose their offices, be imprisoned and ransomed at the king's will, and all others of the realm shall suffer imprisonment and ransom.

And therefore, the party may have an action founded upon any of these statutes. 2 *Inst.* 208. 212. 563.

And, by the *st. Art. super Chart.* 11. may have a writ directed to the justices before whom the plea is depending. 2 *Inst.* 563.

So, an action lies by *qui tam*, &c. upon the *st. 32 H. 8. 9.* for the penalty against him who maintains a suit.

So, by the *st. 4 Ed. 3. 11.* the justices of one bench or the other, or of assize, shall hear and determine, at the suit of the king or the party, of maintainors, champertors, &c. as well as justices in *eyre*; and it straitned in time may adjourn it into *B. R.*

So, an information lies upon the *st. 32 H. 8. 9.* for purchasing a pretended title. 1 *Leo.* 166.

But the information must say, that the sale was of pretended title. *Semb. Cro. Car.* 233.

## Maintenance of Infants.

*Vide* Chancery, (3 R 6.)

## M A L I C E.

*Vide* Action upon the Case for a Conspiracy, (C 3.)—Action upon the Case for Defamation, (G 5.)—Action upon the Case for Misfeasance, (A 6.)—Justices, (M 5, &c.)—(S 6.)

## M A N, Isle of.

*Vide* Navigation, (F 2.)

## M A N D A M U S.

### (A) When it lies.

[**M**ANDAMUS is a prerogative writ, introduced to prevent disorder from a failure of justice and defect of police; and therefore ought to be used on all occasions where the law has established no

C 2

specific



specific remedy, and where in justice and good government there ought to be one. *Rex v. Barker*, H. 2 G. 3. 3 B. M. 1265. *V. Bl.* 352. 552. *Cowp.* 378.]

[*Mandamus* is granted to prevent failure of justice, and for the execution of the common law, or of a statute, or of the king's charter, but not as a private remedy to the party, except on the statute of queen Anne. *Per Hardwicke* C. J. *Rex v. Wheeler*, 8 G. 3. B. R. H. 99.]

The court of B. R. has power to amend all extrajudicial errors, which tend to the breach of the peace, oppression of the subject, or other misgovernance. *R.* 11 Co. 98. a.

And therefore, by writ of *mandamus*, may command right to be done: as, if an officer elected in a city, borough, or corporation be removed without cause, he may be restored by *mandamus* *pro*, a mayor. *Ray.* 431.

An alderman. 2 *Bul.* 122. 1 *Vent.* 19.

A jurat of a corporation. *R.* 1 *Lev.* 148.

A common-council-man. *R.* 2 *Rol.* 456. l. 35. *Sti.* 32.

A recorder. *R.* 2 *Rol.* 456. l. 30. *R. v. Wells*, H. 7 G. 3. 4 B. M.

1999.

A town-clerk. *Poph.* 176. *Noy*, 78. 1 *Vent.* 77. 82. 1 *Sid.* 14. *Sti.* 457. *Vide post.* (B).

A livery-man. *Ray.* 446.

A burgess. 2 *Cro.* 506. 1 *Sid.* 14. 5 *Mod.* 233.

A bailiff, serjeant, &c. *R.* 3 *Rol.* 456. l. 20. 32.

So, it lies for admitting him, who has right, tho' he never had possession of the office; as, to admit a mayor, alderman, &c. 4 *Mod.* 368. *Sti.* 299.

To admit a town-clerk, elected in reversion after the death of B. when B. dies. *R.* *Poph.* 176. *Noy*, 78.

An high-steward, recorder, &c. *Sti.* 355.

To admit him to a freedom, who has a right by service, birth, &c. *R.* 1 *Sid.* 107. 1 *Lev.* 91. *Ray.* 69.

Tho' he broke his covenant in the indenture of apprenticeship, by marriage, &c. *R.* 1 *Lev.* 91. *Vide post.* (D 4.)

So, a *mandamus* lies for any public officer, who has no other remedy to be restored: as, for a steward of a court-leet. *Adm.* 1 *Sid.* 40. 169. *Ray.* 12.

Or, of a court-baron, if he has a patent for life. *Per Hale*, 2 *Lev.* 18. *Vide post.* (B).

For an attorney of the marshal's court, or other court. *R.* 1 *Sid.* 94. 152. *Ray.* 56. 94. 1 *Lev.* 75.

Treasurer of the new-river water. *Symb.* 1 *Sid.* 169. 1 *Lev.* 123.

Scavenger. 1 *Vent.* 143. *Sti.* 346.

Clerk of the peace. *Sho.* 282.

So, for a master of a college. *Ray.* 101.

Or, a fellow of a college, where no visitor is appointed. *Dub.* 1 *Mod.* 82. *Ray.* 31. *Adm.* *Ray.* 111. *Cont.* 3 *Mod.* 265. 1 *Lev.* 23. *Adm.* 5 *Mod.* 404. *R. cont.* *Carth.* 92. *Vide post.* (B).

[To the chancellor, &c. of an university, to restore a person to degrees. *Dr. Bentley's Case*, 10 G. Fort. 202. *Str.* 557. 2 *Ld. Raym.* 1334.]

[N. B. They did not set out that they had a visitor, or it would have put an end to the dispute in B. R.] [To

[To the keepers of the common seal of the university of Cambridge, to put it to the appointment of high-steward. *Rex v. Vice-Chancellor of Cambridge*, P. 5 G. 3. 3 B. M. 1647.]

[To admit a chaplain when there is no visitor, or when the visitor is the same person who ought to admit. *Rex v. Bishop of Chester*, 1 G. 2. Str. 797.]

A fellow of the college of physicians. *R. 1 Sid. 29. Cont. Carth. 92. Vide post. (B).*

An usher, or master of a grammar school. *Ray. 12. Cont. 1 Sid. 40. Dub. Sti. 457.*

[To restore an under-schoolmaster of a school founded by the crown. *Rex v. Balliv. de Merton*, T. 3 G. Str. 58.]

A registor in the ecclesiastical court. *D. Mod. Ca. 18.*

Or, a deputy registor. *R. F. g. 194.*

[It lies for a registor of a bishop's court, to have his deputy admitted, tho' not for the deputy himself. *Rex v. Ward*, H. 4 G. 2. Str. 893.]

To churchwardens, to restore a sexton or parish-clerk. *R. Ray. 211. 1 Pent. 143. 153. R. 2 Lev. 18.*

Or, to swear him. *R. Mar. 101.*

So, if an office be granted to *A. exercend. per se, vel deputat.*; if the deputy be refused, a *mandamus* by *A.* lies to restore his deputy. *R. 1 Lev. 20.*

So, a *mandamus* lies to an inferior jurisdiction, or officer, to require that which by the duty of his office he ought to do: as, to the mayor, &c. of a corporation to admit him, who has a right to a freedom, or office. *Vide supra.*

[To compel the warden of a college to affix the common seal of the college to an answer of the fellows, &c. in Chancery, contrary to his own separate answer put in. *Cowp. 377.*]

[To the commissioners of the land-tax in *A.* to compel them to elect a clerk to them in the department for the rates and duties on windows, houses, and lights. 1 T. R. 146.]

[To a mayor to put the corporate seal to the certificate of the election of recorder. *Rex v. York*, T. 32 Geo. 3. 4 T. R. 699.]

[To compel a meeting of mayor, aldermen, &c. requisite to approve a candidate for a franchise. *Green v. Mayor of Durham*, H. 30 G. 2. 1 B. M. 127.]

[To a mayor, &c. disapproving, without cause, a person who has a right to be approved and admitted. *Ibid.*]

[To a mayor, to proceed to election, where there is a clause to hold over. *Rex v. Mayor of Helston*, T. 9 G. Str. 555.]

[To elect a mayor after a colourable election of one. *R. v. Mayor of Cambridge*, H. 7 G. 3. 4 B. M. 2008.]

[It may be granted to go on to election of a mayor, tho' there is one *de facto*. *Case of Bessiney*, H. 8 G. 2. Str. 1003. *Case of Aberystwith*, T. 14 G. 2. Str. 1157.]

[But the subsisting mayor *de facto* must always be made a party. 1 Bl. 445.]

[And not for a mayor only, but for other officers necessary constituent parts of the corporation, as bailiffs, coroners, chamberlains, &c. *Case of Scarborough*, H. 16 G. 2. Str. 1180.]

[By a liberal construction of *stat. 11 G. c. 4.* a *mandamus* may be



be granted to elect a mayor, tho' there has been no legal mayor for some years. *Rex v. Oxford*, M. 9 G. 2. B. R. H. 178.]

[Two *mandamus's* may be granted on the application of different parties for the same election. *Ibid.* *Rex v. Evesham*.]

[On judgment of *ouster* against a mayor, *mandamus* cannot be granted till the judgment is actually signed, and then the prosecutor has a right of priority of motion for it. *Rex v. West Loe*, P. 3 G. 3. 3 B. M. 1386.]

[To swear in an ale-taster. *Ravenhill's Case*, M. 11 G. Str. 608.]

[To swear in director of a chartered company, as the Amicable Assurance. *Anon.* P. 12 G. Str. 696.]

To an old officer, to deliver records, which concern justice, to the new one. R. 1 Sid. 31.

[To restore to the office of yeoman of the wood-wharf, being an antient office, and a freehold. *Schriiven and Turner's Case*, P. 2 G. 2. Str. 852.]

[To the clerk of a company, to deliver up books, &c. to the company, he being removed. *Rex v. Wildman*, M. 4 G. 2. Str. 879. Vide 1 Bl. 50.]

[For the steward of a borough to attend with the books at next corporate assembly. *Calne's Case*, P. 6 G. 2. Str. 948.]

[To the old overseer of the poor, to deliver the books of the poor's rates to the new overseer. *Rex v. Clapham*, T. 24 & 25 G. 2. 1 Wils. 305.]

To the lord of a leet, to administer the usual oath to a port-reeve of a town elected. R. 2 Rol. 82. 85.

[It lies on 11 G. c. 4. to the steward of a court-leet to hold a court-leet, and there to swear a jury to present all things proper, that they may present A., the person duly elected mayor. *Rex v. Willis*, M. 12 G. 2. Andr. 279.]

[To enforce the attendance of tenants of a manor at the court-leet, to make a jury. *Reitor of Wigan's Case*, P. 17 G. 2. Str. 1207.]

[To steward and homage of a manor, to hold a court, and present purchase deeds of burgage tenements; which, when presented, entitle purchasers to vote for members. The homage are ministerial in this case; if the conveyances are fraudulent and not good in law, it may be returned. *Rex v. Borough of Midhurst*, M. 24 G. 2. 1 Wils. 283.]

[To a lord, to hold a court-baron, and to the homage to present conveyances of burgage tenements, whether the conveyances appear to be legal or not. 1 Bl. 300.]

[To a judge of a court of a town to give judgment on a verdict, tho' he had granted a new trial, which he could not do. *Brooke v. Ewers*, M. 5 G. Str. 113.]

[It lies to oblige an officer to do his duty, tho' there is a penalty for his neglect. *Rex v. Everett*, P. 9 G. 2. B. R. H. 261.]

[In doubtful questions, the court will not determine on motion; *mandamus* shall go, that it may come before them on the return. *Ibid.*]

To the spiritual court, to administer the oath to one elected churchwarden. R. Mar. 22. 66. R. 1 Vent. 115. 267. R. Ray. 439. 1 Lev. 75. R. Pal. 51. R. 2 Rol. 234. l. 15. Mod. Ca. 89. 2 Rol. 106, 107. Lut. 1010. R. Carth. 118. R. Jon. 439. Cra. Car. 551. [*Rex v. Henchman*, T. 8 G. 2. B. R. H. 130.]

To

To swear a sexton, parish clerk, &c. *R. Mas. 151. R. 2. Rol.*

34. l. 35.

To make a probate of a testament. *R. Ray 235. Acc. 2 Rol. 107.*

Or, to grant administration to him to whom it belongs. *1 Sid. 28.*

372. *1 Lev. 187. R. Str. 7. 8.*

[To grant administration generally, but not to what person. *Anon. T. 9 G. Str. 552.*]

[To grant administration to the next of kin, notwithstanding a suit depending, if the consanguinity be not denied. *1 Bl. Rep. 640.*]

[But *lis pendens*, if the consanguinity do not appear, is a sufficient reason to discharge a rule for a *mandamus*. *1 Bl. 668.*]

[To compel a mayor and the capital burgessees of a corporation to fill up two vacancies occasioned by the deaths of two capital burgessees, tho' there was a *quo warranto* information against the mayor, questioning his title. *Rex v. Grampond, E. 35 Geo. 3. 6 T. R. 301.*]

Or, to revive an excommunicated person. *2 Rol. 107.*

To grant probate to an executor. *R. 1 Vent. 335. R. Carth. 457.*

And it is not a good return, that he did not give caution, being an insolvent. *R. Carth. 458.*

[To dean and chapter, to admit a prebendary to his stall and voice. *Rex v. Dean and Chapter of Norwich, H. 5 G. Str. 159.*]

[Or, to elect. *1 T. R. 652.*]

[To a bishop, to admit a parson to a prebend in his church. *Clarke v. Bishop of Exeter, M. 11 G. 2. Str. 1082. Andr. 20.*]

[To justices, to receive complaints against such persons, who refuse to pay the sums assessed upon them, and to proceed thereupon to levy. *Rex v. Benn, H. 35 Geo. 3. 6 T. R. 198.*]

[So, if on an appeal against overseers' accounts the sessions disallow some of the items, and do not order the overseers to pay the balance to the successors, two justices out of session may enforce payment of the balance, and if they refuse to interfere, the court will grant a *mandamus* to compel them to hear the complaint. *Rex v. Carter, E. 31 Geo. 3. 4 T. R. 246.*]

To a justice of peace, to admit a constable. *Adm. Noy, 78. Dub. 1 Bul. 174.*

[To allow constables extraordinary charges in providing carriages for king's forces. *Rex v. Hunt, H. 3 G. Str. 42.*]

[For them to compel treasurer of the county to reimburse constables' extraordinary charges in providing carriages for the king's forces. *Hunt's Case, E. 4 G. Str. 93.*]

[To appoint overseers of an extraparochial vill. *Rex v. Rufford, P. 8 G. Str. 512. Fort. 321. 1 T. R. 374.*]

[To justices, to appoint overseers in a hamlet where there never were any, if there are poor belonging to it, chargeable on another hamlet, which cannot remove them for want of them. *Rex v. Justices of Westmoreland, T. 19 & 20 G. 2. 1 Wils. 138.*]

To sign poor's rates. *Carth. 450.*

[To a justice of the *quorum*, when there is only one to sign a poor's rate. *Rex v. Mayor of Worcester, T. 8 G. 2. B. R. H. 128.*]

Tho' there be a former rate signed, which omits part of the parish as not chargeable; for it is not inconsistent to sign both, whereby the right of those omitted may be contested. *2 Mod. Ca. 335. Vide Carth. 450.*



[To justices, to swear an overseer to his accounts; if they have a legal objection, they may return it. *Rex v. Justices of Middlesex*, H. 19 G. 2. 1 *Wils.* 125. *Vide Justices of Peace*, (B 85.)]

To grant warrant to levy balance of old overseers' accounts. *Rex v. Justices of Somersetshire*, M. 8 G. 2. *Str.* 992.]

[To make a warrant of distress on a poor's rate, tho' it appears that the reason of their refusal was, that they insisted on first summoning and hearing the parties; but they may return that, or what they please. *Saint Luke's v. Justices of Middlesex*, P. 19 G. 2. 1 *Wils.* 133.]

[To justices to swear surveyors of the highways. *Rex v. Pettitward*, T. 9 G. 3. 4 *B. M.* 2452.]

To make a rate upon another parish for relief. 2 *Mod. Ca.* 344.

[To make a rate to reimburse a surveyor of the highways. *Hassell's Case*, M. 6 G. *Str.* 211.]

To take surety for the peace. *R. F.* g. 85.

[To take security, on articles of the peace exhibited in *B. R.* *Rex v. Lewis*, T. 3 G. 2. *Str.* 835.]

[To proceed to judgment on an information of a seizure. *Rex v. Todd*, M. 9 G. *Str.* 530.]

To take an appeal by a teacher in a conventicle, convicted upon the *st.* 22 *Car.* 2. 1. *Sand. Obs. upon the st.* 57.

To admit one to take the oath, &c. in order to be a teacher of a separate congregation. *Mod. Ca.* 310.

[To register and certify a dissenting meeting-house. *Rex v. Justices of Derby*, M. 7 G. 3. 4 *B. M.* 1991.]

[To the trustees of an endowed dissenting meeting-house, to admit one elected to the use of the pulpit, as pastor. *Rex v. Barker*, H. 2 G. 3. 3 *B. M.* 1265. 1 *Bl.* 300.]

[But upon applications for a *mandamus* to be restored, the party applying must shew that he has complied with all the requisites to give him a *prima facie* title; because if properly admitted, he may bring an action for money had and received for the profits. 3 *T. R.* 578.]

To a visitor to take an appeal to him made by a fellow removed. *Semb. cont.* 5 *Mod.* 453. *Vide post.* (B).

So, it lies to the mayor of *London*, to enter up a judgment upon the statute for rebuilding *London*. *R. Ray.* 214. 1 *Vent.* 187.

To the president and council of *Wales*, to admit a deputy of the secretary, who had his office *exercend. per se vel depnt.* *R.* 1 *Vent.* 110. 1 *Lev.* 306.

To the mayor of a borough to inrol a testament, which by custom ought to be inrolled. 2 *Rol.* 106.

*Vide Difines*, (M 8.)

[To one who has turned out the curate of a chapel, endowed with land, who had been appointed, been weeks in possession, and had a licence to restore him; and this, tho' the right of appointment is litigated: this is the proper and most effectual method to try right to officiate in chapels, whether it depends on nomination or election. *Rex v. Blosser*, T. 33 & 34 G. 2. 2 *B. M.* 1043.]

[A *mandamus* must be made out according to the rule for it, or it will be superseded. *Rex v. Wildman*, M. 4 G. 2. *Str.* 879.]

[On motion for *mandamus* to restore one to be in the court of assistants of a company, there is no need of affidavit to shew he was once in; for if he was not, they may return that, *Rex v. Cutlers' Company*, T. 8 G. 2. *B. R. H.* 179.] [If

[If the court has proposed to try an election by issue, or to proceed to new election, and one party refuses it, the court will insert such refusal in the rule, that it may appear authentically to the jury on trial. *Rex v. Barker*, H. 2 G. 3. 3 B. M. 1265.]

[By stat. 12 G. 3. c. 21. any person entitled to be admitted a freeman, who shall apply to the mayor, &c. to be admitted, and give notice, specifying the nature of his claim, and that unless admitted, in a month he will apply to B. R. for a *mandamus*, and *mandamus* afterwards is granted, and the person is admitted, the mayor, &c. shall pay costs.]

(B) When it does not lie.

**B**UT a *mandamus* does not lie for a private office; as, to restore the steward of a court baron. 1 Sid. 40. 169. cont. if he has a patent for life. *Per Hale*, 2 Lev. 18. Acc. F. g. 194. *Vide ante* (A).

Or, a proctor in the spiritual court. R. 3 Lev. 309. 3 Mod. 332. Sho. 217. 251. 261. Skin. 290.—R. for they have jurisdiction over the officers of their courts. *Carth.* 169, 170.

Or, for the master of the water-house of the lord mayor: for it is more a service than an office. 1 Vent. 143.

Or, for a clerk of a private company in London. *Mod. Ca.* 18.

Or, a town clerk, who was removeable *ad libitum*. 1 Sid. 15. (*Vide* 1 Vent. 72. 172.) *Vide ante* (A).

So, it does not lie for the admittance of any in an inn of court to the bar. *Str.* 457. *Ray.* 69. *Mar.* 177. [*Doug.* 353.]

Or, to admit in the college of physicians. R. 2 Sho. 178. *Carth.* 92. R. 1 Lev. 19. *Vide ante* (A).

[A *mandamus* to help a general visitor to visit his college, or to compel an inferior officer to do his duty is *felo de se*, and shall be quashed. *Doctor Walker's case*, H. 9 G. 2. B. R. H. 212.]

[There is no precedent of a *mandamus* to a visitor. *D. Rex v. Bishop of Ely*, P. 11 G. 2. *Andr.* 176.]

[And the court will certainly not grant it, when it is doubtful whether such person is visitor or not. *Rex v. Bishop of Ely*, P. 23 G. 2. 1 *Wils.* 266.]

[It does not lie to a bishop to grant a licence to a parson to preach as lecturer of a parish to which he has been elected by a number of the inhabitants where there is no temporal right in question, and where another elected by other of the inhabitants, and admitted by the rector, is in possession. *Rex v. Bishop of London*, P. 16 G. 2. *Wils.* 11. *Str.* 1192. *Vide* 1 T. R. 331. 4 T. R. 125.]

[Nor to the bishop of a diocese, who is visitor, to restore a prebendary deprived by him for incontinency, tho' he had not admonished him thrice as the statutes require. *Rex v. Bishop of Chester*, H. 21 G. 2. 1 *Wils.* 206.]

[If parson has power to nominate parish-clerk, who must be approved of by the vestry; parson nominates A., many of the vestry sign their approbation, none dissent expressly, but some demand a poll for B., which is refused, the court will not grant *mandamus* to a parson to nominate. *Rex v. Rector of Saint Anne's*, P. 6 G. 3. 3 B. M. 1877.]

So, it does not lie for a fellow of a college, when there is a visitor.

R. Sho.



*R. Sto. 74. R. 3 Mod. 165. R. 1 Sid. 71. R. 1 Mod. 22. 2 Lev. 23. Carth. 168. R. Ray. 31. Adm. Ray. 102. 1 Mod. 84. 2 Jon. 175. Vide ante (A).*

Or, for any fellow or scholar of a college; for if it has no special visitor, the founder shall be visitor. *R. Carth. 92.*

[In the case of a private eleemosynary lay foundation, if no special visitor be appointed by the founder, the right of visitation in default of his heirs devolves upon the king to be exercised by the great seal, on this ground the king is visitor of *St. Catherine's Hall, Cambridge*, and the court refused to interfere by *mandamus* to compel the master and fellows to declare one of the fellowships vacant, and to proceed to a new election. *Rex v. Cambridge, E. 31 Geo. 3. 4 T. R. 233.*]

Or, to the master of a college, to remove fellows for not taking the oaths. *Semb. Skin. 393. 546.*

So, it does not lie for an office not known, unless it be specially described; as, to be one of the eight men in *Ashbourn court*, without describing what is his office. *R. 2 Mod. 316.*

[So, where there is a custom that no person shall be elected to, or serve an office for more than two years successively, a *mandamus* will not be granted to admit a person who has been elected to serve for a third or fourth year. *1 T. R. 423.*]

[To give a man actual possession (except it be to restore) but only legal, and then he may maintain his right. *Rex v. Dean and Chapter of Dublin, M. 9 G. Str. 536.*]

So, a *mandamus* does not lie to prevent a molestation against law: as, not to molest a preacher. *R. Sal. 572.*

[Nor, to restore a person, where it is confessed he was rightly removed, tho' he had no notice at the time to appear and defend himself. *Cowp. 523.*]

[Nor, to restore to an office, tho' the party was irregularly suspended, if it appear by his own shewing, that there was good ground for the suspension, if the proceedings had been regular. *2 T. R. 177.*]

To make a rate to reimburse an overseer; for the statute does not direct any, but for relief of the poor. *R. Sal. 53. 2 Mod. Ca. 338.*

[To overseers, &c. to make an equal rate. *Rex v. Canterbury, H. 9 G. 3. 4 B. M. 2290. 1 Bl. 667.*]

[To churchwardens to make a church-rate, it being a subject of ecclesiastical jurisdiction. *Rex v. Thetford, T. 33 Geo. 3. 5 T. R. 364.*]

[To magistrates to order them to issue warrants of distress to levy a poor-rate on certain persons who have refused to pay, unless those persons have been previously summoned. *Rex v. Benn, H. 35 Geo. 3. 6 T. R. 198.*]

[To make a rate to reimburse two of the inhabitants their charges, in defence of an indictment for not repairing a bridge. *Anon. M. 4 G. Str. 63.*]

[Not to insert particular persons in a poor's rate, tho' affidavits of their sufficiency, and that they are omitted to prevent their voting for members of parliament. *Rex v. Weobly, T. 19 G. 2. Str. 1259.*]

[To churchwardens, to call a vestry to elect churchwardens. *Anon. H. 12 G. Str. 686.*]

[To justices of a city to grant a licence to keep an alehouse. *Giles's Case, M. 4 G. 2. Str. 881.*]

So,

So, it does not lie to do an act, which the party may do, or not, at his discretion; as, it does not lie to a visitor to receive an appeal. *Per Holt, M. 11 W. 3. Usher's Case, 5 Mod. 453.*

[*Contra*, that it lies to hear an appeal and give some judgment. 2 T. R. 338. n.]

[Not to a mayor, to give the key of the town-hall to the lord of a manor to hold the court-leet in it, as had been usual. *Rex v. Mayor of Wigan, T. 17 G. 2. Will. 76.*]

To the ecclesiastical court to deliver an original will, proved there, to a devisee of lands by the same will. 1 Sid. 443.

To grant administration to one as next of kin, after an administration granted to another. *Blackborow v. Davies, E. 13 W. 3. Com. 96.*

[To the ordinary, to grant administration *durante minori atate*; for no law says to whom it shall be granted. *Smith's Case, H. 4 G. 2. Str. 892.*]

[Or, to grant administration with the will annexed during minority to a certain person, nor to grant administration generally in such cases. *Barker's Case, M. 11 G. 2. And. 24.*]

So, if there be a suit depending in the spiritual court, whether there was a will or not, a *mandamus* shall not be granted to grant administration, till the suit be determined. R. 5 Mod. 374, 5. [*Rex v. Hay, H. 9 G. 3. 4 B. M. 2295.*]

Or, if such a *mandamus* is granted when there was a will, that may be reversed. 5 Mod. 375.

So, a *mandamus* does not lie for a man outlawed, till the outlawry be reversed. R. Sho. 288.

[Or, to swear in one who has had judgment against him, on a *quo warranto* for usurpation. *Rex v. Hearle, P. 11 G. Str. 625.*]

Or, to restore *A.* who was elected alderman, &c. in the place of *B.*, afterwards restored by *mandamus*; tho' the place of *B.* be afterwards vacant; for *A.* must be elected *de novo*. R. 2 Bul. 122.

So, if he be not wrongfully ousted; as, if he resign. R. 1 Sid. 14.

Or, be only suspended. *Dub. 1 Lev. 162.*

Or, lapse his time; as, if a mayor be amoved, after his year elapsed, he shall not have a *mandamus*. R. 1 Sid. 33.

So, if a peremptory *mandamus* go, there can be no *mandamus* for another, upon pretence that he was well elected, and the other *mandamus* gained by artifice, till the right of election be tried. R. 2 Jon. 215.

[Where an action will lie for a complete satisfaction equivalent to a specific relief, a *mandamus* will not lie. It will therefore not be granted against the bank to transfer stock, because a special action of assumpsit will lie. *Doug. 526.*]

[Nor, against a bishop to license a curate of an augmented curacy, where there is a cross nomination, because the party has another specific legal remedy by *quare impedit*. 1 T. R. 396.]

[If the right of nomination be in one party, and that of presentation in another, if either impede the other in his right, a *quare impedit* lies, and therefore a *mandamus* will be refused. 3 T. R. 646.]

[A *mandamus* does not lie *ex debito justitie* for every rightful officer, tho' disseised, for he may bring assise. *Rex v. Wheeler, P. 8 G. 2. B. R. H. 99.*]

[One who has a legal right to an office is not entitled to have books delivered



delivered by one who has an equitable right, and therefore not to a *mandamus* for them. *Rex v. Wheeler*, P. 8 G. 2. B. R. H. 99.]

[The court will not grant *cross* or concurrent *mandamus* without special reasons. *Rex v. Wigan*, P. 32 G. 2. 2 B. M. 782.]

[If an election is doubtful, it should be tried by information *quo warranto*, not on *mandamus*. *Rex v. Bankes*, H. 4 G. 3. 3 B. M. 1452.]

[Therefore a *mandamus* was refused, to admit a recorder of a borough, because there was a recorder *de facto*, and the parties had another remedy by *quo warranto*; tho' both claimed under the same election. 2 T. R. 259.]

[And if a rule to shew cause is obtained, and it appears on affidavits that it was improper for *mandamus*, the court may discharge it with costs. *Ibid.* 1 T. R. 396.]

[The court will not grant a special *mandamus* to summon the individual persons who were summoned for a jury on a former day to proceed to election. *Rex v. Bankes*, H. 4 G. 3. 3 B. M. 1452. 1 Bl. 452.]

[The court will not grant a *mandamus* to compel the performance of any thing in future, which had been voluntarily done before: therefore, where trustees under a road act had turned a road thro' an inclosure, and made the fences at their own expence, and repaired them for several years; a *mandamus* was refused, to compel them to continue such repairs, because there was no special provision in the act to that effect. 2 T. R. 232.]

[By an act of parliament for maintaining the poor at *Southampton*, and for other purposes, and incorporating the guardians, power is given to the guardians to raise money for certain purposes, and to appoint a treasurer who is to account to them and pay over, &c. according to their order; and an appeal is given to the quarter sessions against any thing done under the act, who have power to make such order therein, "either by directing the money to be returned, or otherwise, "as to them shall seem meet;" the guardians ordered the treasurer to pay a sum of money for a purpose different from those mentioned in the act, against which an appeal was entred at the sessions, where that sum was disallowed in the account, and the treasurer who had paid it was ordered to repay it to the succeeding treasurer. The court refused to grant a *mandamus* to compel the late treasurer to pay over the money according to the order of sessions, because he was a ministerial officer and bound to obey the order of the guardians. *Rex v. Shaw*, E. 34 Geo. 3. 5 T. R. 549.]

[The court will not grant a *mandamus* to restore a person banished from the university of *Cambridge*, under the statute *de concionibus*, tho' that statute inflicts also banishment from the college, which part of the punishment the sentence had not inflicted. *Rex v. Cambridge*, M. 35 Geo. 3. 6 T. R. 89.]

[Nor, to admit a vestry clerk. *Rex v. Croydon*, T. 34 Geo. 3. 5 T. R. 713.]

[A., a captain of an *India* country trader, contracts in *India* with B. for a crew according to the custom of the country; A. arrives in *England* with the crew, and then makes a voyage with them to the *West Indies* and back again. An action was brought by part of the crew for wages due on the *West India* voyage, and it was holden, on a motion

motion for *mandamus* to examine witnesses in *India* under the statute 13 Geo. 3. c. 63. s. 44. that the cause of action did not arise there, and the rule was discharged with costs. *Francisco v. Gilman*, C. P. M. 38 Geo. 3. 1 Bos. & Pull. 177.]

(C) The Form of a *Mandamus*.

(C1.) To whom directed.

A *Mandamus* must be directed to those, who are to do the thing commanded: and therefore, where a corporation is to elect, &c. it may be directed to them by their corporate name.

And if the corporation be misnamed, there shall be no restitution thereon. R. 2 Jon. 52. Vide Carth. 501. Sal. 700.

[The court, when they grant *mandamus*, will not specify the person to whom it shall be directed: it is at the peril of the person who desires the writ to direct it to a proper presiding officer. *Rex v. Wigan*, P. 32 G. 2. 2 B. M. 782.]

[It need not allege the person to whom it is directed is the person to whom it appertains, &c. and if it is not directed to the proper person, he must return it so. *Rex v. Ward*, H. 4 G. 2. Str. 893.]

[After a return has been made, no objection can be received to the writ itself. *Rex v. York*, M. 33 Geo. 3. 5 T. R. 66.]

[The rule to shew cause why a *mandamus* should not issue to chuse a mayor, should include the mayor *de facto*, and he should be served. *Rex v. Bankes*, H. 4 G. 3. 3 B. M. 1452.]

If the corporation be, mayor, aldermen and commonalty, a writ to the mayor, burgeses and commonalty, is bad. Sal. 433.

So, if a writ be *ballivis*, &c. *gippi*, and not *gipwici*. Sal. 435.

If the right of election is in the mayor and aldermen, and the *mandamus* is directed to the mayor, aldermen and common-council, the court will grant *superfedeas, quia improvidè*. *Rex v. Mayor of Norwich*, T. 3 G. Str. 55.]

[If the power of motion is in the mayor, aldermen, *et al. de communi concilio*, and the writ is directed to the mayor, aldermen and common-council, it is well, tho' the word *al.* is omitted. *Pees v. Mayor of Leeds*, M. 12 G. Str. 640.]

If directed to those, who ought to do it, tho' they are only part of the corporation, it is sufficient. R. Sal. 699. 701. Carth. 501.

And if it be directed to them and more, it will be bad. *Per three J. Holt cont.* 701.

So, if a writ be to *A.*, which commands *B.* to restore, &c. it shall be quashed. Sal. 436.

But it is sufficient, if it be directed to the corporation, tho' part only are to do that which is commanded by the writ. 1 Rol. 409.

If directed to the mayor and burgeses, *quod eligetis et juretis secundum auctoritatem vestram*, when the burgeses only are to elect, and the mayor only to swear. R. 2 Mod. Ca. 112. 128.

[In a *mandamus* to a company to compel them to inrol indentures of apprenticeship, it is sufficient to state generally, that those who have served a free burges, &c. under indentures of apprenticeship, and whose indentures have been inrolled, are entitled to be admitted to their freedom; that *A. B.* had served, &c.; that his indentures ought to have been inrolled on being tendred, &c.; and that they



were tendered for that purpose; but that the defendant refused to arrest them, &c. *Rex v. Coopers' Co. Newcastle, E. 38 Geo. 3. 7 T. R. 543.*

(C 2.) Must be to make Election.

So, it ought to be granted, to proceed to an election to the office, and not to elect a particular person. *R. 2 Bul. 122. R. 2 Rol. 456. l. 25.*

[Under 11 G. 1. c. 4. it may be, to proceed to the election of any annual officer as well as of the mayor, or head officer. *2 T. R. 732.*]

If several are removed, it must be for each by himself; for several cannot join. *R. 5 Mod. 11. Sal. 433. 436. 2 Mod. Ca. 209.*

[It must not be to admit all persons having a right; if the writ is so drawn up it shall be superseded. *Rex v. Mayor of Kingston, H. 10 G. Str. 578.*]

[If there is a custom to give twenty-four hours notice of election, the court will not fix a day, nor order six days notice. *Evesham's Case, P. 6 G. 2. Str. 949.*]

(C 3.) Must shew the Party ought to be admitted.

So, the writ of *mandamus* must suggest all that is requisite to shew the party ought to be admitted. *Mod. Ca. 310.*

[So, if the suggestion of the writ is, that he has a right (there set forth) to be admitted on payment of a reasonable fine, he need not shew how or by whom it is to be assessed. *Moore v. Mayor of Hastings, H. 10 G. 2. B. R. H. 362.*]

A *mandamus* to overseers to account, must shew that there was no other remedy. *5 Mod. 420, 1.*

But a *mandamus* to do, &c. is sufficient, tho' the words, *vel causam nobis significes*, &c. be omitted. *R. 5 Mod. 314. Skin. 359.*

(C 4.) How teste'd.

So, a *mandamus* must be teste'd within term. *1 Sid. 304. Vide Abatement, (H 14.)*

Must have fifteen days between the *teste* and return, if it goes above forty miles, otherwise only eight days. *Sal. 434.*

[Must have fourteen days between the *teste* and return if it goes above forty miles, otherwise only eight days, and one day is to be taken inclusive, the other exclusive. *Rex v. Mayor de Dover, M. 7 G. Str. 407.*]

But a *mandamus* may be amended before the return. *Mod. Ca. 133.*

(D) Return of a *Mandamus*.

(D 1.) By whom it shall be made.

THE return of a *mandamus* shall be made by those to whom the writ is directed.

If the writ be directed to the bailiffs, &c. of a corporation to swear others elected bailiffs, it shall be returned by the old bailiffs, tho' others have been sworn to the same office; for if the old swear others not duly elected, they continue bailiffs. *Mod. Ca. 133.*

But, if the return be by the mayor and burgesses to whom directed, it

it shall not be refused upon a suggestion that the major part did not consent. *Sal. 431. Carth. 500.*

Or, that the mayor made the return without assent of the corporation. *Sal. 432.*

(D 2.) How made.

A return to a *mandamus* may be received without oath of the truth. *R. 1 Sid. 257.*

Need not be under the common seal. *1 Sal. 192.*

Or, signed by the head of the corporation. *1 Sal. 192. Skin. 368.*

So, the court will not direct how it shall be made.

Nor, give a rule for a view of the charter; tho' they shall have it in an action for a false return. *Sal. 430.*

By the *st. 9 Ann. 20.* a return to a *mandamus* for admitting or restoring to any office or freedom in a corporation, shall be made to the first writ.

So, the court may require that the return be made upon oath. *Per Dod. Pal. 455. Dist. Ray. 365.*

Or, at a day certain. *F. g. 4.*

[If the return is made, and signed by the mayor, and delivered to prosecutor's agent, and the mayor dies, the return may be filed afterwards. *Semb. sed qu. Rex v. Holmes, H. 5 G. 3. 3 B. M. 1641.*]

(D 3.) What shall be a good one.

The return to a *mandamus* for restoration to an office may be, *that he was never elected. Vide post. (D 4.)*

[That he was not elected churchwarden. *Rex v. Harwood, T. 11 G. 2 Ld. Raym. 1495.*]

*That he was removeable ad libitum*, without other cause, when this is warranted by custom or charter. *R. Ray. 188. 1 Sid. 461. 1 Vent. 77.*

[And this without shewing summons, or that the office is filled up. *Rex v. Churchwardens of Thame, M. 5 G. Str. 115.*]

[On a *mandamus* to churchwardens to restore *L. C.* to the office of sexton, a return that *L. C.* was not duly elected according to ancient custom; and that there is a custom for the churchwardens and inhabitants to remove at pleasure, and that *L. C.* was removed pursuant to such custom, is good. *Cowp. 413.*]

[That he was guilty of bribery, and therefore they removed him, having power to remove. *Rex v. Mayor of Carlisle, M. 9 G. Fort. 200.*]

[That he is an officer at pleasure, and on summons to chuse another, they chose another, and thereby *A.* was amoved, good; for a new election is an actual amotion. *Rex v. Mayor of Canterbury, M. 12 G. Str. 674.*]

So, if the writ be to restore *A. debito modo elect.*, the return may say in the words of the writ, *quod non fuit debito modo elect.* *Sal. 434.*

[Not duly elected, admitted, and sworn, is not a good return to a *mandamus* to restore. *Doug. 79.*]

[If the writ be to admit, it is a good return that he was not duly elected. *Ibid.*]

If a writ be to admit two churchwardens *debito modo elect.*, it may say,



say, *non fuerunt debito modo electi*; for both must be so, otherwise the writ is insufficient. *Sal. 433. 4.*

The return must shew the power [*vide 2 Str. 819.*] to amove, that there was such cause for removal, that he was summoned, and upon appearance could not excuse himself; wherefore he was amoved, according to the power.

Or, that he was summoned, and did not appear.

Or, that he appeared; for then a summons is not material. *Sal. 428.*

If the return says, *quod procuraverunt eum summoniri*, it is sufficient. *R. 1 Vent. 19.*

That he was summoned, tho' it does not shew for what cause, specially. *Semb. 5 Mod. 259.*

*Quod fuit auditus de materiis objectis*, tho' it does not say that he was summoned; for the intent of the summons is, that he may be heard. *Semb. 5 Mod. 259. Sal. 428.*

[In a return to a *mandamus* to restore, if it be stated that the party was amoved by the body at large, it is unnecessary to aver that the power is vested in them. If the party mean to contend that it is vested in a select part, he must allege it in *reply* to the return. *Doug. 149.*]

So, a return which says, *fuit amotus per majorem et burgesses*, is sufficient, tho' the power be given to the mayor, and burgesses who had been mayors; for it shall be intended, that all the burgesses were present and assented: and if there was not the assent of the major part of those who had been mayors, an action lies for a false return. *R. 1 Vent. 20.*

So, if it says, another was elected mayor before the writ to him, and *adhuc est major*, without saying, *debito modo electus*. *Dub. Ray. 365.*

So, if the return be, *quod fuit amotus 21 Aug.*, and in another part, that he continued in office till 25th *December*, which is contradictory; yet the return will be good, for it is surplusage. *1 Vent. 144.*

*Quod fuit debito modo amotus. 5 Mod. 11.*

[But on a *mandamus* to restore to the office of a capital burges, it is not sufficient in a return to say, "that the cause of amotion was non-attendance at a meeting to which the party was summoned for the election of a capital burges;" and to aver "that the right of election is in the capital burges, being the common-council;" for this does not assert with sufficient *certainty*, that he had a right to concur in the election, because it does not necessarily appear that *all* the capital burges are of the common-council. *Doug. 177.*]

It is not necessary that the removal should be under the common seal; for, being *per majorem & aldermanios*, it shall be intended. *R. 1 Vent. 77. 82. 342.*

[If commissioners of sewers, on a *mandamus* to make a rate, return, that the commission expired four days after the writ was delivered, and so they had not time, it is good. *Rex v. Commissioners of Sewers in Essex, P. 13 G. Str. 763. Ld. Raym. 1479.*]

[To a *mandamus* to license usher of a school, bishop may return, he is inquiring into the truth of an accusation on a *caveat*. *Rex v. Bishop of Litchfield, M. 9 G. 2. Str. 1023.*]

[To a *mandamus* to restore *A.* who was duly elected, sworn, and admitted, (mentioning no time,) that *A.* was on 29th *August* duly elected,

electd, but that whether at his election nor since, *not*, is he sworn or admitted, and therefore, *Et*, is a good return. *Rex v. Linn*, *H. 11 G. 2. Andr. 103.*

[To a *mandamus* to grant probate to executor, that before *pro*, and now is pending a suit in the prerogative court touching the validity of the will, is a good return. *Rex v. Bettefworth*, *H. 12 G. 2. Andr. 365. 4 B. M. 2205.*

[To a *mandamus* to the administration of the husband of deceased, that husband had *ad* in a suit, that by deed before marriage he had agreed she should make a will, which she had made, and suit was depending for the administration with the will annexed, is good; for the husband's consent *et*. *Rex v. Bettefworth*, *T. 12 G. 2. Str. 1111.*

[To *mandamus* reciting, that there are substantial inhabitants in *A.*, therefore to appoint overseers; that *A.* is extra-parochial, and is not, nor is, nor ever was, reputed, a vill or township, is good, tho' it answers not the supposal as to substantial inhabitants. *Rex v. Welbeck*, *M. 14 G. 2. Str. 1143.*

[To *mandamus* to two justices, to proceed and give judgment in a complaint depending before them, that they have heard and determined the complaint, is good. *Rex v. Richardson*, *T. 16 G. 2. Wilf. 21.*

[On *mandamus* to justices to register and certify a dissenting meeting-house, they may return, "*not within the qualifications.*" *Rex v. Justices of Derby*, *M. 7 G. 3. 4 B. M. 1991.*

[The return is good, if it pursues the suggestion of the writ, as if it is suggested that *A.* was chosen in *Easter* week, and the return is, that he was not chosen in *Easter* week. *Rex v. Penrice*, *T. 18 G. 2. Str. 1235.*

[Return to *mandamus* to admit or shew cause may return any number of consistent causes. *Wright v. Fawcett*, *P. 7 G. 3. 4 B. M. 2041.*

[That *A.* was not a burghers; that he was not eligible to the office of common-council-man; and that he was not elected, are not inconsistent returns. *2 T. R. 456.*

[If the return consists of several independent matters, not inconsistent with each other, but part of them good in law and part bad; the court may quash the return as to such part only as is bad, and put the prosecutor to plead to or traverse the rest. *Ibid.*

[But where two causes returned are inconsistent, the whole is bad. *Ibid.*

[It is a good return to a *mandamus* to the ordinary to grant a licence to teach in a grammar school, to state that he had suspended granting his licence until the party would submit himself to be examined "*touching his sufficiency in learning.*" *Rex v. York*, *M. 36 Geo. 3. 6 T. R. 490.*

[The court will not quash a return to a *mandamus*, (which directed an inferior court to give judgment on an indictment,) merely because it states an erroneous judgment given below; but a writ of error must be brought to reverse that judgment. *Rex v. West Riding of Yorkshire*, *H. 38 Geo. 3. 7 T. R. 467.*



(D 4.) What not.

(D 4.) If it do not shew the corporation had authority to amove, &c. But a return is not good, if it does not shew, that the corporation has authority to remove, and how. [Vide 2 Str. 819.]

So, a return upon a *mandamus*, directed to A. mayor, that before the writ awarded he was removed, and B. elected, and now is mayor; for by a collusive resignation of his office, the return may be evaded. R. Ray. 431. Dub. Re. 365. R. 2 Jon. 177.

If it does not shew, that the party was summoned, or heard to the matters objected against him. 11 Co. 99. a. Sti. 151. 447. [Rex v. Gafkin, E. 39 Geo. 3. 8 T. R. 209.] Vide ante, (D 3.)

[If it does not set forth that the party deprived was summoned. Dr. Bentley's case, 10 G. Fort. 202. Str. 537. 2 Ld. Raym. 1334.]

[N. B. They did not set out that they had proceeded according to the civil law, which they might have done, by which they can proceed in the absence of the party accused.]

[It is not sufficient to say, the common-council was in due manner met and assembled; it must expressly allege that they were all summoned. Rex v. Liverpool, H. 32 G. 2. 2 B. M. 723.]

And, *licet sapius requisitus*, is not sufficient. 5 Mod. 258. R. 4 Mod. 37.

If it does not answer to the supposal of the writ; and therefore, if the writ supposes, that they ought to elect persons not in office three years before, it is not sufficient to say, that by the charter they ought to elect out of aldermen, and they have elected out of the aldermen. Sal. 431.

If the writ supposes them capital burgesses, and the return says, that they did not take the sacrament before election; for they might have been elected at another time. Sal. 432.

If a return to a *mandamus*, for swearing churchwardens elected by the parishioners, according to the custom, says *quod lis pendet* in the ecclesiastical court concerning the custom *indecisa*; for the ecclesiastical court cannot try the custom. R. Ray. 440. F. g. 195.

[If to a *mandamus* to swear in a churchwarden, it is returned that the bishop of A. did inhibit the archdeacon, whose official defendant is to proceed, it is bad, if it do not aver that the parish is in the diocese of A., for the court cannot take notice of it. Rex v. Simpson, M. 11 G. 2 Ld. Raym. 1379. Str. 609.]

Or, if the return be, *quod non fuit electus*, generally. 2 Mod. Ca. 380. 325. Semb. cont. F. g. 195. Vide ante, (D 3.)

[If to a *mandamus* to swear in a churchwarden, the archdeacon return, *non fuit electus*, it is bad. Rex v. White, M. 11 G. 2 Ld. Raym. 1379. Sed per Ld. Raym. This is certainly wrong, and so ruled to be a good return in Rex v. Harwood, T. 11 G. 2 Ld. Raym. 1405.]

So, it cannot be returned, that the borough is within a county palatine. S i d. 92.

That an apprentice married contrary to his indenture; for that is only a breach of covenant. R. Ray. 92. 1 Lev. 91. Vide ante (A).

[To a *mandamus* to admit the master of Catherine Hall to a prebend, under letters patent, returned, that by their statutes no person who is prebendary of another church can be admitted, that the said master is

is prohibited *Sancti Pauli*, and therefore they cannot admit, not allowed, because said letters patent had been confirmed by act of parliament and peremptory *mandamus* granted. *Rex v. D. & Cap. of Norwich*, H. 5 G. Str. 159. *Port. 222.*

[That the party had misbehaved as chamberlain, and therefore they had removed him from being a capital burgess, is bad. *Rex v. Mayor of Doncaster*, M. 3 G. 2. *Ld. Raym. 1564.*]

[On a *mandamus*, on the complaint of the register for life of a bishop's court, to admit a party, if the commissary return, that a former deputy had been removed, and had appealed, and that delegates had issued inhibition to do nothing to the prejudice of appellant pending the appeal, which was not determined, and therefore he could not admit, &c. it is bad; for he is but ministerial, and must execute his part. *Rex v. Ward*, H. 4 G. 2. *Str. 893.*]

[That cross suits are depending before him, and that he cannot admit till he shall have judicially determined who was elected, is bad on cross *mandamus*'s; to admit A. and to admit B. he must obey both *mandamus*'s, and admit both A. and B. *Rex v. Harris*, T. 3 G. 3. 3 B. M. 1420.]

[If the return admits the party's qualification, that there are five court days at which persons should be admitted, that he had notice and did not appear, and therefore cannot be admitted, it is bad, unless it sets forth, that he is tied up to these five days. *Rex v. Whislin*, T. 10 & 11 G. 2. *Andr. 1.*]

[To *mandamus* to grant administration to husband of deceased, that her mother had given her effects to her separate use, that she had made her will which was litigating, is bad; for here no assent of husband's appears as to these effects, and she may have others. *Rex v. Bettefworth*, M. 13 G. 2. *Str. 1118.*]

[To *mandamus* to admit a man who is a quaker, member of the Turkey Company, it is not good to say he would not take the oath prescribed by 26 G. 2. c. 18. his affirmation is sufficient. *Rex v. March*, P. 33 G. 2. 2 B. M. 999.]

[That an alderman had totally left the borough (when he had only left it four months, and no notice given him): *Rex v. Mayor of Leicester*, P. 7 G. 3. 4 B. M. 2087.]

(D 5.) *If it be not certain.*] So, the return to a *mandamus* shall be disallowed, if it be not certain and positive; for no answer can be given to it. 11 Co. 99. b.

And therefore if it says, *non fuit debito modo electus*, it is bad; for that is a negative pregnant. *Dub. Ray. 365. R. 1 Sid. 209, 210. Semb. cont. Sho. 253. R. cont. Carth. 170. 5 T. R. 66.*

So, if it says, *non fuit amotus per nos*. *Semb. but held cont. 1 Sid. 210.*

*Non constat quod fuit electus. R. 1 Vent. 267. Ray. 153.*

*Tempore brevis non fuit constitutus. R. 1 Vent. 111. 1 Lev. 306.*

*Quod servivit ut journeyman potius quam servus. R. Ray. 92.*

*Quod ante advent. brevis fuit electus pro anno, et ad finem anni amotus*, without saying at what time. 5 Mod. 10.

*That B. had so many votes, and the plaintiff only so many. R. Mod. Ca. 309.*

*So, that A. and B. were not elected*, without saying, *nec aliquis eorum. R. Mod. Ca. 89.*

Or, they ought to make a special return, that a custom was claimed



to elect two, or that they had equal votes, or are jointly elected, *Et Per Holt, Mod. Ca. 89.*

So, if it says, *quod procuraverunt A. cum summonere*; for that is not direct that he was summoned. *1 Vent. 19.*

*That he was heard de alibi et omnibus ei objectis*, without saying, what, before whom, or in what place. *Semb. 5 Mod. 258.*

*That he was auditus in communi concilio*, without saying, by whom, &c. *5 Mod. 258.*

*That he did not account for money to the corporation*, without saying, that he was request and refused. *5 Mod. 259.*

*That he did not take the oath required by the st. 13 Car. 2. before the mayor*, without saying, or before justices of the peace, who by the same statute have also authority to administer it. *R. 5 Mod. 318.*

Or, *that he did not take it before them*; when before justices of peace, or two of them, is sufficient. *R. Sal. 429.*

So, if they return a custom to remove *ad libitum*, only by way of recital, without saying positively that there is such a custom. *R. Sal. 430.*

If they return, *no sacrament taken before election, per quod electio vacua et non sunt capitales burgenses*; for that is only an inference from the premises. *R. Sal. 432.*

So, if the return consist of several inconsistent matters; as, misbehaviour, bribery, and not elected. *Sal. 436. 5 T. R. 66.*

Yet, if it appears by the return, that he ought not to be restored, &c. it is sufficient, tho' the return be insufficient; as, if it appears, that he resigned, tho' the return be not certain, he shall not have a peremptory *mandamus*. *R. 1 Sid. 14. R. Sal. 433.*

Yet, where a man was removeable *ad libitum*, where the return was of a removal for a cause that was insufficient, he had a peremptory *mandamus*. *R. Sal. 429. 435.*

So, a mere misprision in a return may be amended. *Sho. 273.*

[After verdict on a traverse to a return to a *mandamus* made by a corporation, the court will not allow the defendants to amend the return by setting forth a different constitution. *Rex v. Grampond, T. 38 Geo. 3. 7 T. R. 699.*]

*Vide Amendment, (G 1.)*

#### (D 6.) Remedy for a false, or no Return.

If an officer make a false return to a *mandamus*, an action upon the case lies for the party grieved; and if he obtains a verdict, he shall have restitution. *FI Ca. 99. b.*

[In an action for a false return, what is only a circumstance need not be proved; as, that plaintiff after he was elected presented himself to be sworn. *Batson v. Sayer, M. 13 G. Str. 728.*]

[On action for false return, of *non fuit electus*, to a *mandamus*, to deliver the *insignia*, &c. to a town clerk, plaintiff need not prove taking the sacrament within the year before election, if the trial is above six months after the election without prosecution. *Crawford v. Powell, 33 & 34 G. 2. 2 B. M. 1013.*]

And a peremptory *mandamus* for his restitution is of right, when the return is falsified. *Sal. 430.*

So, by the *st. 9 Ann. 20.* on return to a *mandamus*, the person prosecuting it may plead, and traverse all or any material facts contained in the return; to which the persons making the return may reply, take

take issue, or demur; and such further proceedings shall be as if an action on the case had been brought for a false return.

And the issue joined shall be tried, where the issue in an action on the case might be tried.

And if a verdict be for the plaintiff, or a judgment on demurrer, by *nil dicit*, or for want of replication, or other pleading, he shall recover damages and costs, as he might in an action on the case, to be levied by *capias ad satisfaciendum, fieri facias*, or *elegit*.

And a peremptory *mandamus* shall go, as if the return had been judged insufficient.

So, the person making the return, if judgment be for him, shall recover costs to be levied as aforesaid; or, if judgment be against him, he shall not be liable to be sued in another action for such return.

Before that statute, if a verdict was for the plaintiff in an action for a false return, a peremptory *mandamus* went. *Skin. 670.*

But an action upon the case does not lie for a false return, till judgment be given upon the return. *Semb. 2 Lew. 238.*

So, there shall not be a peremptory *mandamus* in *B. R.* upon a verdict for the plaintiff in action for a false return in *C. B.* *R. Sal. 428.*

[No peremptory *mandamus* shall go pending error on action for false return. *Ruding v. Newel, T. 7 G. 2. Str. 983.*]

[A peremptory *mandamus* is not a judicial writ, founded upon a record, but a mandatory writ, which the court grants when they are satisfied of the parties' right.]

[A peremptory *mandamus* may go before any formal judgment.]

[If judgment for defendant, on an action for a false return, be reversed in the Exchequer-Chamber and parliament, peremptory *mandamus* shall go. *Foote v. Prowse, P. 11 G. Str. 697.*]

So, if upon a motion or disfranchisement a man be amoved with force, imprisoned, &c. he shall have trespass, in which the cause of amotion may be pleaded, and determined by the court. *11 Co. 99. b.*

So, an information lies for a false return, where the public government is concerned. *1 Sal. 374.*

If the return be under the common seal, the information may be against the particular persons, who procured it. *Ibid.*

[Where the *mandamus* is not for a private right, so that there cannot be an action for a false return; nor on *stat. 9 Ann. c. 20.* so that the return may be traversed, nor the return wrong, so that there may be peremptory *mandamus*, the court will grant information, as for a false return, to try the fact, as, whether two townships shall join in maintenance of their poor? *Rex v. Spotland, M. 9 G. 2. B. R. H. 184.*]

So, if no return be made to a *mandamus*, there shall be an *alias* and *pluries*, and thereon an attachment, without hearing counsel to excuse the contempt. *Sal. 434. Pal. 455.*

And the court, if necessary, may give a little time, *viz.* two or three days for the return of each writ. *Per Holt, Mod. Ca. 25.*

Or, may make the first writ, or the *alias* peremptory. *Mod. Ca. 25. D. Skin. 669.*

Or, make a peremptory rule for a return of the first writ, upon which there shall be an attachment. *Sal. 429. Semb. Latch, 230. Pal. 455.*

[The court will make a rule to return a *mandamus*, to admit a man



into a trading company. *Dacosta v. Russia Company*, M. 1 G. 2. Str. 783.]

[If a *mandamus* directed to two is not returned, the court will grant an attachment against both, tho' one was willing to obey. *Bailiff of Bridgenorth's case*, T. 2 G. 2. Str. 808.]

[If a *mandamus* is not returned, because the mayor and others to whom it is directed are of different opinions, the court instead of attachment will, by consent, direct the right to be tried in a feigned issue. *Rex v. Rye*, T. 33 G. 2. B. M. 798.]

[If the mayor makes a return in the name of the town-clerk and free burgesses, without their consent, it is a contempt, and attachment shall go. *Rex v. Hoskins*, H. 9 G. 2. B. R. H. 188.]

So, by the *st. 9 Ann. 20.* in cases of officers in corporations, &c, the return shall be made to the first writ of *mandamus*.

[A *mandamus* in town (as to the judge of the prerogative court) should be returned *instantly* at the return. *Rex v. Bettefworth*, H. 3 G. 2. Str. 857.]

[The court expects a return, and will not determine on affidavits, where the party has not opportunity to right himself by an action, *Rex v. Whaley*, T. 13 G. 2. Str. 1139.]

[If the party prosecuting a *mandamus* traverses the return, and there is a general verdict for him in part, and a special verdict, and the court of opinion with him, but no damage found, the court cannot grant a writ of inquiry; there cannot be judgment for costs, nor can there be a peremptory *mandamus*. If judgment is entered, that the return is not sufficient to bar *A.* from being restored, and that it be therefore quashed; it shall be reversed, and *venire facias de novo* awarded. *Kynaston v. Mayor of Shrewsbury*, T. 9 G. 2. Str. 1051, B. R. H. 295, 377.]

[In such case, the person making the return would be liable to an action for damages. *Ibid.*]

[On consent, the court will give defendants leave to withdraw their return, and order a peremptory *mandamus*. *Rex v. Barker*, P. 2 G. 3. 3 B. M. 1379.]

### M A N D A V I B A L L I V O.

*Vide Return*, (D 3.)

### M A N O R.

*Vide Copyhold*, (Q 1, &c.)—*Dismes*, (C 4.)

### M A N S L A U G H T E R.

*Vide Justices*, (M 15, &c.)

### M A R I N E L A W.

*Vide Admiralty*, (E 10, &c.)

### M A R I N E R.

*Vide Admiralty*, (E 15.)—*Navigation*, (I 5.)—*Uses*, (N 2.)

## M A R K E T.

## (A) Market.

**A** MARKET is the privilege of a town to hold a market. *Bl. Nom. Verb. Market.*

And the usual place where a market is held, is the market, not every place within the same town. *Godb. 131.*

## (B) Fair.

**E**VERY fair is a market, not *vice versa*. 2 *Inst.* 406. 221.

And therefore, where any statute speaks of a fair, a market shall be also comprehended. *Ibid.*

If the king grant a fair generally, the grantee may keep it where he pleases. 3 *Mod.* 108.

So, if he grant a fair to be held in such a town, place, &c. he may keep it in what part of the town he pleases. *Ibid.*

## (C) Who shall have a Market, &amp;c.

## (C 1.) What Grant shall be good.

**N**ONE can have a fair or market, but by grant or prescription. 2 *Inst.* 220.

So, a fair or market by prescription shall not be extinct by the soil coming to the crown, as other franchises are. *Mo. 474.*

Otherwise, if the fair or market commenced by grant. *Ibid.*

## (C 2.) What not.

But a grant of a fair, or market, has usually a clause, *quod non fit ad nocumentum*, &c. And therefore, if it be to the prejudice of the king or others in any respect, the patent shall be avoided. 2 *Inst.* 406. 2 *Rol.* 476. *Vide post.* (C 3.)

(C 3.) *How avoided.*] If a patent for a fair, or market be to the nuisance, it may be repealed by *scire facias*. 2 *Inst.* 406. 2 *Vent.* 344. *Semb.* 2 *Rol.* 476.

Tho' an *ad quod damnum* went before the patent. *R.* 2 *Vent.* 344.

Or, the person who has the annoyance, may have a *quod permittat* to throw down such fair or market. *F. N. B.* 184. *A.*

Or, shall have an assise of nuisance. *F. N. B.* 184. *A.* 2 *Inst.* 406.

Or, an action upon the case. 2 *Sand.* 172. 1 *Lev.* 296.

And by the *st. W.* 2. 13 *Ed.* 1. 24. an assise of nuisance lies against an alienee. 2 *Inst.* 405.

If a market or fair be erected too near my antient fair or market upon the same day, it is a nuisance, and shall be revoked. 2 *Rol.* 140. *l.* 10.

Tho' the words (*nisi fit ad nocumentum*) are omitted in the patent. 2 *Rol.* 140. *l.* 17.

So, if it be the day before *R.* after verdict where it did not appear that the second market was by lawful authority. 2 *Sand.* 174. *Fl.* *d.* 4. *c.* 28. *f.* 14. 1 *Lev.* 296.



But if it be the second or third day after, it is no nuisance. *Fl. l. 4. c. 28. f. 14.*

If new houses be built in one part of *D.* where I have a market in another part of *D.* and merchandizes are there sold, it is a nuisance, *2 Rol. 123. C.*

A market, or fair erected *infra sex leucas et dimidiam et tertiam partem dimidia*, is too near, if it be also injurious; *quia rationabiles dietæ constant ex 20 miliaribus. Fl. l. 4. c. 28. f. 13.*

But *ultra talem terminum non est vicinum. Fl. l. 4. c. 28. f. 13.*

*Et poterit esse vicinum et infra prædictos terminos, et non injuriosum. Fl. l. 4. c. 28. f. 14.*

If a fair or market be to the annoyance of the king, or his people, in any respect, it is a nuisance, tho' the patent says *si non sit ad nocumentum feriarum vicinarum. 2 Inst. 406.*

But whether it be to the nuisance or not, is matter of evidence. *2 Sand. 174.*

#### (D) How a Fair, or Market, shall be held,

**B**Y the *st. North 2 Ed. 3. 15.* the lord of a fair, at the commencement of the fair, shall publish for what time it shall continue, and shall not hold it beyond his due time, otherwise it shall be seized into the king's hands.

By the *st. 5 Ed. 3. 5.* if a merchant sell after the time published, he shall forfeit double the goods sold.

By the *st. 27 H. 6. 5.* a fair or market shall not be held upon principal feasts, *Sundays* or *Good Friday*, (four *Sundays* in harvest excepted,) upon forfeiture of all goods sold, to the lord of the franchise. And he that has no day for it, but only such festival days, shall hold his fair or market within three days before or after, proclamation being first made; and he that has other days sufficient, shall hold it the full number of days allotted for his market, or fair, such festival days, &c, excepted.

The antient law was; *die dominico si quis mercaturam egerit, ipsâ merce et 30 præterea solidis mulctatur. 2 Inst. 220.*

By the *st. Win. 13 Ed. 1. 6.* fairs or markets shall not be kept in church-yards.

But a prescription to hold a fair 29th *September* is good, tho' it may be a *Sunday*; for a fair upon that day is not void, tho' the goods then sold shall be forfeited by the *st. 27 H. 6. 5. Cro. El. 485.*

#### (E) Sale in Market Overt.

**A** Sale or contract, in a fair or market overt, changes the property, against the party and strangers. *2 Inst. 220. 713.*

Against an infant, *feme-covert*, *non compos*, a man in prison, or out of the realm. *2 Inst. 713.*

Tho' the *feme-covert*, &c. be an executor or administrator. *Ibid.*

Tho' no toll paid. *2 Inst. 714.*

So, a sale in an open shop in *London* of proper goods; for every day, except *Sunday*, there is a market there. *5 Co. 83. b.*

So, in *Bristol*, or elsewhere, by custom. *Dub. Mo. 625.*

But

But a sale out of a fair, or market, does not change the property against the rightful owner, who is no party. 2 *Inst.* 220.

So, the king cannot grant, that a shop shall be a market *over*. R. Mo. 625.

So, a sale in a covert place within a fair, or market, does not change the property: as, in a back-room or warehouse. R. 5 Co. 83. b. R. Mo. 360. R. 1 *And.* 344. *Poph.* 84.

Or, behind a hanging or cup-board, where a man passing before the shop cannot see, R. 5 Co. 83. b. Mo. 360. R. 2 *Rol.* 122. l. 50.

Or, when the windows of the shop are shut, 1 *And.* 344. 2 *Rol.* 122. l. 47.

So, if the sale be of goods improper and foreign to the owner or trade of the shop: as, plate in a scrivener's shop, &c. For a shop in London is not a market, except for goods proper to its trade. R. 5 Co. 83. b. 2 *Rol.* 122. l. 40. R. *Poph.* 84. Mo. 360. R. 2 *Cro.* 69. R. 1 *And.* 344.

A jewel in a shop, which does not belong to a goldsmith. R. 2 *Rol.* 122. l. 40.

So, if the sale be covinous. 2 *Inst.* 713. *Jon.* 164.

As, where the buyer knows that the feller has no right. 2 *Inst.* 713.

Or, the feller be of such age, that the buyer knows him to be an infant. *Ibid.*]

Or, if the buyer knows the feller to be a *feme-covert*, where she does not use a trade for such things, and does it without the consent of her husband. *Ibid.*

So, if the sale be in the night after sun-setting, and before sun-rising. 2 *Inst.* 714.

Or, the treaty for the sale was begun out of the market. 2 *Inst.* 713. *Jon.* 164.

So, if there be no sale: as, where no consideration is paid; for that is a gift, 2 *Inst.* 713.

Or, the goods are the goods of the buyer himself. *Ibid.*

So, a sale in a fair, or market, does not bind the king. *Ibid.*

If a man pursue his appeal freshly against a felon of his goods, till he be convicted, he shall have restitution of his goods, tho' they have been sold in market *overt*. 2 *Inst.* 714.

So, by the *st.* 21 H. 8. 11. if a felon be convicted by the evidence of the owner of the stolen goods, or by his procurement, upon indictment. *Ibid.*

[But the owner is not entitled to restitution before conviction of the felon: thus he cannot maintain trover against a purchaser in market *overt* who sold the goods *before* conviction, tho' he gave him notice of the robbery while they were in his possession: till conviction the property was *in dubio*, and the purchaser was not bound to keep the goods till that time: but the owner has a right to the restitution of the goods in specie, and perhaps would be entitled to recover damages in trover against any person who is fixed with the goods after conviction and refuses to deliver them; for then the goods are converted to the prejudice of the owner. 2 *T. R.* 755.]

So, by the *st.* 2 & 3 Ph. & M. 7. no sale of an horse stolen binds the property, unless it stand, or be ridden an hour together, between 10 o'clock and sun-set in an open part of the market, and all parties to the bargain come with the horse to the book-keeper, and enter the colour



colour and one mark at least of the horse sold, and pay the toll, if any due, else a penny. *Vide post.* (F 1.)

And by the *st.* 31 *El.* 12. no sale of an horse shall bind, unless the toll-taker, &c. know the vendor and enter his christian, surname, and dwelling, or else one, who knows him and is known to the toll-taker, vouch his knowledge of name, surname, addition, and place of dwelling, which shall be entred, &c. *Vide post.* (F 1.)

And this statute extends to an horse taken by wrong, tho' not stolen. *R. Jon.* 163. 2 *Inst.* 717.

And is only additional to the common law, and the *st.* 2 & 3 *Ph.* & *M.* 7. all which must be pursued. 2 *Inst.* 719.

If the feller of a stolen horse in market overt be entred in the toll-book by a false name, that does not alter the property. *Per two J.* *Owen*, 27. 1 *Leo.* 158. *R. cont. Cro. El.* 86.

If a man plead a sale in his shop, he must say, that it was in a shop where he used his trade. *R. Mo.* 624.

That it was *in pleno mercatu.* *Mo.* 624.

And a custom, that a sale binds, *modo unus contrahentium sit liber homo*, is void; for it tends to a monopoly. *Mo.* 625.

[There can be no market-overt for pawning. *Hartop v. Hoare*, P. 16 G. 2. *Str.* 1187. 1 *Wilf.* 8. 3 *Atkyns*, 44.]

[By 1 & 2 P. & M. c. 7. no person living in the country, out of any city, borough, town-corporate, or market town, shall sell by retail within any city, &c. any woollen cloth, &c. except in open fairs.]

[But the inhabitants of a market town, &c. are not prohibited by this act from selling woollen-cloth, &c. in other market towns, &c. by retail, and not in open fair. *Doug.* 256.]

### (F) What Duties are payable.

#### (F 1.) Toll.

THE duties usually paid at a fair or market are toll, stallage, picage, &c. *Vide Toll.*

Toll is a reasonable sum due to the lord of the fair or market, for things sold there, which are tollable. 2 *Inst.* 220.

And it was usually allowed for witnessing of the sale. *Ibid.*

And, by common right, shall be only upon a sale of live cattle, not of victuals, wares, &c. *R. Mo.* 474.

But, by custom, it may be due for all goods brought to the market. 1 *Leo.* 218.

So, by special custom, toll may be due for goods not sold. *Semb. Lut.* 1336.

But that seems to be for stallage. 2 *Inst.* 221. *Mo.* 835. 2 *Rel.* 123. l. 37. *Vide post.* (F 2.)

If an ancient fair or market returns to the crown, and the king re-grants it, the toll passes. *Pal.* 78.

The judges are to determine, whether the toll be reasonable. 2 *Inst.* 222.

The *Mirror* says, that a halfpenny shall be taken of goods of 10 s. *et sic pro ratâ*, so that no toll exceed a penny. *Ibid.*

And therefore above a penny is an unreasonable toll. *Mo.* 474.

Above a penny, or two pence. *Per Poph. Cro. El.* 558.

If the toll granted be unreasonable, the grant will be void. 2 *Inst.* 220. *Cro. El.* 558.

So, by the *st. W.* 1, 3 *Ed.* 1. 31. if the lord take an outrageous toll, the king shall take the franchise; and if it be by a bailiff, without the command of the lord, he shall render to the plaintiff as much more as he has taken, and shall be imprisoned for forty days. *Vide post.* (1).

An outrageous toll is any toll, when there is none due, or the party is discharged of toll. 2 *Inst.* 220.

Or, if more be exacted than is due. *Ibid.*

And therefore, an action upon the case lies against him, that takes an outrageous toll, viz. of him, who ought to be quit. *Yel.* 13.

So, toll is not incident to a fair or market: and therefore, a grantee shall not have toll without a special grant. 2 *Inst.* 220, 716. *in marg.* *R. Cro. El.* 558. 592. *Mo.* 474. *R. Pal.* 77. 86.

[And therefore if it is a new fair, custom cannot support it. *Holloway v. Smith*, *M.* 16 G. 2. *Str.* 1171.]

And therefore, if the king grant a market, &c. *de novo*, *cum omnibus libertatibus pertinent.*, he shall not have toll. *R. Pal.* 78.

So, after a fair, or market granted, the king cannot grant a toll, without a *quid pro quo*. 2 *Inst.* 220. *Vide Prærogative*, (D 18.)

And therefore, it is not sufficient to allege the grant of a market, with all tolls belonging, but there must be alleged an express grant, or a prescription for toll. *Lut.* 1380.

So, the king cannot grant a toll for goods not brought to the market. *Lut.* 1502.

So, regularly, toll shall not be paid, before the sale; for it is due from the buyer, not from the seller. 2 *Inst.* 221. *R. Lut.* 1336.

So, the king shall not pay toll. 2 *Inst.* 221.

Nor, tenant in *antient demesne*, for goods for his tenements or family. 2 *Inst.* 221. 1 *Rol.* 321. *B.* 1 *Leo.* 233. *Vide Antient Demesne*, (F 4.)

Nor, if a man has a grant to be discharged of toll, for goods for his own use, bought since his grant. 2 *Inst.* 221.

And he shall be exempted in a fair or market of the king. *Ibid.*

Tho' the grant be for him only, it will be good against the king's successors. *R. Yel.* 15.

A grantee to be quit of toll, may plead his exemption. *Lut.* 1332.

So, an inhabitant of a borough exempted by charter.

So, an inhabitant of the dutchy of Lancaster. *Lut.* 1379.

And a prescription for an inhabitant is good, being for a discharge. *R. Lut.* 1380. *Adm.* 2 *Cro.* 152.

But if a market, where toll was due by prescription, comes to the king, and he grants the market *cum pertinentiis*, the grantee shall have the toll. *Pal.* 78.

[The owner of a market cannot distrain for toll the goods brought there to be sold, as damage-feasant, but he has an action for the toll. *Wigley v. Peachy*, *T.* 5 & 6 G. 2. *Ld. Raym.* 1589. *Austen v. Whitted*, *C. P. H.* 20 *Geo.* 2. *Willes*, 623.]

[Nor, for the toll of goods fraudulently sold out of the market to avoid the toll. *Blakey v. Dinsdale*, *B. R. M.* 18 *Geo.* 3. *Cowp.* 661.]

[A claim of toll to be taken in specie for goods sold in a market is supported by evidence of a right to toll for goods brought into the market



market and sold there, without shewing any right to toll for goods sold in the market without being brought there. *Moseley v. Pierfon*, B. R. M. 31 Geo. 3. 4 T. R. 104.]

[If the grantee of a market under letters patent from the crown, suffer another to erect a market in his neighbourhood, and use it for the space of twenty-three years without interruption, he is by such use barred of his action on the case for disturbance of his market. *Holcroft v. Heel*, C. P. E. 39 Geo. 3. 1 Bos. & Pull. 400.]

[Qu. Whether if no specific toll be granted in the letters-patent, the grantee be entitled to any toll, and whether in such case he can support any action for an injury to his market? *Ibid.*]

*Toll booth.*] By the st. 2 & 3 Ph. & M. 7. the owner of every fair or market shall appoint one in a special open place to take the toll, and keep the same place from ten in the morning till sun-set, on pain of 40s., who shall take the toll at the same and no other time or place, and then have before him and enter the names and dwellings of all parties to bargain for any horse, and the colour with one special mark of such horse, on pain of 40s., and shall deliver the book by the next day to the owner of the fair, or market, who shall make a note of the number of the horses sold, and subscribe his name to it, on pain of 40s. on the defaulter.

By the st. 31 El. 12. no book-keeper shall take toll, or make an entry, &c. unless he truly know the feller of the horse, or his voucher, their names and dwellings, and then shall truly enter the same and the price of the horse, &c. on pain of 5 l. for every default.

#### (F 2.) Stallage, Picage, &c.

*Stallage* is a duty for the liberty of having stalls in a fair or market; or for removing them from one place to another. *Pal.* 77.

[Erecting a stall in a market is not of common right, stall-keeper must compound as he can. *Mayor of Northampton v. Ward*, M. 19 G. 2. Str. 1238. *Wilson*, 107.]

[And it is a trespass to set tables in a market place, for the sale of goods thereon, without leave of the owner of the soil. 2 Bl. R. 116.]

*Picage* is a duty for picking holes in the lord's ground for the posts of the stalls. *Per Treby*, *Quo W.* 29. *Pal.* 77.

And it belongs to the soil; and therefore, though a fair granted in *Borough-English* land go to the eldest son, picage shall be to the youngest son of the grantee. *Mo.* 474.

By custom, a man shall have toll for goods in a market, sold or not sold; but this seems to be for stallage. *Vide ante*, (F 1.)

So, he may take for stallage the eighth part of a bushel of corn in every four bushels in specie. 2 Rol. 123. l. 30. 37. *Mo.* 835.

The owner of an house next to a fair, or market, cannot open his shop for selling in a market, without payment of stallage; for if he takes the benefit of the market, he ought to pay the duties there. *Cont. per Dod.* But it was R. per Cur. 2 Rol. 123. l. 30.

If a man prescribe for toll, viz. *pro qualibet stallia* so much, it is well; for toll is a general word. *R. Lut.* 1519.

So, if there be a prescription for toll, viz. *inter alia pro qualibet stallia*, it is well. *Lut.* 1519.

Or,

Or, for the stall and soil *prope et circa stallam*; for it shall be ascertained by the usage. *R. Lut. 1519.*

### (G 1.) Court of Pyepowders.

**T**O every fair or market, *curia p<sup>re</sup>sentis pulverisati*, viz. a court of pyepowders, is incident. *4 Inst. 272. Cro. El. 773.*

Or, by custom, may be held where there is no fair or market.

*4 Inst. 272.*

This is a court of record, in which the steward is the judge. *4 Inst. 272. Skin. 33.*

And it cannot be held before the mayor, or other person, except the steward, without special custom. *R. Skin. 33.* but by special custom it may. *2 Bul. 23.*

The jurisdiction shall be, of contracts in the same fair or market, for goods there bought, or sold. *4 Inst. 272.*

Or, for battery or disturbance there. *D. Cro. El. 774.*

Or, for words to the slander of wares in the market. *4 Inst. 272. 10 Co. 73.*

And therefore, if the proceeding be on a contract in the fair, &c. but not for a thing to be sold there, it will be void. *R. Skin. 33. R. 2 Bul. 21.*

Or, for slander of another, which does not concern the fair, or the goods there. *4 Inst. 272. R. 10 Co. 73. a. Cro. El. 774.*

Or, out of the precinct of the fair or market. *4 Inst. 272.*

Or, at a day before or after; tho' at another fair or market. *4 Inst. 272. 10 Co. 73. Cro. El. 773.*

So, by the *st.* 17 *Ed. 4. 2. conf. by the st. 1 R. 3. 6.* the steward, &c. shall not hold plea upon pain of 5 *l.*, unless the plaintiff or his attorney swear, that the contract, &c. in the declaration, was within the time and precinct of the fair or market.

And if it be sworn the defendant may plead in abatement, or tender issue, that it was not; and if no oath, or it be found for the defendant, the plaint shall be dismissed, and the party sent to his remedy by common law.

But such oath need not appear upon the record. *4 Inst. 272.*

So, if it does not appear in pleading, that the suit there was for a matter within the jurisdiction, it will be void. *R. Skin. 33.*

So, an information there, for a duty within the market, tho' it is not void, is erroneous. *R. Cro. El. 530.*

### (G 2.) How the Proceeding shall be.

The proceeding in a court of pyepowders shall be by plaint.

And the cause of action, plaint, &c. ought to arise, and shall be entirely determined at the same fair. *4 Inst. 272.*

And therefore, the process shall be returnable *de hora in horam. Ibid.*

But time shall be allowed to the plaintiff upon a writ of inquiry. *R. Cro. El. 774.*

### (H) Clerk of the Market.

**A**Ntiently, there was a continual market at the house of the king's court, and a clerk of the market to inquire, whether the weights and measures were according to the standard. *4 Inst. 273.*

And



And he had a court for that purpose. 4 *Inst.* 273.

And might make process to the sheriffs and bailiffs, to return panels before him. *Ibid.*

And all estreats were to be returned into the *Exchequer*. *Ibid.*

By the *st.* 16 *R.* 2. 3. he shall have all his weights and measures, according to standard of the *Exchequer*, ready with him, when he makes assay.

But he could hold no plea, except what was held in the time of *Edw.* 1. 4 *Inst.* 273.

Nor, limit the price of victuals. 4 *Inst.* 275.

Nor, break pots, under the measure. *Semb. Sav.* 57.

Nor, distrain *ex officio* for a fine, in not conforming to the standard. *Semb.* 1 *Sal.* 327.

By the *st.* 27 *H.* 8. 24. and 32 *H.* 8. 20. the king's clerk of the market, and no other, shall use that office within the verge, &c. notwithstanding any grant to any liberty, &c. while it happens to be within the verge.

The office of clerk of the market requires, that he set reasonable prices upon provisions in the king's progress, and survey whether they are wholesome, &c. 2 *Rusb.* 373.

The clerk of the market may take reasonable fees. 2 *Rusb.* 375.

By the *st.* *W.* 1. 3 *Ed.* 1. 26. nul *minister le roy preigne reward pur faire son office*; within which statute is the clerk of the market. 2 *Inst.* 209. 4 *Inst.* 274.

By the *st.* 13 *R.* 2. 4. the king's clerk of the market shall do his office duly, and shall take no common fine, on pain of 5 *l.* for the first, 10 *l.* for the second, and 20 *l.* for the third offence.

And therefore, if he prescribe to have 2 *d.* or other rate for viewing, and examining of measures, whether they are lawful or not, it is void. *R.* 4 *Inst.* 274.

Yet, by the *st.* 7 *H.* 7. 3. (and 11 *H.* 7. 4.) he shall have 1 *d.* for sealing of every bushel, and an halfpenny for a less measure.

### (I) Forfeiture of a Fair, or Market.

**B**Y the *st.* *North.* 2 *Ed.* 3. 15. if a man hold his fair beyond the time allowed, he forfeits the franchise. 2 *Rol.* 124. *l.* 30.

So, if he hold his market at another day. 2 *Rol.* 124. *l.* 35.

Or, has a fair to hold two days, and he holds it three days. 2 *Rol.* 124. *l.* 30.

But if a man hold his market upon the day allowed, and upon another day, he shall not forfeit his market; but shall be punished for the addition of the day. 2 *Rol.* 124. *l.* 26.

If a man take outrageous toll, he does not forfeit the market, but the toll only. The *st.* *W.* 1. 31. says, *le roy pendra le franchise del marche en sa maine*; but that is, till it be redeemed. 2 *Inst.* 221. *R.* that the toll only is forfeited. *Pal.* 82. *Qua W. Treby*, 37.

### M A R Q U I S.

*Vide Dignity.*

## MARRIAGE.

*Vide Action upon the Case upon Assumpsit, (B 8.)—Baron and Feme, (B 1, &c.—C 1, &c.—E 1, &c.)—Chancery, (3 Z 1, &c.)—Dignity, (C 6.)—Guardian, (G 4.—H 7.)—Prohibition, (G 15.)*

### Marriage Brokage.

*Vide Chancery, (3 Z 8.)*

### Dissolution of Marriage.

*Vide Parliament (H 3.)*

### Divorce.

*Vide Abatement, (H 43.)—Baron and Feme, (C 1, &c.)—Dower, (A 1, 2.)—Pleader, (2 Y 12.)*

### Forcible Marriage.

*Vide Justices, (S 3.)*

### King's Marriage.

*Vide Parliament, (H 4.)*

### Marriage Settlement.

*Vide Chancery, (3 Z 1, &c.)*

## MARSHAL.

*Vide Certificate (C).—Courts (E 1, &c.—F).—Imprisonment (C).—Officer, (E 3.)*

## MARSHALSEA.

*Vide Courts (F).—Imprisonment (C).*

## MARSHES.

*Vide Wales, (A 3.)*

## MARTIAL LAW.

*Vide Parliament, (H 23.)—Prærogative, (C 1, &c.)—War, (B 6.)*

## MASS.

*Vide Justices of Peace, (B 14.)*

## MASTER.

*Vide Justices, (L 1.)—Justices of Peace, (B 50, &c. 53, &c. 58, &c.)—London, (N 2.)*

### Master of the Rolls.

*Vide Chancery, (B 4.)*



**Masters of Chancery.**

*Vide Chancery, (B 5.—W 1, &c.)*

**Master of a Ship.**

*Vide Merchant, (E 2, &c.)*

**M A T T E R S.**

**Matters of Laws.**

*Vide Parliament (H 1, &c.—I—K).*

**Matters Civil.**

*Vide Parliament, (H 9, &c.)*

**Matters Criminal.**

*Vide Parliament, (H 6, &c.)—Prohibition, (F 6.)*

**Matters Marine.**

*Vide Admiralty.—Navigation.—Parliament, (H 25.)*

**Matters Martial.**

*Vide Parliament, (H 22, &c.)*

**Matters Matrimonial.**

*Vide Prohibition, (G 15.)*

**Matters Testamentary.**

*Vide Prohibition, (G 16, &c.)*

**M A Y H E M.**

*Vide Battery, (B—E 1, &c.)—Justices, (S 6.)*

**M A Y O R.**

*Vide Courts, (O 3.)—Dismes, (M 6, 7.)—Franchises, (F 22.)—  
London (C).—Statute Staple, (D 1.)*

**M E A S U R E S.**

*Vide Justices of Peace, (B 90, &c.)—Leet, (L 6, &c.)*

**MEDIETAS LINGUÆ.**

*Vide Alien, (C 8.)*

## MEERS.

*Vide Chase, (G 1.)*

## MELIUS INQUIRENDUM.

*Vide Officer, (G 12.—K 12.)—Prerogative, (D 67, &c.)*

## MERCHANT.

## (A) Merchant, who shall be.

THERE are four species of merchants:—merchant-adventurers, merchants-dormant, travellers, and merchants-resident.  
<sup>2</sup> *Brownl. 99. Vide Trade, (A 1, &c.)*

And, generally, every one shall be a merchant who traffics by way of buying and selling, or bartering of goods or any merchandize, within the realm, or in foreign parts. *Sal. 445.*

So, if a man draw a bill of exchange, he will be a merchant for that purpose. *Vide post. (F 4.)*

## (B) Factor.

A Factor is authorized by a letter of the merchant, with a salary, or an allowance for his care. *Ma. 81.*

And the same person may be factor for many different merchants. *Ibid.*

Every factor must pursue his commission strictly. *Ibid.*

And by his general commission has authority to sell upon credit.  
<sup>2</sup> *Ca. Ch. 57.*

[A factor has power to sell, and thereby bind his principal, but he cannot bind or affect the property of the goods, by pledging them as a security for his own debt, tho' there is a bill of parcels, and a receipt. *Paterfon v. Tass, H. 16 G. 2 Str. 1178.*]

[If a factor pledge the goods of his principal, the latter may recover the value of them in trover against the pawnee, on tendering to the factor what is due to him, without any tender to the pawnee. *Daubigny v. Duval, B. R. E. 34 Geo. 3. 5 T. R. 604.*]

So, if a loss happens to the merchant, the factor shall be excused, if he does not act contrary to his commission. *Ma. 81.*

But if a factor does not pursue his commission, he shall lose his factorage, and shall answer to the merchant for his damage. *Ibid.*

And therefore, if a factor gives more, or buys less in quantity or quality, than his commission requires, the merchant may disclaim, and the factor shall take the goods bought to himself. *Ma. 82.*

[If *A.* merchant in *London* orders *B.* merchant abroad, to buy him goods at a price limited, *B.* exceeds the price, and sends the goods, *A.* refuses the contract, but disposes of the goods as his own, and at a risk; he shall not be deemed the factor of *B.*, but to have accepted, notwithstanding what he said; and shall account with *B.* according to the price *B.* paid. *Cornwall v. Wilson, T. 1750, 1 Vesey, 509.*]

So, if he ships them for a different port or place. *Ma. 82.*



So, if he sells for a less price than was directed without sufficient reason, he shall make satisfaction. *Ma. 82.*

If he sells without giving advice, to make a profit to himself. *Ibid.*

Or, sells to *A.* who was insolvent, without a special direction, or plain ignorance. *Ma. 83.*

If a factor sells to *A.* for his principal, and before payment sells for himself, and takes money for himself, he shall answer so much for the debt to his principal; for he cannot receive his own debt to the prejudice of the debt of his master. *Ma. 82.*

[Where the custom of the trade is, that the factor sells goods at his own risk, for which he has an additional allowance; no credit is given as between owner and buyer, and the buyer is not answerable to the owner, tho' he gives him notice before payment not to pay to the factor, who has failed. By the jury, against the direction of *Lee C. J.* and by a special jury on a new trial, still against *C. J.*'s direction. *Scrimshire v. Alderton, H. 16 G. 2. Str. 1182.*]

[If a factor, who sells under a *del credere* commission, sells goods as his own, and the buyer knows nothing of any principal, the buyer may set off any demand he may have on the factor against the demand for the goods made by the principal. *George v. Clagett, B. R. T. 37 Geo. 3. 7 T. R. 359.*]

[It is a general rule, that where a factor who is authorized to sell goods in his own name, makes the buyer debtor to himself; tho' he is not answerable to his principal for the debt, if the money be not paid, yet he has a right to receive it if it be, and his receipt is a discharge to the buyer. *Cowp. 255.*]

[He may compel such payment by action, and the buyer cannot defend himself against such action, by saying that the principal was indebted to him in more than the amount. *Ibid.*]

If he makes a false entry at the custom-house, whereby the goods are forfeited. *Adm. Ca. Ch. 25.*

And therefore, if a factor in a foreign kingdom do not pay the customs, he shall have them to himself, and shall not be accountable to his principal. *R. Ca. Ch. 25. R. Ca. Ch. 76.*

Otherwise, if he does not pay the customs to the king. *R. Ca. Ch. 30.*

If a factor takes security by an obligation of *A.* upon a sale of goods, without authority, in his own name, he shall answer, if *A.* fails. *Semb. 2 Ca. Ch. 57.*

[If a merchant directs his factor or correspondent to insure, and he charges him with it as if done, and loss happens, he shall be charged as insurer; but if factor employs an agent, this equity will not extend to that agent. *Tickel v. Short, H. 1750, 2 Vesey, 239.*]

[If a merchant abroad, interested in goods and the freight of a cargo, mortgage them to his correspondent in *England* for payment of money at a certain day, and by letter inclosing the bills of lading, direct him to insure, the latter having accepted the bills of lading will be liable to an action for not insuring, notwithstanding the mortgage was become absolute before the order was received. *2 T. R. 187.*]

[If a merchant in *England* has been used to procure insurances for his correspondent abroad, in the usual course of trade, the latter has a right to expect compliance with an order for insurance from the former,

former, tho' he has no effects in his correspondent's hands, unless some previous notice be given to the contrary. 2 T. R. 187.]

[If a merchant accept an order for insurance, and limit the broker to too small a premium, in consequence of which no insurance can be procured, he is liable to make good the loss to his correspondent. 188. n.]

[Yet if a merchant residing in London, who has received an order for insurance from his correspondent, does what is usual to get the insurance effected, he is not bound to do more. *Ibid.*]

[A factor has a lien on goods consigned to him, not only for incident charges, but as an item of mutual account for the general balance due to him, so long as he retains the possession; if he parts with possession, he parts with his lien. *R. per Hardwicke C., Krutzer v. Wilcox, H. 1754. Gardiner v. Coleman, T. 1755, cited by Ld. Mansfield. Godin v. London Assurance Company, H. 31 G. 2. 1 B. M. 489. 1 Bl. 104.*]

[If he be surety in a bond for his principal, he has a lien on the price of the goods sold by him for his principal, to the amount of the sum he is bound for. *Cowp. 251.*]

[A dyer (not acting as a factor but merely as a manufacturer) has no lien on goods delivered to him to dye for other debts, only for the dyeing these goods. *Green v. Farmer, P. 8 G. 3. 4 B. M. 2214.*]

[A packer, being in the nature of a factor, has. *Ibid.*]

[Joint-factors are answerable and accountable for the whole on an action of account. *Godfrey v. Saunders, P. 10 G. 3. 3 Wils. 73.*]

[If a factor sells goods as his own by indorsement of the bill of lading, tho' no delivery, (if the goods are at sea,) the vendee shall hold; if fraud appears between factor and vendee, otherwise. *Wright v. Campbell, P. 7 G. 3. 4 B. M. 2046. 1 Bl. 629.*]

[Bills remitted to a factor or banker, while unpaid, are in the nature of goods unsold, and, if the factor become bankrupt, must be returned to the principal, subject to such lien as the factor may have thereon. 2 Bl. 1154.]

[*A.* and *B.* came to this agreement, that *B.* should purchase of *A.* all the light gold coin which he could send at a stated price, and that *A.* should from time to time draw upon *B.* for the money due upon such sale, and that *B.* should also from time to time accept other bills drawn by *A.* for his own convenience, for which *A.* was to remit value: after they had acted under this contract for some time, *B.* became a bankrupt, being under acceptances to a large amount; and *A.* (ignorant of the bankruptcy) sent a parcel of light gold and bills to enable *B.* to discharge the acceptances, which parcel was taken by *B.*'s assignees: it was holden that *A.*, who had since paid *B.*'s acceptances, might recover back the gold and bills sent after the bankruptcy, on the ground of their having been sent for the particular purpose of paying those acceptances; and that, as that purpose was not answered, the property in the gold, &c. remained in *A.* *Tooke v. Hollingsworth, B. R. E. 33 Geo. 3. 5 T. R. 215. Ex. Ch. E. 35 Geo. 3. 2 H. Bl. 501.*]

[If *A.* and *B.* have a general running account, consisting of bills drawn by *B.* on *C.* in favour of *A.*, and of bills and other securities deposited by *A.* with *B.*; and, upon the failure of *B.* and *C.*, *A.* be obliged to take up the bills received by him from *B.*, whereby the balance



lance of the accounts is in favour of *A.*, still he cannot maintain trover for the bills deposited by him with *B.*, unless they were specifically appropriated to answer *B.*'s drafts on *C.* in favour of *A.*, and deposited expressly for that purpose. *Beat v. Puller*, *B. R. H.* 34 *Geo.* 3. 5 *T. R.* 494.]

[If *A.* deposit goods with *B.* for sale, and *B.* promise to pay the proceeds to *A.* when sold; *B.* has no lien on them (if not sold) for the balance of his general account arising upon other articles. *Walker v. Birch*, *B. R. E.* 35 *Geo.* 3. 6 *T. R.* 258.]

[If a factor, in consideration of goods being consigned to him, accept bills drawn by the consignor, and pay part of the freight, and become insolvent before the bills are due, and before the goods get into his actual possession, the consignor may stop them *in transitu*. 3 *T. R.* 119. 783.]

[But, in order to divest the consignor's right to stop *in transitu*, it is not necessary that the goods should have been taken by the hands of the consignee himself. 3 *T. R.* 464.]

[A consignor may stop goods *in transitu*, tho' the consignee has in part paid for them. *Hodgson v. Ley*, *B. R. M.* 38 *Geo.* 3. 7 *T. R.* 440.]

[If the consignee assign the bills of lading to a third person for a valuable consideration, the right of the consignor as against such assignee is divested. 2 *T. R.* 63. held *contra* by the court of Exchequer-Chamber in a writ of error from *B. R. H.* 30 *Geo.* R. 1 *H. Bl.* 357. 5 *T. R.* 683.]

[If the consignee of goods, to whom the bill of lading is indorsed in blank, assign it over as a security for acceptances given by the assignee, not amounting to the value of the goods, and afterwards by an agreement between them they became partners in the goods, by which agreement it appears that the consignor has not been paid for them, the assignee of the bill of lading cannot maintain trover against the consignor, if he stop the goods *in transitu* upon the insolvency of the consignee. *Solomons v. Nissen*, *B. R. M.* 29 *Geo.* 3. 2 *T. R.* 674.]

[*A.* at a foreign port ships goods by the order and on the account of *B.*, to be paid for at a future day; and bills of lading are accordingly signed by the master of the ship. One of the bills is immediately transmitted to *B.*, who, before the arrival of the ship at the place of destination, sells the goods, and indorses the bill of lading to *C.* after the arrival of the ship, and a delivery of part of the goods to the agent of *C.*; *B.* becomes bankrupt, without having paid *A.* the price of the goods. By this delivery the *transitus* is at an end as to the whole of the goods. *Sleehey v. Heyward*, *C. P. E.* 35 *Geo.* 3. 2 *H. Bl.* 504.]

[If goods be consigned to a factor for sale, and he sell and receive the money before his bankruptcy, and do not purchase with it any specific thing capable of being distinguished from the rest of his property, the consignors cannot recover the whole money from the assignees, but must come in under the commission. *Scott v. Salem*, *C. P. H.* 16 *Geo.* 2. *Willes*, 400.]

[So, if the factor, at the time of the sale, agree to set off a debt of his own due to the vendee, it is the same as if the factor received so much money from the vendee, and the consignors must come in under the factor's commission. *Ibid.*] [But

[But if the goods remain in specie in the factor's hands at the time of the bankruptcy, the consignors may recover the goods in trover from the assignees. *Scott v. Salem, C. P. H. 16 Geo. 2. Willes, 400.*]

[Or, if a factor sell goods for his principal, and become bankrupt before payment, and his assignees afterwards receive the money, the principal may recover it from them in an action for money had and received. *Ibid.*]

[So, if the factor on such a sale takes notes in payment from the vendee, payable at a future day, and his assignees afterwards receive the money, the principal may recover it from them in an action for money had and received. *Ibid.*]

[If the assignees of a factor (bankrupt) receive bounty-money on any article under an act of parliament giving the bounty to the importer, the consignor of that article may recover such bounty-money from them in an action for money had and received. *Ibid.*]

### (C) Broker.

**B**ROKERS are persons employed among merchants to make contracts between them, and fix the exchange for payment of wares sold or bought. *Ma. 143.*

And by usage in *London*, freemen of the city selected out of the companies of which they are free, and presented by six at least approved members of their company to the mayor and aldermen, and by the court of aldermen allowed, have been admitted and sworn to be brokers in *London*. *Vide the st. 1 Jac. 21. s. 1. [Vide also the stat. 6 Ann. c. 16.]*

[*Qu.* Whether the selling goods by auction within the city of *London*, by an auctioneer who has paid the duty of 20 s. for a licence, required by the *stat. 17 Geo. 3. c. 50.* but who has not been admitted as a broker, makes him liable to the penalty of the statute for acting as a broker, without having been so admitted?—*Sembl.* that it does not. *Wilkes v. Ellis, C. P. M. 36 Geo. 3. 2 H. Bl. 555.*]

[A commission *del credere* is an absolute engagement to the principal from the broker, and makes him liable in the first instance: so that the broker is liable at all events; tho' the principal may resort to the underwriter as a collateral security. 1 *T. R. 112.*]

[Where a bankrupt has underwritten a policy to a broker acting under a commission *del credere*, and a loss, upon the policy, happens before the bankruptcy, but is not adjusted till after, the broker may deduct the amount of the loss from the debt which he owes to the estate of the bankrupt; and if, by mistake, he pay it to the assignees, he may recover it from them as money had and received to his use. 1 *T. R. 285.*]

[A broker, when he bought goods for his principal, agreed for  $\frac{1}{2}$  per cent. to indemnify him from any loss on the re-sale; it was holden that this undertaking was discharged, when the principal had a fair opportunity of selling to advantage, but neglected it, tho' he was afterwards obliged to sell at a loss. *Curry v. Edensson, B. R. H. 30 Geo. 3. 3 T. R. 524.*]

[Such an agreement, if reduced to writing, need not be stamped, because it is a contract relating to the sale of goods. *Ibid.*]

[One who for brokerage and hire negotiates and concludes bargains



for stocks is a broker within 6 *Ann. c. 16.* *Janssen v. Green, T. 7 G. 3. 4 B. M. 2103.*

But pawnbrokers, who buy and sell goods upon pawn, use an unlawful trade. *Kelg. 50.* [*Vide stat. 30 Geo. 2. c. 24.*]

And by the *st. 1. (or 2.) Jac. 21. f. 5.* a sale or pawn to them of goods purloined, or stolen at any place within the city or liberties of London, or in *Westminster or Southwark*, or within two miles of London, shall not alter the property of the goods so purloined or stolen.

And an action lies against them by the owner for such goods, tho' the felon be not prosecuted. - *Kelg. 50.*

And by the *same statute, f. 7.* if the owner require the pawnbroker to shew him such goods, and tell how he came by them, or how he hath disposed of them, and he refuse to disclose them, he forfeits double the value. [*Vide stat. 30 Geo. 2. c. 24.*]

[For the regulation of pawnbrokers, see 25 *G. 3. c. 48.* 27 *G. 3. c. 37.*]

### (D) Lex Mercatoria,

There shall be no Survivorship.

**L**EX mercatoria, or law-merchant, is part of the law of England. *Co. L. 11. 2 Rol. 114.*

[And therefore it cannot be proved by witness, *Pillans v. Van Mierop, P. 5 G. 3. 3 B. M. 1663.*]

*Per legem mercatoriam*, the merchandizes, debts, and duties of joint-merchants do not survive, but go to the executor of him who dies; for *jus accrescendi inter mercatores pro beneficio commercii locum non habet.* *Co. L. 182. a.*

And this extends to all merchants and traders, tho' they do not go beyond sea. 2 *Brownl. 99.*

And therefore, the executor of the deceased shall join with the surviving merchant for goods carried away in the lifetime of the testator. *Lut. 1493. Dub.* whether necessary. *Sho. 189. Cont.* for the remedy survives, tho' the duty does not survive. *Sal. 444.*

[If money be owing to two partners, and after the death of one it be paid to a third person, the surviving partner may maintain an action for money had and received, in his own right. 2 *T. R. 476.*]

[If judgment is obtained against a surviving partner for a partnership debt, it is still a partnership debt. *Jacomb v. Harwood, P. 1751, 1 Vesey, 265.*]

And if a joint-factor dies, an account lies against the executor of the deceased, and the survivor. *Ca. Ch. 127.*

Yet the survivor of joint-factors may be charged solely for goods sold by him and his partner. *R. Ca. Ch. 127.*

So, if a joint-merchant die, the action for money due to them survives; for the survivor and the executor of the deceased cannot join. *Sal. 444.*

[Articles of partnership in trade do not subist for the benefit of executors (to entitle them to continue in the partnership) unless specially provided. *Pierce v. Chamberlain, M. 1750, 2 Vesey, 33.*]

[In a cause for an account of a copartnership, both parties being dead, a receiver shall be appointed, otherwise in the case of a surviving partner, 2 *Brown. 272.*]

[Assumpsit

[*Assumpsit* for a partnership debt may be brought against one partner only, and unless he plead in abatement he shall be afterwards concluded. 1 *Bl.* 695. 5 *Bur.* 2613. 2 *Bl.* 947.]

[All the partners must join in an action brought for a partnership transaction. *Graham v. Robertson*, *B. R. H.* 28 *Geo.* 3. 2 *T. R.* 282.]

[Where two enter into articles of partnership for seven years, in which is a covenant to account yearly, and to adjust and make a final settlement at the expiration of the partnership, and they dissolve the partnership before the seven years are expired, and account together, and strike a balance which is in favour of the plaintiff, including several items not connected with the partnership, and the defendant promises to pay it, an *assumpsit* lies on such express promise. *Foster v. Allanson*, *B. R. E.* 28 *Geo.* 3. 2 *T. R.* 479.]

[If partners dissolve their partnership, persons who deal with either, without notice of such dissolution, have a right against both. *Cowp.* 449.]

[If two be partners, as *attornies* and *conveyancers*, and one receive money to be laid out on mortgage; the other is answerable for the amount, tho' his partner gave only his own separate receipt for it. *Cowp.* 814.]

[One of two partners applied trust-money in the trade with the privity of the other, afterwards they separated, and the partnership effects were assigned over to the first, who took on him the debts; this was holden to be no payment in discharge of the other partner, but both were considered liable to make good the trust-money. *Smith v. Jamefon*, *B. R. E.* 34 *Geo.* 3. 5 *T. R.* 601.]

[But to make a person liable as a partner, there must either be a contract between him and the ostensible person, or he must have permitted the latter to make use of his credit, and to hold him out as one jointly answerable. *Doug.* 371.]

[One partner may maintain an action for money had and received, against the other partner for money received to the separate use of the former, and wrongfully carried to the partnership account. 2 *T. R.* 476.]

[Surety for the service of *J. C.* to a sole trader does not extend to a subsequent partnership. 2 *Bl.* 934.]

[Money lent to a trader, by a partner who retires from business, at legal interest, with an additional annuity for a certain term of years, is not a continuance of the partnership. 2 *Bl.* 998.]

[*A.* and *B.*, ship-agents at different ports, enter into an agreement to share, in certain proportions, the profits of their respective commissions, and the discount on tradesmen's bills employed by them in repairing the ships consigned to them, &c. By this agreement they become liable, as partners, to all persons with whom either contracts as such agent, tho' the agreement provides that neither shall be answerable for the acts or losses of the other; but each for his own. *Waugh v. Carver*, *C. P. M.* 34 *Geo.* 3. 2 *H. Bl.* 235.]

[On a bankruptcy between partners, they are entitled as against each other to the balance of accounts. *Cowp.* 469.]

[And the assignees under a commission against one partner can only be tenants in common of an undivided moiety, subject to all the rights of the other partner. *Id.* 449.]

[If one of two partners commit a secret act of bankruptcy, the other



other partner may, for a valuable consideration, and without fraud, dispose of the partnership effects; and tho' the latter afterwards become bankrupt, the assignees under a joint commission cannot maintain trover against the *bonâ fide* vendee of such partnership effects. *Cowp.* 449.]

[If on an execution against one of two partners, the partnership effects be taken and sold, the court will order the sheriff to pay over to the other a share of the produce proportioned to his share in the partnership effects to be ascertained by the master. *Doug.* 650.]

[One partner cannot bind the other partners by deed. *Harrison v. Jackson*, B. R. E. 37 Geo. 3. 7 T. R. 207.]

### (E 1.) Contracts of Merchants.

**C**ontracts of merchants are regal, notarial, or verbal. *Ma.* 89.

The regal are, where the king by commissioners contracts with any particular merchants for provisions, apparel, &c. of the army, &c. *Ibid.*

Notarial contracts are, where an entry of the contract is made by a public notary. *Ma.* 90.

### (E 2.) Contract by Charter-party.

(E 2.) *How made.*] Contract by charter-party is, when there are agreements or covenants by charter between one or more merchants, and the master or owners of a ship, for the freight of his ship and the safe carriage of the merchandizes. *Ma.* 97.

No ship ought to be freighted without a charter-party. *Ibid.*]

(E 3.) *What the merchant ought to do. Freight of the ship.*] The merchant ought to import his goods in the ship, and pay the freight according to the agreements by the charter-party. *Ma.* 98, 99.

The usual freight is so much *per ton*. *Ma.* 99.

Or, so much for the voyage outward, and so much inward, or so much for the whole. *Ma.* 98. 100.

If no sum is expressed for the freight, so much ought to be paid as is usual in such voyage. *Ma.* 100.

So, if the freight be agreed for such goods, and the merchant puts more in the ship, the master shall take as much freight as he pleases. *Ma.* 99.

If the freight be agreed for 3 *l.* *per ton*, and afterwards there is an embargo upon the ship for six weeks, the master may make a new agreement with the merchant's factor for 6 *l.* a ton, without discovering the former agreement. *R.* 2 *Ver.* 242.

If the freight be in gross, *viz.* 600 *l.* for a ship of 200 tons, it shall be paid, tho' the ship has not so many tons. *Ma.* 100.

If the ship be freighted, so much outward and so much inward, the outward freight shall be paid, tho' the ship perish in her return. *Ma.* 98.

Or, return without lading, by the default of the merchant or his factor, the whole shall be paid. *Semb.* 2 *Ca. Ch.* 75. 2 *Ver.* 212.

So, tho' by the letter of the charter-party the freight cannot be recovered by law, yet, if by the intent it ought to be paid, it shall be recovered in equity. 2 *Ver.* 210. [*Doughl.* 272.] But

But if the ship perish, the whole freight from the last place or time of payment will be lost. 1 *Sid.* 236. [*Doug.* 541.]

So, if there be a default in the master, he shall lose his freight; as, if the master sail out of port in a tempest, &c. *Ma.* 98. 102. *Vide post.* (E 6. 9.)

Or, without a pilot, or necessaries, or contrary to the terms required by the charter-party. *Ma.* 98. 102.

So, if the ship returns without lading, where he does not stay for it the whole time agreed, and makes a protest against the factor, &c. *Ma.* 98.

Tho' there was danger of being taken by the enemy, if he had stayed. *Ma.* *Ibid.*

And if no freight was payable till the return, he shall lose the freight outward as well as inward. *Ibid.*

The goods carried generally, are a security for the freight. [*Doug.* 104.]

And the master need not deliver them, without payment.

[If a freighted ship becomes disabled without the master's fault, he has his option to refit (if possible in convenient time) or to hire another ship to carry the goods; if the merchant will not agree to this, the master is entitled to the full freight of the whole voyage. *Lutwidge v. Grey*, in the House of Lords, 1773, cited in *Luke v. Lyde*, *M.* 33 G. 2. 2 *B. M.* 882. 1 *Bl.* 190.]

[The master shall have his freight, tho' the goods are spoiled, if the merchant takes them. *Ibid.* *Dougl.* 272.]

[The merchant may abandon *all*, tho' *all* are not lost; but he cannot abandon *some*, and take *some*; if he abandons *all*, he is excused freight. 2 *B. M.* 882.]

[If the ship is disabled or taken, when part of the voyage is performed, without fault of the master, he shall be paid a rateable proportion of the freight. *Ibid.* *Dougl.* 272.]

[A ship is freighted from *Newfoundland* to *Lisbon*, when seventeen days at sea, and within four days of *Lisbon*, is taken, retaken, brought to *Biddiford*, the merchant has his goods, pays half salvage, sends them to *Bilboa*, and sells them at loss; the master is entitled to seventeen twenty-one parts of the freight of half the goods. 2 *B. M.* 882.]

(E 4.) *Contract of bottomree.* *Bottommarie*, *bottomage*, or *bottomree*, is so called, where the master takes up money, by way of loan, for the use of the ship, and pledges the bottom or keel of the ship for security of payment. *Latch*, 252. 1 *T. R.* 77.

[If the owner of a ship charge her for repairs done in *England*, by an instrument under seal, stated to be by way of *bottomree*, on which she was afterwards seized by Admiralty process, and decreed to be sold to satisfy the demand, and no appeal is made from that sentence, but between the seizure and decree a writ of execution issues against the owner at the suit of another creditor, the sheriff cannot take the vessel under this writ; nor can trover be maintained against the officer in possession by the warrant of the court of Admiralty. 1 *T. R.* 649.]

And such hypothecation of the ship binds the owners. *Latch*, 252. *Vide Admiralty*, (E 10, 11.)

So, if a man makes a loan of money to be paid upon the return of the ship, and takes a security by obligation, &c. such contract is called a *bottomree* contract. *Ma.* 122.

[Where



[Where repairs are ordered by the underwriters, for the payment of which a *bottomree* bond is given, and they refuse to pay it on the arrival of the ship, in consequence of which she is sold, they are liable for all the damage which shall accrue to the owner, in consequence of that refusal. 2 T. R. 407.]

And because the lender loses his money, if the ship does not return from the voyage, a great interest or *premium* is usually taken for it, and will not be usurious. *Vide Usury* (B).

But if a contract be made, by colour of *bottomree*, to evade the statute of usury, it will be usurious.

So, if the master or merchant takes a loan upon a *bottomree* contract, and deviates from the voyage agreed, he shall pay the money, tho' the ship never returns, but is lost before the time of payment agreed upon; for the deviation was the default of the master. R. Skin. 152.

(E 5.) *What the master ought to do. Provide the ship.*] The master has the power over, and charge of the ship. Ma. 102.

And therefore, ought to take care that the ship and tackle be sufficient. Ma. 103.

And he shall answer for the damage which happens, if he pursues his voyage when the overloop of the ship is untight, or pump faulty. *Ibid.*

So, he shall answer for damage by bad hooks, ropes, blocks, &c. whereof he has notice. *Ibid.*

(E 6.) *Perform his voyage.*] So, the master ought to pursue his voyage with due care according to the instructions; and therefore, shall answer for damage which happens, if he hoist sail without a good pilot. Ma. 102.

Or, in tempestuous weather, without the advice of his company. Ma. 102. *Vide ante*, (E 3.)—*Post*. (E 9.)

(E 7.) *The contract. How dissolved.*] If a contract be not by charter-party, but only by earnest given, if the merchant recedes from the contract, he loses his earnest only. Ma. 98.

If the master recedes, he shall lose double the earnest. *Ibid.*

[In a charter-party, if A. covenants to proceed to W. to stay forty days, and load with the goods B.'s agent's tender to be laden; and in consideration B. agrees to pay freight at 4*l.* 10*s.* per ton; proviso if the ship does not arrive on 1st March, then to be at B.'s option to load at that freight, or the current freight, or not at all; and A. does not go to W. he is liable to the penalty. *Shubrick v. Salmond*, H. 5 G. 3. 3 B. M. 1637.]

(E 8.) *Remedy for non-performance.*] If a contract by charter-party be broken, covenant lies upon it by the one party or the other. 3 Lev. 41. Lev. Ent. 37. Dougl. 272.

[The owner of the ship is liable to the freighter, for the default of the master, tho' the freight was to go to the master, either by special agreement of the owner, or by the custom of trade, and though it were in a trade unlawful in the foreign country, but lawful in England. *Boucher v. Lawson*, H. 8 G. 2. and H. 9 G. 2. B. R. H. 85 & 194.]

[But

[But it must be charged on the custom of the realm, as in a ship usually carrying for hire, or employed that voyage to carry for hire; or on the personal undertaking of the owner; and in a special verdict this must be specially found; on a general verdict, it is presumed, *Boucher v. Lawson*, H. 8 G. 2. and H. 9 G. 2. B. R. H. 85 & 194.

[A. owner of a ship, lets it to B. for a voyage for a sum certain, and B. to have the benefit of carrying goods, and A. covenants for the condition of the ship, and the behaviour of the master, C. sends gold, and has bills of lading signed by the master, A. is liable and not B. *Parish v. Crawford*, H. 19 G. 2. Str. 1251.]

[The plaintiff must sue for the whole penalty at law, but if the defendant thereupon applies to equity for relief, on his paying principal, interest and costs, the charter-party shall be delivered, and satisfaction acknowledged. *Forward v. Duffield*, T. 1747, 3 Atkyns, 555.]

[If a factor hires a ship, and executes a charter-party, by which the goods to be put on board are made liable to the master; and some merchants load the ship, and agree with the factor at 9l. per ton for the carriage, and the factor becomes bankrupt; the merchants are not liable to the owner's demand, nor their goods, but they are liable to pay the factor the freight of the cargo, and as the master has a specific lien on the goods, he must be paid before the assignees of the bankrupt take any thing. *Paul v. Birch*, T. 1743, 2 Atk. 621.]

[Owners of ships let to freight under the charter-parties of the East India Company are not answerable for damage or loss to the cargo happening by the act of God. *Dougl.* 272.]

[“Ship damage” in those charter-parties, means damage from negligence, insufficiency or bad stowage in the ship, exclusive of what is occasioned by storm or other sea hazard. *Ibid.*]

#### As to Contract between Master and Owners.

*Vide Navigation*, (I 4.)

#### What Contract is good by the Law-Marine.

*Vide Admiralty*, (E 10, 11.)

#### (E 9.) Contract by Policy of Assurance.

A policy of assurance is, when a merchant gives a consideration in money to others, to assure his goods, ship, or other thing by him adventured, upon such terms as may be agreed between the merchant and assurers. *Vide* st. 43 El. 12.

This usage was introduced by the emperor *Claudius Caesar*, and recorded amongst the laws of *Oleron*, and afterwards used amongst merchants in *England*, and since in other kingdoms. *Ma.* 105.

And by the st. 43 El. 12. it appears, that this usage is common, when a grand adventure is made in parts remote, whereby, if the ship perishes, the loss is divided amongst many.

And upon this statute the king may make an office for entry of policies. *R. Hard.* 351.

By the instrument, or policy of assurance, in consideration of a premium of so much per cent. to be paid by the merchant, the assurers assure such a ship, her tackle and keel, &c. from *London* to such a port; and if the ship, &c. perish, every subscriber pays the sum by him subscribed for recompence of the loss. 2 *Sand.* 200. [The



[The insurance of an enemy's property is illegal, and no action can be maintained upon it. *Brissow v. Towers*, B. R. M. 35 Geo. 3. 6 T. R. 35.]

[Goods, the produce of *Holland*, purchased in that country during hostilities between *Holland* and *Great Britain*, by a *British* agent resident there, and shipped for *British* subjects, were insured by them in this country; and the insurance was holden legal. *Bell v. Gilson*, C. P. M. 39 Geo. 3. 1 Bos. & Pull. Rep. 345.]

[If a ship is insured *at and from* a place, whilst she is there preparing for the voyage, the insurer is liable; but if the voyage is laid aside, and the ship lies there several years, with the owner's privity, the insurer is not liable. *Chitty v. Selwin*, T. 1742, 2 Atk. 359.]

[If a ship insured for a certain time sail before the time on a different voyage from that insured, the assured cannot recover, tho' she afterwards get into the course of the voyage described in the policy, and is lost after the day on which the policy was to have attached. 2 T. R. 30.]

[In an action on a policy of insurance the declaration stated, that *after* the making of the policy the ship sailed; the evidence was that she sailed *before*, but the variance was holden immaterial. *Peppin v. Solemons*, B. R. H. 34 Geo. 3. 5 T. R. 496.]

So, an assurance may be made for a ship, &c. in her voyage to such a country, or port, and her return to *London*. 2 Sand. 200.

Or, for a voyage to such a country, and to trade there, and return to such a port. *Ibid.*

So, it may be for the goods and merchandizes laden in such a ship. *Ma.* 106.

Or, for such and such goods in particular. *Ibid.*

Or, for goods laden, or to be laden in any ship at such a port, or from such a country to *London*. *Skin.* 327.

[A policy of insurance is effected on certain goods on board a certain ship on a voyage *at and from* A. to B., and another policy is also made on any kind of goods as interest should appear *on board ship or ships* on the same voyage, warranted to sail within a limited time, but no circumstances of the first policy are communicated to the underwriters of the second, nor do they know that the first was made. Goods to the full amount of the sum insured in the first policy are put on board the specified ship, which arrives in safety. Goods also to the full amount of the sum insured in the second policy are put on board another ship, which sails within the limited time from A. *with an intention of touching at C. in her course to B., but is lost before she arrives at the deviating point.* The underwriters of the second policy are answerable for the loss. *Kewley v. Ryan*, C. P. T. 34 Geo. 3. 2 H. Bl. 348.]

[If freight be insured on a valuation, and after part of the goods are loaded on board, the ship be driven from her moorings and lost, the rest of the goods being ready to be shipped, the insured is entitled to recover the whole of the valued freight. 3 T. R. 362.]

[If ship and freight are insured, and the ship is lost whilst careening, before the cargo is put on board, the insurer is liable for the ship only, and not for the freight she might have earned. *Tonge v. Watts*, H. 19 G. 2. 2 Str. 1251.]

[Provisions sent out in a ship for the use of the crew, are protected by

by a policy of assurance "on the ship and furniture." *Brough v. Whitmore*, B. R. H. 31 Geo. 3. 4 T. R. 206.]

[Where a ship was chartered from L. to T. there to take on board a certain number of pipes of wine, and proceed to B.; &c. for which the owner was to receive freight at the rate of so much *per pipe*, a policy of insurance on such freight was held to attach from the sailing of the ship from L. *Thompson v. Taylor*, B. R. M. 36 Geo. 3. 6 T. R. 478.]

So, for money; tho' he has no interest in the ship or cargo, except what he lends upon *bottomree* bond. *Cont. 2 Ver.* 269. R. acc. 2 *Ver.* 717.

[If a man who has lent money on *bottomrees* or *respondentia*, insures on goods, he cannot recover; for *bottomree* or *respondentia* must be specified in the policy. *Glover v. Black*, T. 3 G. 3. 3 B. M. 1394. 1 *Bl.* 396. 405. 422.]

So, an assurance may be made upon ship and goods, *lost or not lost*. 2 *Sand.* 200. (*Vide Ma.* 107.)

For the goods of A. without account, if proved that A. had goods there, tho' the particulars are not proved. *Skin.* 405.

So, it may be made for the life of any person. *Ma.* 107.

[By *stat.* 14 G. 3. c. 48. no insurance shall be made on lives, or other event, but by person having interest therein whose name must be inserted; and he can recover no more than his interest amounts to. This extends not to *bonâ fide* insurances on ships or goods.]

[On insurances of houses against fire, it is necessary the party injured should have an interest in the house, at the time the policy is made out, and at the time the fire happens; therefore after the lease of a house is expired, and after the fire happens, the insured's assigning the policy does not oblige the insurers to make good the loss to the landlord, the assignee. *Sadlers' Company v. Badcock*, P. 1743, 2 *Atkyns*, 554.]

[Policies of assurance against fire are not assignable in their nature, nor intended to be assigned from one person to another, without the consent of the office. *Ibid.*]

[Policy of assurance against fire, with proviso not to be liable if burnt by invasion by foreign enemies, or any military or usurped power whatsoever: a mob rises on account of the dearth of provisions, the proclamation is read, mob disperses, another rises and burns the house; this is not an usurped power within the proviso. *Drinkwater v. London Assurance Company*, M. 8 G. 3. 2 *Wils.* 363.]

[In a policy of insurance against loss by fire from half a year to half a year, the assured agreed to pay the *premium* half-yearly, "as long as the insurers should agree to accept the same," within fifteen days after the expiration of the former half year; and it was also stipulated that no insurance should take place till the *premium* was actually paid; a loss happened within fifteen days after the end of one half year, but before the *premium* for the next was paid; it was holden, that the insurers were not liable, tho' the assured tendered the *premium* before the end of the fifteen days, but after the loss. *Tarleton v. Staniforth*, B. R. T. 34 Geo. 3. 5 T. R. 695.]

[If a policy of insurance refer to certain printed proposals, the proposals will be considered as part of the policy. *Routledge v. Burrell*, C. P. T. 29 Geo. 3. 1 H. Bl. 254. *Worsley v. Wood*, B. R. T. 36 Geo. 3. 6 T. R. 710.]

[A war-



[A warlike fort may not be insured by the governor; but a nominal fort, really a factory, and only defensible against black natives, may be insured by a governor, who is a merchant, and not a military man. *Carter v. Boehm*, P. 6 G. 3. 3 B. M. 1905.]

[Such insurance is good, tho' the insured does not disclose such conditions of the place as do not affect the risk insured against; nor his speculations, that the enemy might make them a visit, being unable to act elsewhere; nor that the enemy designed to attack them the year before. *Ibid.*]

So, a policy may be explained by a *parol* agreement; as, that it shall not take effect till the ship arrive at such a place, tho' the policy be from *London*. *Sal.* 444, 5. *Cont. Skin.* 55.

That it shall be for the ship *A.*, where *B.* is commander; tho' the policy by mistake was for the ship *B.* where *D.* was commander. *Per Holt*, *Sal.* 444.

So, if the policy has a blank for the time of the insurance, it shall be helped by a verdict. *Semb. F. g.* 275.

If the ship or goods insured be lost in whole or in part, every assurer shall make recompence according to his subscription, or *pro rata* in proportion thereto. *Ma.* 105. 108. 118.

[The nature of a policy is an insurance *on the ship, for the voyage*. If either the ship or the voyage be lost, it is a total loss. 1 T. R. 191.]

[But if the ship arrive safe, the circumstance of her not being worth repairing will not make it a total loss. *Id.* 187.]

[And owners of ships are not entitled to abandon, unless at some period of the voyage there has been a total loss: and where the jury have found only an average loss, occasioned by the perils of the sea, the court are precluded from saying there has been a total loss. *Ibid.*]

[When the assured receive intelligence of such a loss as entitles them to abandon, they must make their election in the first instance; and if they abandon they must give the underwriters notice in a reasonable time, otherwise they waive their right to abandon, and can only recover as for an average loss. 1 T. R. 608.]

[The insurer, after satisfaction made to the assured, stands in his place as to the goods, salvage, and restitution, and is entitled to a share of prizes taken by virtue of letters of reprisal. *Randal v. Cockran*, T. 1748, 1 Vesey, 98.]

[If a ship insured is taken, retaken, and no person appearing to give security, condemned and sold, the moiety paid the recaptors, and the other moiety remains with the officers of the court, and the insured recovers on the policy. Chancery will not restrain him from proceeding for the whole, if he offers to relinquish the salvage to the insurer. *Pringle v. Hartley*, M. 1744, 3 Atk. 195.]

[If a privateer is insured to cruise for three months, and is taken by the enemy, retaken before she is *infra presidia hostis*, carried into a neutral port, and sentenced to be restored to the owners on paying salvage, yet it is a total loss to the insured. *Pond v. King*, H. 21 G. 2. 1 Wils. 191.]

[If after an illegal sentence of condemnation the owner repurchase his ship at a public auction, he cannot recover the money so paid from the underwriter. *Havelock v. Rockwood*, B. R. T. 39 Geo. 3. 8 T. R. 268.]

[Such

[Such a contract is a ransom, and illegal. *Havelock v. Rockwood*, B. R. T. 39 Geo. 3. 8 T. R. 268.]

[Insurance on a ship (a privateer) at and from *Jamaica* to any ports, &c. at sea or shore, cruising for four months, without further account, &c. and free from average, (before the *stat. 19 Geo. 2. c. 37.*) the insured had interest in the ship to the amount insured. During the four months the crew mutinied, brought the ship by force into *Jamaica*, and having carried away the arms, &c. deserted her, by which the further cruise was prevented. As the ship was in safety in her proper port at the end of the four months, it was holden the assured could not recover, the insurance being on the ship, and not on the voyage. *Pole v. Fitzgerald*, Cam. Scacc. E. 25 Geo. 2. Willes, 641.]

[If the salvage falls short of the freight, it is to be considered as a total loss. *Boyfield v. Brown*, M. 10 G. 2. Str. 1065.]

[The expences of salvage may be given in evidence, tho' the only special damage laid is, that the goods were spoiled by the ship's sinking, for it is within the cause of action. *Cary v. King*, T. 9 G. 2. B. R. H. 304.]

[If a ship is taken, retaken, and arrived in *England* before the insured offers to abandon, and is afterwards brought to the port of delivery, and has sustained no damage from the capture, he cannot recover for a total but only an average loss. *Hamilton v. Mendez*, T. 1 G. 3. 2 B. M. 1198. 1 Bl. 276.]

[In action on the case, on policy of insurance, tho' the declaration is for a total loss, and damages laid for such, and plaintiff only proves an average loss, and does not attempt to prove a total loss, yet he may recover as for a partial loss. *Gardner v. Croasdale*, H. 33 G. 2. 2 B. M. 904. 1 Bl. 198. Doug. 732. n.]

[An average loss, on a valued policy, must be estimated by the real value of the goods on board. 1 Bl. 279.]

[Where there has been only an average loss, but the account is so complicated that it cannot be adjusted in court, the jury, by consent of the parties, may find for a total loss, the plaintiff entering into a rule, to account to the underwriters for what part of the insured property he shall recover. Doug. 294.]

[The owners of goods insured, by the act of shifting the goods from one ship to another, do not preclude themselves from recovering an average loss arising from the capture of that other ship, if they acted for the benefit of all concerned. 1 T. R. 611. n.]

[The duty arises on the ship's arrival and landing her cargo, the insured has then a right to satisfaction, to be paid such proportion of the prime cost, or value in the policy, as corresponds with the proportion of the diminution in value occasioned by the damage; and the adjustment must be according to the value at that time, and not depend on speculations or future events.]

[Thus *A.* insures sugars to *Hamburgh*, at 30*l.* per hogthead, it is damaged, and therefore, and therefore only, must be immediately sold; the value of sugar undamaged is then 23*l.*, of this damaged sugar 20*l.* *A.* shall pay the same proportion of 30*l.*, as 3*l.* (the difference between 23*l.* and 20*l.*) is of 23*l.*; that is, three twenty-thirds of 30*l.* *Lewis v. Rucker*, P. 1 G. 3. 2 B. M. 1167.]



[Average signifies a contribution to a general loss: it also signifies a particular partial loss. *Wilson v. Smith*, T. 4 G. 3. 3 B. M. 1550.]

[If corn is insured *free from average, unless general, or the ship be stranded*, and the ship is obliged in a storm to cut away and leave her cable and anchor, and runs into a port to refit, then proceeds to the port of delivery, and delivers the corn which is damaged by the storm, the insured cannot recover. *Ibid.*]

[If an insurance be effected on fruit, and the policy contain the usual memorandum, "corn, fruit, &c. warranted free from average, "unless general, or the ship be stranded;" and the ship be in fact stranded in the course of the voyage, the underwriters are liable for an average loss arising from the perils of the sea, tho' no part of the loss arise from the act of stranding. *Burnett v. Kensington*, B. R. E. 37 Geo. 3. 7 T. R. 210.]

[Where a ship has been forced by a storm to enter a port, in order to repair, and cannot continue her voyage without apparent risk of being lost, the wages and provisions of the crew are to be brought into an average from the day it was resolved to seek such port to the day of departure from it, with all the charges of loading, and every other expence incurred by that necessity. 2 T. R. 414.]

[So, the charges of loading and unloading the cargo, and taking care of it, and the wages and provisions of the workmen hired for the repairs, become general average. *Id.* 407.]

[Freight must contribute to general average. *Id.* 408.]

But a fraud in him that makes the assurance will excuse the assurer: as, if the owner of a decayed ship after assurance destroy the ship. *Ma.* 107.

Or, if the ship perish by his default. *Ibid.*

Or, the default of the pilot. *Ma.* 109.

Or, the ship be insured as the ship of an ally, when it was the ship of an enemy. *Skin.* 327.

So, if a man knows the ship, &c. to be lost before assurance. *Sho.* 324.

Tho' the assurance was for the ship, *lost or not lost.* *Ibid.*

So, if the words are general, without saying, *lost or not lost*; if the ship was lost before assurance, tho' the assured did not know it. *Sho.* 324.

[But if goods be insured from the lading of them on board the ship "lost or not lost," and warranted well on a particular day; if the ship was lost on that day, before the policy was actually underwritten; the underwriter is liable, for the warranty is complied with, by the ship's being well any time of that day. 3 T. R. 360.]

[An agreement between the insured and the first underwriter, "that he shall not be bound by his signing the policy," renders the policy fraudulent. *Wilson v. Duckett*, M. 3 G. 3. 3 B. M. 1361.]

[A fraudulent policy shall be delivered up, and the premium returned, deducting costs. *Ibid.*]

So, if the voyage be changed, or a deviation made by the default of the assured. *Sho.* 324.

Or, of the master. *Sho.* 325.

[If a ship is insured from one port to another, but takes in goods to be delivered at a third, and is lost before she comes to the dividing point

point of the two voyages, the insurer is liable; for the intention to deviate does not discharge him. *Foster v. Wilmer*, H. 19 G. 2. Str. 1249. *Kewley v. Ryan*, C. P. T. 34 Geo. 3. 2 H. Bl. 343.]

[A ship insured from A. to B., sails with intent to touch at C., an intermediate point; to a certain point the voyage is the same; from that point there are three tracts to B., one by the way of C., the two others by different courses; there are advantages and disadvantages attending each, and the captain must elect according to circumstances; the ship takes the tract by C. with intent to put in there, but is taken before she actually comes to the point where she must have turned out of the tract to B., by the way of C., for the purpose of putting into the harbour of C.; yet the underwriter is discharged, because he was entitled to the advantage of the captain's judgment in electing which of the three tracts it was best to pursue, when he came to the first dividing point. *Middlewood v. Blakes*, B. R. H. 37 Geo. 3. 7 T. R. 162.]

[Insurance on a voyage from C. to D., on a representation that the ship was first to sail from A. to B., and from B. to C.; the voyage from A. to B. was performed, but that from B. to C. being unavoidably prevented, the ship returned to A., and thence immediately proceeded to C.; and in performing the voyage from C. to D., was lost; and this was holden a good commencement of the voyage insured. *Driscoll v. Passmore*, C. P. H. 38 Geo. 3. 1 Bos. & Pull. Rep. 200.]

[Insurance on a voyage from A. to B., from B. to C., and from C. to A. The voyage from A. to B. is performed, but that from B. to C. being unavoidably prevented, the ship returns to A.; from whence the captain writes to his broker in London, requesting him to obtain the opinion of the underwriters as to his proceeding directly to C., if the charterer should insist upon it: and is answered by him that he thinks the policy at an end: At the instance of the charterer the captain does proceed to C., and on his return from thence to A. the ship is captured. It was holden that the voyage insured was never abandoned. *Driscoll v. Bovil*, C. P. M. 39 Geo. 3. 1 Bos. & Pull. Rep. 313.]

Or, the goods are transferred to another ship. *Sho.* 325.

So, the assurer shall not be charged for goods, &c. embezzled, or stolen by any of the mariners. *Ma.* 109.

Or, taken feloniously out of the ship. *Ibid.*

Tho' the assurance be against pirates, thieves, &c. for it shall be intended of public thieves, as enemies, pirates, &c. *Ibid.*

So, by the custom of merchants, if an insurance be upon goods in a ship to such a certain value, every insurer subscribing, after the whole value subscribed, shall return his premium, and shall not be charged for the goods lost. *R. Sho.* 133.

Tho' the first subscribers prove insolvent. *Sho.* 133.

[Double insurance is where the same man is to receive two sums instead of one, or the same sums twice over for the same loss, by reason of his having made two insurances on the same goods or ships; but every case where there are two insurances is not a double insurance. *Godwin v. London Assurance Company*, H. 31 G. 2. 1 B. M. 489. 1 Bl. R. 105.]

[Every re-assurance in this country, either by British subjects or foreigners, whether on British or foreign ships is void by 29 G. 2.



c. 37. f. 4. unless the assurer be insolvent, become a bankrupt, or die. 2 T. R. 161.]

[*A.* at *Saint Petersburg*, is indebted to *B.* in *London*, who sends a ship for goods, makes insurances; *A.* sends goods, but not bill of lading, directs insurances to be made, which are done accordingly; *A.* indorses the bills of lading to *C.* of *Moscow*, who orders insurance for the whole, which is done with *D.*; the whole is lost; *C.* shall recover the whole sum of *D.*, and if *C.* is any ways entitled under the insurances made by *A.* or *B.*, *D.* shall stand in his place. This is still stronger, if *D.* was apprised that there might be another insurance. *Ibid.*]

[The assured cannot recover on the policy, unless the loss be a direct and immediate consequence of the peril insured; so that slaves who die by any other means than by wounds or bruises received in the very act of quelling a mutiny, are not within that provision of an *African* policy, which insures against loss by mutiny. 1 T. R. 130. n.]

So, the assurer shall not be charged, if the assured does not perform the terms on his part: as, if a policy has the words, *warranted to depart with convoy*: for that imports that the assured shall take convoy for his security, and if he does not, the assurer shall not be charged. R. 3 Lev. 320. 4 Mod. 60. Sho. 326.

And it is not sufficient, that he took convoy, for his departure, if he did not take it for the whole voyage. R. 3 Lev. 320. 4 Mod. 60. Sal. 443. [Doug. 72. 735.]

[Sailing orders are necessary to the performance of a warranty to depart with convoy, unless particular circumstances exempt the insured from the general rule. *Webb v. Thomson*, C. P. E. 37 Geo. 3. 1 Bos. & Pull. Rep. 5.]

[But in such a case an unforeseen separation is no breach of the warranty. Doug. 74. 736.]

[In a policy on goods shipped on board a certain ship, to return part of the premium if she sailed with convoy and arrived, the arrival of the ship, tho' not in company with the convoy, is what is meant, and the full return is to be made on the whole sum insured, tho' there should be an average loss on the goods. Doug. 268.]

[The insurer on freight agreed to return part of the premium, "if the ship sailed with convoy and arrived;" it was holden that the assured were entitled to that return, the ship having sailed with convoy and arrived, though she had been captured and recaptured during the course of the voyage, and the assured had been obliged to pay for salvage. *Aguilar v. Rodgers*, B. R. M. 38 Geo. 3. 7 T. R. 421.]

[Coming out of harbour on a signal and orders from a man of war, and sailing in the fleet for some time, and there taken, tho' unable to get sailing orders from the man of war, is sailing with convoy. *Victorin v. Cleeve*, H. 19 G. 2. Str. 1250.]

If the ship make a deviation in her voyage. 4 Mod. 60.

If the assured act contrary to his agreement. R. 4 Mod. 60.

[After an insurance on a ship on a trading voyage, the ship sailed with a general letter of marque, for which the consent of the underwriters had been solicited, but was refused; this vacated the policy, altho' the assured did not in fact make use of the letter of marque for the purpose of cruising, or intend so to do, but took it on board merely for

for the purpose of cruising on the voyage home. *Denison v. Modigliani*, B. R. E. 34 Geo. 3. 5 T. R. 580.]

[The assured upon a trading voyage taking out a letter of marque, (but without a certificate, which is necessary to its validity,) unknown to the underwriters, solely with a view to encourage seamen to enter, and without any intention of using it for the purpose of cruising, tho' the vessel was armed for self-defence, is not such an alteration of circumstances as will avoid the policy. *Moss v. Byrom*, B. R. T. 35 Geo. 3. 6 T. R. 379.]

If there are mutual covenants, and the one is the cause, whereby the other cannot be performed. *Sho.* 324.

But if the convoy be separated by tempest, and the ship in search of the convoy be taken, it is not such a default that the assured shall lose his insurance. R. 3 Lev. 321. 4 Mod. 60. *Sho.* 326.

So, if a convoy be taken at the usual place, viz. at the Downs, tho' he depart without it from London. *Per tres J. Holt cont. Sal.* 443.

[On insurance of ship warranted to depart with convoy, she may go to the place appointed for the general convoy for that trade (as from the Downs to Spithead) at the hazard of the insurers. *Gordon v. Morley*. *Campbell v. Bordieu*, H. 20 G. 2. Str. 1265.]

[A policy is effected on a ship, on a voyage from A. to C., warranted to depart with convoy for the voyage. The convoy appointed is to B., a port in the course, and near to C. This is a compliance with the warranty, and the underwriters are liable, the ship being captured in the passage from B. to C. *D'Eguino v. Bewicke*, C. P. M. 36 Geo. 3. 2 H. Bl. 551.]

[The term *convoy*, in a policy, means such a convoy as shall be appointed by government. *Ibid.*]

[If there be any illegality in the commencement of an integral voyage, and an insurance be effected on the latter part of the voyage, which taken by itself would be legal, still the assured cannot recover on the policy. *Wilson v. Marryat*, B. R. M. 39 Geo. 3. 8 T. R. 31.]

[A deviation intended, if the loss happen before it take effect, does not discharge the policy. *Doug.* 361.]

[But if a ship sail on a voyage different from, although coinciding in part with, that insured, the policy is discharged, tho' the loss happen before the dividing point. *Id.* 16.]

[If goods be insured on board a ship from London to Nantz, with liberty to call at Ostend, and the ship be cleared only for Ostend, but sail directly for Nantz, that being the known course of the trade, in order to save certain duties both here and in France, there is no fraud on the underwriter so as to discharge the policy. *Doug.* 251.]

[If an insured ship quit the course described in the policy, from necessity, she must pursue the new voyage of necessity, in the direct course and in the shortest time, otherwise the policy will be discharged. *Doug.* 284.]

[If a ship insured at and from Jamaica, warranted to have sailed on or before a certain day, (with return of part of the premium in case of convoy,) sail on or before the day from her port of lading, with all her cargo, &c. on board, to the usual place of rendezvous at another part of the island, for the sake of joining convoy there ready, it is a compliance with the warranty, tho' she be afterwards detained there



by an *embargo* beyond the day. And tho' such place of rendezvous be out of the *direct* course of the voyage, it is *no deviation*. *Cowp.* 601. *Doug.* 357. 266.]

[Yet if a ship, warranted to sail on or before a particular day, be prevented from sailing on the day, by an *embargo*, the warranty is not complied with. *Cowp.* 784.]

[But if in such a case the ship had actually got under sail on the day with intent to pursue her voyage, the warranty is complied with, tho' she should be obliged to put back instantly by an *embargo*, before she gets out of the harbour. *Doug.* 369. n.]

[If a ship be driven out of her loading port, and obliged to go into another, and after fruitless attempts to get back again, she do the best she can to get from thence to the place of her destination; that will not be considered as a deviation. 1 *T. R.* 22.]

[Neither will it vacate the policy if she complete her loading at the port into which she is so driven. *Id. ibid.*]

[If the voyage described in a policy be "from *A.* to *B.* and *C.*," and the ship go to *C.* before *B.*, (tho' *C.* be nearer to *A.* than *B.* is,) it is a deviation, and the plaintiff cannot recover for any subsequent loss, if it be not the regular and settled course of the voyage to go first to *C.* *Beatson v. Harworth, B. R. H.* 36 *Geo.* 3. 6 *T. R.* 531.]

[*Qu.* Whether such a regular and settled course of voyage would control such a policy? *Ibid.*]

[If a ship is insured from *London* to *Halifax*, warranted to depart with convoy from *Portsmouth*, and before she arrives at *Portsmouth* the convoy is gone, (so that the insurer runs no risk for the remaining part of the voyage,) he shall return part of the premium. *Stevenson v. Snow, M.* 2 *G.* 3. 3 *B. M.* 1237.]

[In an insurance on a ship at and from *Hull* to *Bilboa*, warranted to depart from *England* with convoy; the voyages from *Hull* to *Portsmouth*, where she meets with convoy, and thence to *Bilboa*, may be considered as distinct; and in case of a loss between the two latter places, an apportionment and return of premium may be demanded. *Rothwell v. Cooke, C. P. M.* 38 *Geo.* 3. 1 *Bos. & Pull.* 172.]

[If goods be insured from *A.* to *B.* in a *neutral* ship, it is sufficient to charge the underwriters that the ship was neutral when she failed. *Doug.* 732. 3 *T. R.* 477. *Cont.* 3 *Bur.* 1419. 1 *Bl.* 427.]

[But if such a warranty be false, tho' the loss should not happen in consequence of the property not being neutral, the policy is void. *Doug.* 733. n.]

[If a ship or cargo insured be taken and condemned as prize, it is not necessary for the insured to make any claim or appeal, before they call on the underwriters. *Ibid.*]

[And a condemnation by a *foreign* court of admiralty is not conclusive evidence that they were not neutral, unless it appear that the condemnation went on that ground. *Doug.* 575.]

[So, if the damage happens before any deviation, tho' afterwards the ship deviates, the insurance shall not be lost. *R. Sal.* 444.]

So, a voyage in the usual course, tho' it be not direct, will not be a deviation. *R. Sal.* 445.

[If a policy of insurance differs from the *label*, i. e. the minute of the agreement entered in a book, and signed by the insurer and the insured, it shall be made agreeable to it. *Motteux v. London Assurance Company, M.* 1739, 1 *Atk.* 545.]

[If a ship at *Bengal* is insured in *London* from her arrival at *Fort Saint George*, it means her first arrival there in her homeward-bound voyage. *Motteux v. London Assurance Company*, *M.* 1739, 1 *At.* 545.]

[If a ship so insured, being arrived at *Fort Saint George* is found leaky, and is directed by the governor to go to *Bengal* to refit, and is lost in returning from *Bengal*, it is a loss during the voyage, and according to the adventure intended to be insured. *Ibid.*]

[It is usual, prudent, and for the benefit of all concerned, to take out the furniture, tackle, &c. of a ship, and put them in a warehouse on land at a certain place, (as on the sand-banks in the river of *Canton*,) while she refits, and if they are there burnt, the insurers are liable. *Pelly v. Royal Exchange Assurance*, *P.* 30 *G.* 2. 1 *B. M.* 341.]

[If a ship insured to the port of *London*, and till there moored twenty-four hours in good safety, arrives the 8th, is that day served with order to return to perform fourteen days quarantine, the crew desert, captain petitions to be excused, petition adjourned to 28th, and then ordered back; she returns, performs the quarantine, applies to air the goods, and before her return is burnt, the insurers are liable. *Waples v. Eames*, *M.* 19 *G.* 2. *Str.* 1243.]

[But the underwriter is in no instance liable for any loss which happens after the vessel has been moored 24 hours in safety; altho' such loss should arise from some previous damage sustained during the voyage; as for barratry committed by the master, by smuggling during the voyage. 1 *T. R.* 252. 261.]

[The insurance of a ship to *Jamaica* determines, by her mooring 24 hours in any port there, and does not continue till she arrive at her last port of delivery. 1 *Bl.* 417.]

[Where a ship is insured for six months, and three days before the expiration of the time she receives her death's wound, but is kept afloat by pumping till three days after the time, the underwriter is discharged. 1 *T. R.* 261.]

[So, in the case of an insurance on a life for a year, if the person die after the expiration of it, tho' in consequence of a mortal wound received before, the insurer is discharged. *Id.* 260.]

So, if the assurance be, till the ship be discharged from the voyage, she is not discharged by arrival at the port, till the goods are unladen. *R. Skin.* 243.

[If goods are lost after the owner has taken them out of the ship into a lighter, and before they reach land, it is no charge on the insurers; otherwise, if they had been sent by the ship's boat. *Sparrow v. Carruthers*, *T.* 18 *G.* 2. *Str.* 1236.]

But the usual perils, expressed in policies of assurance, against which the assurer insures, are

(1) *Perils of the sea.* *Ma.* 108.

And therefore, the assurer undertakes to assure against all damages by tempest or shipwreck. 2 *Rol.* 248. *l.* 35. *D. Sal.* 443. *Sho.* 323.

If he assure against perils by distress of weather, the assurer shall pay, if the ship be lost in the sea, not if it be lost by capture of an enemy. *R. Skin.* 3.

So, against all dangers upon the sea by pirates, or men of war. *R.* 2 *Rol.* 248. *l.* 40. 4 *Mod.* 60. *Sho.* 322.

So, against seizure by the government. *Dub. Sal.* 444.

[If a ship is insured except as to captures and seizures, and four years afterwards has never been heard of, it shall be deemed sufficient



evidence that she foundered, and plaintiff shall recover against insurers. *Green v. Brown*, M. 17 G. 2. Str. 1199.]

(2) The usual hazards expressed in policies are, *men of war, enemies, pirates, rovers, thieves*. Ma. 109.

[As between insured and insurer, a ship is lost by the capture, and the insurer must indemnify the insured as to the loss actually sustained; and he shall stand in the place of the insured, in case of recapture or abandonment. *Goss v. Withers*, M. 32 G. 2. 2 B. M. 683. Doug. 231.]

[Generally, but not universally, on a capture, the insured may demand as for a total loss, and abandon. 2 B. M. 683.]

[So, on an arrest or embargo by a prince not an enemy. *Ibid.*]

[But where the capture is but small hindrance, as sudden escape, or immediate ransom, it is only an average loss. *Ibid.*]

[The insured in no case is obliged to abandon. *Ibid.*]

[He cannot turn what in its nature is an average loss, into total loss, by abandoning. *Ibid.*]

[A ship insured is taken, the hands, except two, taken out and sent to France, she remains eight days in the enemy's hands, is retaken, brought to England; she could not proceed without coming to refit, immediate notice to insurers, with offer to abandon. This is total loss. *Goss v. Withers*, M. 32 G. 2. 2 B. M. 683. 1 Bl. 279.]

[A policy of assurance on a ship and stores "at and from a port," in a foreign country, in the common form against arrest of princes, people, &c. extends to an embargo laid on by the government of that country in the loading port. *Rotch v. Edie*, B. R. M. 36 Geo. 3. 6 T. R. 413.]

[And if the embargo continue, the assured may abandon and recover as for a total loss. *Ibid.*]

So, against *barratry of the master himself*. Per Holt, Sho. 326.

[Barratry can only be committed by the master or mariners against the owners of the ship, and without their consent. The owner cannot commit barratry; he may make himself liable to the owner of the goods by his fraudulent conduct, but not as for barratry. 1 T. R. 323.]

[In an action by the assured of goods against the underwriters for a loss by the barratry of the master, proof that the person who was described in the policy as *master*, and who was treated with and acted as such, carried the ship out of her course for fraudulent purposes of his own, *prima facie* is sufficient to entitle the plaintiff to recover without shewing negatively that he was not the owner, or that any other person was. *Ross v. Hunter*, B. R. M. 31 Geo. 3. 4 T. R. 33.]

[Such proof lies on the defendant, wishing to avail himself of it, to establish. *Ibid.*]

[And where the voyage insured was from *Jamaica* to *New Orleans*, which lies up the river *Mississippi*, and the captain proceeded on his voyage as far as the mouth of that river, and then dropped anchor, and went up the river in his boat for a fraudulent purpose of his own; it was holden that the dropping of the anchor with such fraudulent intent was an act of barratry, and not merely a deviation. *Ibid.*]

And every fraud of the master will be barratry; as, if he run away with the ship or embezzle the goods. R. 2 Mod. Ca. 230.

And therefore, it is sufficient to assign a breach, and find by the verdict,

verdict, *quod per fraudem et negligentiam magistri, &c.* 2 *Mod. Ca.* 231.

But mere negligence does not amount to barratry. *R.* 2 *Mod. Ca.* 231.

[To constitute barratry in the master, there must be something criminal, as well as deviation or breach of contract; therefore if by bill of lading he undertakes to go straight to *Marseilles*, and afterwards giving notice by advertisement, and by his owners' orders, and for their benefit, and without benefit to himself, he passes *Marseilles*, and goes to *Leghorn* first, and returning to *Marseilles* is lost, it is not barratry. *Stamma v. Brown*, *M.* 16 *G.* 2. *Str.* 1173.]

[If a captain, contrary to the instructions of his owner, cruise for and take a prize, and the vessel is afterwards lost in consequence of it, it is an act of barratry, upon which the assured may recover against the underwriters, although the captain libelled the prize for the benefit of his owner as well as of himself. *Moss v. Byrom*, *B. R.* *T.* 35 *Geo.* 3. 6 *T. R.* 379.]

[A deviation of a vessel from the voyage insured through the ignorance of the captain, or from any other motive not fraudulent, tho' it avoids the policy, does not constitute an act of barratry. *Phyn v. Royal Exch. Ass. Company*, *B. R.* *H.* 38 *Geo.* 3. 7 *T. R.* 505.]

[If the crew force the master to go out of the course of the voyage, to carry a prize taken into port, it is not barratry, nor such a deviation as will discharge the insurers. *Elten v. Brogden*, *H.* 20 *G.* 2. *Str.* 1264.]

[An insurance on a voyage expressly prohibited by the laws of this country, is void. *Doug.* 254.]

[Where an embargo had been laid on provisions in *Ireland*, an insurance on such provisions from thence, laden on board a vessel bound to an enemy's port, was held void. 1 *T. R.* 85. *n.*]

[If a ship be insured, in the terms of the policy, in any lawful trade, and the barratry of the master be mentioned as one of the risks to be borne by the underwriters, they are liable for a loss which happens by the barratry of the master in smuggling. 1 *T. R.* 277.]

[The stipulation, respecting the employment of the ship in a lawful trade, must be applied to the trade in which the owners employ her. *Ibid.*]

[Where a policy does not appear, on the face of it, to be illegal, the court will not grant a new trial, in order to let the defendant into proof that it was so; he should have shewn it on the first trial. 1 *T. R.* 84.]

(3) *Restraint of princes, embargo.* *Ma.* 110, 111.

But such a policy does not assure against restraint for non-payment of customs. 2 *Ver.* 176.

Or, if the assured navigates contrary to the laws of the country. 2 *Ver.* 176.

[If the insured conceals from the underwriter any circumstance that increases this risk, the policy is void. *Carter v. Boehm*, *P.* 6 *G.* 3. 3 *B. M.* 1905. 1 *Bl.* 593.]

[If the underwriter insures a ship as on her voyage, which he privately knows is arrived, an action lies to recover the premium from him. *Ibid.*]

[Facts only, not speculations, are to be disclosed. *Ibid.*]



[The insured need not tell the underwriter what he *actually* knows, what he *ought* to know, what he takes upon himself the knowledge of, or what he waives being informed of. *Carter v. Boehm*, P. 6 G. 3. 3 B. M. 1905. *Vide Doug.* 251.]

[Concealment of the true port of loading will vitiate a policy of insurance. 1 Bl. 463.]

[Concealment of circumstances on a life insurance, is not so fatal, if the life be warranted a good one, as if it be a common insurance without warranty. *Ibid.* 312. *Cowp.* 788.]

[If the circumstance, "of advice having been received that the ship was leaky and suddenly disappeared," be concealed from the insurer, the policy is void, tho' the ship be not lost, but taken by the enemy. 2 Str. 1183.]

[In insurances on *East-India* ships, it is not necessary to disclose that there has been a new agreement to detain the ship a year longer in the *Indies* than the enlarged time provided for by the charter-party; for this is the course of that trade, which the underwriters are presumed to know; and this detention, and its consequences, are part of the risk they insure. *Salvador v. Hopkins*, *Heaton v. Rucker*, and seven more causes. T. 5 G. 3. 3 B. M. 1707.]

[There is a difference in the effect of a *warranty* and only a *representation*. The warranty must be strictly complied with; but it is sufficient that a *representation* be fair and substantially true. *Cowp.* 785. *Doug.* 11. n. 260. 1 T. R. 345.]

[A stipulation on the margin of a policy is a warranty. *Doug.* 12. n.]

[But, on a detached piece of paper, tho' inclosed in the policy, or wafered to it; is only a *representation*. *Id.* 12, 13. 1 T. R. 345.]

[On a *representation* that a ship was seen safe on a particular day, at a certain latitude or point in the *voyage*, if it turn out that she got safe to the point represented, but was lost two days before the day mentioned, the difference though by mistake is *material* and discharges the policy; because if the insured *represent material* facts, without knowing them to be true, he takes the risk of their being so on himself. *Doug.* 260.]

[If facts not disclosed by the broker for the insured, in a *representation* of the state of the ship, appear *material* to the jury tho' they did not to the broker, who merely on that account abstained from mentioning them, the insurance is void. *Doug.* 306. n.]

A *representation* that a ship is expected to sail on such a day from the coast of *Africa*, is not *material*, so as to discharge the policy, tho' it turn out that she actually sailed six months before. *Doug.* 305.]

[A representation made to the first underwriter extends to all the others. *Ibid.*]

[Where an insurance was ordered by the principal to be made as soon as a letter should be received from his agent; and that agent, when he wrote the letter, knew nothing of the loss of the vessel, but had an opportunity by the course of the post, of contradicting the contents of it, and transmitting intelligence of the loss before the insurance was effected, and neglected to do so; the policy was held void on the ground of misrepresentation, tho' the assured himself knew nothing of the loss. 1 T. R. 12.]

[By 19 G. 2. c. 37. no assurance may be made on any ship or goods of the king, or his subjects, interest or no interest, or without benefit of salvage.] [Com.]

[Commissioners appointed by the crown under the authority of an act of parliament, which enabled them "to take into their possession" and care all *Dutch* ships and effects detained or brought into the ports of "Great Britain, and to manage, sell, and dispose of the same to the best advantage, according to the instructions they should receive" from his Majesty and his Privy Council," may insure in their own names such ships and effects after seizure abroad, and while they are *in transitu* to this country. *Crauford v. Hunter*, B. R. M. 39 G. 3. 8 T. R. 13.]

[A count stating the nature of their trust, and averring the interest to be in themselves as commissioners, and another count to the like effect, but without any averment of interest at all, were both holden good upon demurrer. *Ibid.*]

[A. being indebted to B., without any order from him consigns goods to C. to be held for B., and indorses the bill of lading to C., and it was resolved that B. had an insurable interest in the goods so consigned. *Hill v. Secretan*, C. P. M. 39 Geo. 3. 1 Bos. & Pull. Rep. 315.]

[Captors of ships seized as prize may insure their interest therein, and are not entitled to a return of premium, altho' it be afterwards adjudged to be no prize and restitution be awarded to the owners by the court of Admiralty. *Boehm v. Bell*, B. R. H. 39 Geo. 3. 8 T. R. 154.]

[But privateers, and goods from the dominions of *Spain* and *Portugal*, may be so assured.]

[No re-assurance may be made unless the assurer becomes insolvent, or bankrupt, or dies.]

[Money lent on bottomree or respondentia, shall be lent only on the ship, or on the goods, and shall be so expressed in the bond; benefit of salvage to the lender, who alone may make assurance on the money lent, and no borrower shall recover more than his interest, exclusive of the money borrowed; and if his share amounts not to the money borrowed, he shall be responsible to the lender for the difference with interest, tho' the ship is lost.]

[In all actions plaintiff is, on fifteen days request, to declare how much he has insured, and how much he has borrowed at bottomree, or respondentia.]

[Defendant may pay money into court. 19 Geo. 2. c. 37.]

[Policies on foreign ships and property are not within this statute. *Doug.* 316. *Vide* 1 T. R. 84.]

[Where there is a stipulation on a policy on a foreign ship that the policy shall be sufficient proof of interest, and there is judgment by default, the plaintiff, on the writ of inquiry, has only to prove the defendant's subscription without giving any evidence of interest. *Doug.* 315.]

[In case of total loss, and adjustment, with a clause that in case of salvage hereafter, the insured shall return the insurer whatever he recovers in such proportion as the sum insured bears to the whole interest or salvage. The neat proportion after deducting salvage is to be returned and no more. *Da Costa v. Firth*, M. 7 G. 3. 4 B. M. 1966.]

[In a declaration on a policy signed by an agent, plaintiff need not lay different counts, one as signed by the principal, and another as signed by the agent, duly authorized; either is sufficient. *Nicklefon v. Croft*, T. 1 G. 3. 2 B. M. 1188.]

[If



[If there are articles of agreement, that when any ship wherein any member has property is lost, the rest shall contribute to such loss; and if any would cease to be a member, he must give six months notice. *A.* has property, but parts with it before the loss, but agrees with the purchaser to pay 500*l.* if loss happens, and has not given notice of ceasing to be member, he shall recover on the articles against the other members. *Reed v. Cole*, T. 4 G. 3. 3 B. M. 1512.]

[If an insurance be made on two distinct risks, and one of them be not run, the insurer shall refund a rateable part of the premium. 1 Bl. 318.]

[And it is a general rule, that wherever the risk has *not begun*, to whatever cause it may be owing, the *premium* shall be returned. *Cowp.* 668. *Doug.* 588. 789.]

[But wherever the risk *has once begun*, tho' it cease immediately after, there shall be no apportionment or return of premium. *Ibid.*]

[On a policy at and from *London* to *Halifax*, warranted to depart with *convoy* from *Portsmouth*, the contract and risk are divisible; from *London* to *Portsmouth* is one contingency, from *Portsmouth* to *Halifax* with *convoy*, is another; therefore where the ship departed from *Portsmouth* without *convoy*, by which means the second risk did *not begin*, it was held there should be a return of premium. *Ibid.*]

When a ship is insured against captures for twelve months at the rate of so much *per month*, making a specified gross sum, tho' the risk cease before the end of two months by the loss of the ship in a storm, there shall be no *apportionment* nor *return* of premium, the contract being entire. *Ibid.*]

[So, if a ship be insured for twelve months at a *gross* sum, warranted free from captures, there shall be no apportionment, tho' the risk cease, by the capture of the ship, before the expiration of the twelve months. *Ibid.*]

So, if there be an insurance on a life for a year, with an exception as to suicide, and the hands of justice, and the party die in either of these ways within the year, there shall be no apportionment. *Ibid.*

[By the *st.* 25 Geo. 3. c. 44. the name of the *party interested* must be inserted in a policy of insurance, otherwise he cannot recover on it.]

[And if an agent effect a policy without inserting his name as agent, such a policy is void by the same statute. *Pray v. Edie*, B. R. T. 26 Geo. 3. 1 T. R. 313. *Cox v. Parry*, B. R. M. 27 Geo. 3. 1 T. R. 464.]

[By the *stat.* 28 Geo. 3. c. 56. which repeals the former act, it is enacted, that in every policy of insurance shall be inserted, the name or names, or the usual style and firm of dealing of one or more of the persons interested, or, instead thereof, the name or names, or the usual style and firm of dealing of the consignor or consignors, consignee or consignees, or the name or names or the usual style and firm of dealing of the person residing in *Great Britain*, who shall receive the order for and effect such policy, or of the person who shall give the order or direction to the agent immediately employed to negotiate and effect such policy; *A.* having consigned a cargo to *B.*, and drawn bills on him to the amount of it, in favour of *C.*, his general agent, sends these bills together with the bills of lading to *C.*, desiring him to transmit them to *B.*, "that *B.* may have an opportunity of insuring:"

he

he also draws a bill for 300 *l.* on *C.*, which is accepted; *B.* refuses to take to the cargo or accept the bills drawn on him; *C.* then effects a policy in his own name, and informs *A.* thereof, who approves of his conduct. In an action by *C.*, stating himself in the first count to be the agent of *A.*, and averring interest in him; in the second averring interest in himself; it was holden that the policy was good within this statute, and that *C.* had an insurable interest to the amount of the 300 *l.* he had paid. *Wolff v. Horncastle*, *C. P. M.* 39 *Geo.* 3. 1 *Bos. & Pull. Rep.* 316.]

[If the name of the broker effecting the policy be inserted as "agent," it is a sufficient compliance with this statute. *Bell v. Gilson*, *C. P. M.* 39 *Geo.* 3. 1 *Bos. & Pull. Rep.* 345.]

[Where the policy is effected in the name of the agent, without stating him to be such, it is good. *De Vignier v. Swanson*, *B. R. M.* 39 *Geo.* 3. 1 *Bos. & Pull. Rep.* 346. *n. b.*]

[It is required by the *stat.* 26 *Geo.* 3. *c.* 60. *f.* 17. that as often as the property in any ship or vessel shall be transferred in whole or in part, the certificate of the registry of such ship shall be truly recited in the bill or other instrument of sale, otherwise such bill of sale shall be utterly void to all intents and purposes. Two partners purchased a ship under a bill of sale conformable to this statute; afterwards they took in two other partners, but there was no transfer of the ship to them jointly with the others; and it was holden, that the four partners had no insurable interest in the freight of the ship. The right of freight results from the right of ownership, and these four partners had neither a legal, nor an equitable title to the ship. *Camden v. Anderson*, *B. R. T.* 34 *Geo.* 3. 5 *T. R.* 709. *Rolleston v. Hibbert*, *B. R. M.* 39 *Geo.* 3. 3 *T. R.* 406. *S. P.* *Vide Navigation*, (12.)

[The *stat.* 30 *Geo.* 3. *c.* 33. *f.* 8. enacts, that it shall not be lawful for any owner of a vessel to insure any cargo of slaves against any loss or damage, except the perils of the sea, piracy, insurrection, or captures by the king's enemies, barratry by the master or crew, or destruction by fire. And the *stat.* 34 *Geo.* 3. *c.* 80. *f.* 10. reciting the former act, provides, that no loss or damage shall be recoverable on account of the mortality of slaves by natural death or ill-treatment, or against loss by throwing overboard of slaves on any account whatsoever. Upon an insurance of slaves against perils of the sea, their death by failure of sufficient and suitable provision occasioned by extraordinary delay in the voyage by bad weather, is not a loss within the policy, but a loss by natural death within these statutes. *Tatham v. Hodgson*, *B. R. E.* 36 *Geo.* 3. 6 *T. R.* 656.]

[Where a mate of a ship or a sailor is to receive something at the end of the voyage in lieu of wages, *e. g.* slaves, he cannot insure it, nor can he recover the value of such thing in an action against his agent for negligence in not procuring such an insurance. *Webster v. de Tafel*, *B. R. H.* 37 *Geo.* 3. 7 *T. R.* 157.]

[A ship homeward-bound to the port of *London*, received a pilot at *Orfordness*, as directed by 5 *Geo.* 2. *c.* 20. and dropped him before she reached her moorings in the river *Thames*; after which, before she was safely moored, an accident happened and the vessel was sunk; the underwriter was discharged from his liability on account of there

not



not being any pilot on board at that time, tho' it did not appear that the loss was directly imputable to want of skill in those who navigated the vessel. *Law v. Hollingsworth*, B. R. H. 37 Geo. 3. 7 T. R. 160.]

*Qu.* Whether it is necessary to the assured's right of action that the pilot taken in to navigate up the *Thames* should be duly qualified according to the directions of the *stat.* 5 Geo. 2. c. 20.? *Ibid.*]

[A warranty in a policy of insurance that the ship is *American* property, means that the ship is entitled to all the privileges of an *American* flag; and if she has no passport on board, (which is required by the treaty between *France* and *America*.) the warranty is not complied with, and the assured cannot recover against the underwriters, tho' in fact the ship suffered no inconvenience in the voyage from the want of the passport. *Rich v. Parker*, B. R. T. 38 Geo. 3. 7 T. R. 705. *Vide Farmer v. Legg*, B. R. E. 37 G. 3. 7 T. R. 186.]

[Any forfeiture of neutrality by the wilful act of the assured, or of the master, &c. after the commencement of the voyage insured, is a breach of such a warranty. *Garrels v. Kensington*, B. R. E. 39 Geo. 3. 8 T. R. 230.]

(E. 10.) *What remedy upon a policy of assurance.*] By the *st.* 43 *El.* 12. the chancellor annually, or oftner, may grant a standing commission to the judge of the Admiralty, recorder of *London*, two doctors of the civil law, two common lawyers, and eight merchants, who may examine, and decree all causes concerning policies of assurance, which shall be entred within the office of assurance, within the city of *London*, in a summary course, without formality of pleadings.

And the commissioners shall meet weekly, and take no fee for execution of the commission.

And may summon the parties, examine witnesses on oath, and commit any who disobey their final decree.

By the *st.* 13 & 14 *Car.* 2. 23. the commission may authorise them, or any three of them, *quorum* a doctor of law, or barrister of five years standing to be one, to meet and make a court: and they may punish contempt of witnesses on first summons, and parties on second summons, by imprisonment and costs: and any commissioner may examine a witness going to sea, giving notice, &c.

And commissioners may pass a final decree and execution against body or goods, against executor or administrator, and give costs.

But by the *st.* 43 *El.* 12. and 13 & 14 *Car.* 2. 23. a party aggrieved, satisfying the decree, or depositing the money awarded, may in two months exhibit a bill in *Chancery* for re-examination of the decree, and the chancellor, if he affirm it, shall give double costs.

And if the commissioners decree the bill *pro confesso* upon the first summons without proof of the bill, *Chancery* upon appeal will reverse it. 1 *Ver.* 223.

*Vide Action upon the Case upon Assumpsit.*

## (F) Payment.

(F 1.) *In Pecuniâ numeratâ.*

**P**ayment by a merchant shall be made in money, or by bill.  
*Ma. 70.*

(F 2.) By Bill obligatory.

Payment by bill is by bill of debt, bill of credit, or bill of exchange.  
*Ma. 70, 71.*

A bill of debt, or bill obligatory, is, when a merchant by his writing acknowledges himself in debt to another, in such a sum to be paid at such a day, and subscribes it at a day and place certain. *Ma. 74.*

Sometimes a seal is put to it. *Ibid.*

But such bill binds by the custom of merchants without seal, witness, or delivery. *Ma. 72. 74.*

So, it may be made payable to bearer. *Ma. 71, 72. 74.*

And, upon demand. *Ma. 72. 74.*

So, it is sufficient, if it be made and subscribed by the merchant's servant. *Ma. 72.*

So, a bill of debt to a person certain may be assigned to another *toties quoties.* *Ma. 71.*

If a bill be signed by two or more as principals, each is bound by the custom of merchants only for his part. *Ma. 75.*

So, tho' one or more subscribe the bill of another as principals. *Ibid.*

But, if the words are, *nos et quilibet nostrum in solidum*, each is bound for the whole. *Ibid.*

Or, if they subscribe as sureties. *Ibid.*

Or, with a renunciation of privilege, &c. *Ibid.*

And now, by the *st. 3 & 4 Ann. 9.* all notes in writing made and signed by any person, or the servant or agent of any corporation, banker, merchant, or trader usually intrusted to sign such notes, whereby he promises to pay to any or order, or to bearer, any sum of money, the same shall be construed to be due to him to whom made payable.

And such note payable to any or order, shall be assignable or indorsible over as an inland bill of exchange.

And the party to whom the note is payable may maintain an action, as on an inland bill of exchange, against him, who or whose servant, or agent signed the same.

And he, to whom a note, payable to any or order, is indorsed, may maintain an action against him, who or whose servant, or agent signed the same, or against any who indorsed the same, as in case of inland bills of exchange.

(F 3.) Bill of Credit.

A bill of credit is, when a merchant sends a letter by a servant or agent to another merchant, within the realm, or in foreign parts, whereby he desires him to give credit to the bearer for goods or money, to such a value. *Mar. 36. Ma. 71. 76.*

So, he may give a general letter of credit to all merchants or others,  
 for



for all monies delivered to such a one, within such a time: and thereupon shall be liable for all monies advanced to such agent. *Mar. 36. Ma. 71.*

And if his agent draw a bill of exchange upon his master for monies advanced upon such letter of credit, the master shall be liable without his acceptance, or tho' he refuses to accept. *Mar. 36. Ma. 272.*

(F 4.) Bill of Exchange.

(F 4.) *By whom it may be made.*] So, payment may be made by a bill of exchange.

A bill of exchange is, when a man takes money in one country or city upon exchange, and draws a bill, whereby he directs a person in another country or city to pay so much to A. or order for value received of B., and subscribes it. *Ma. 270. Mar. 1, 2.*

And therefore, generally, there are four parties to a bill of exchange: 1. *the deliverer*, who gives the money upon exchange: 2. *the drawer* who makes and subscribes the bill: 3. *the acceptor*, to whom the bill is directed, and who is to accept and pay it: 4. *the person to whom the bill is payable.* *Mar. 2.*

Or, three parties are sufficient: as, if the drawer directs the bill to the acceptor to be paid to B., for value received of himself. *Mar. 3.*

Or, two parties: as, if the drawer makes a bill to A., to be paid to himself or order, for value of himself. *Mar. 3. 1 Sal. 130.*

And a bill of exchange may be by one merchant upon another, in a foreign kingdom. *Mar. 2.*

Or, upon another, in the same kingdom; and such inland bill is of the same effect as an outland. *Mar. 2.*

So, if any, not a merchant, make a bill of exchange, he shall be bound by it, according to the usage among merchants. *R. 2 Vent. 295. 310. Sho. 125.*

So, if one, two, or three bills of the same tenor are made, a stranger may sign the third bill with the drawer, and shall be bound thereby as surety for the drawer. *Ma. 271.*

(F 5.) *In what manner.*] The usual form of a bill of exchange is, at six days sight pay to A. or assigns 100 l. for value received of A., and put it to account, as per advice.

Your Friend, C. D.

To E. F., Merchant, *Mar. 7.*

[A bill of exchange is not good, if not paid for value received. *Banbury v. Leffet, T. 17 G. 2. Str. 1212.*]

[A bill of exchange is good, tho' it do not import to be for value received. *White v. Ledwick, B. R. H. 25 Geo. 3. Bayley on Bills, 72.*]

The time of payment is mentioned so many days after delivery, or at *usance*, double or treble *usance*, which imports, one, two, or three calendar months after the date, according to the usage of the place where the bill is made. *Mar. 13. Ma. 268. 270.*

Inland bills are usually directed to be paid so many days after sight or delivery to the acceptor. *Mar. 13. 19. Ma. 268.*

Bills of London to the Netherlands, Paris, &c. at *usance*, or one month after date. *Mar. 13. 15. 18. Ma. 269.*

Of

Of London to *Hamburgh*, at double *ufance*; or two months. *Ibid.*

Of London to *Venice*, &c. or *à contra*, at treble *ufance*, or three months. *Mar.* 13. 15. 19. *Ma.* 269.

[A bill of exchange, payable 60 days *after sight*, becomes due 60 days after acceptance, or after protest for non-acceptance. *Campbell v. French*, B. R. H. 35 Geo. 3. 6 T. R. 200.]

The most safe direction of payment is, to such an one, by name, or order. *Ma.* 13, 14.

To such an one, or his assigns. *Ibid.*

So, it may be, to A. or bearer, tho' it be more perilous. *Ma.* 13.

To A. without more. *Ma.* 270.

So, one may direct a special manner of payment. *Mar.* 13.

May make two or three bills, and then shall say, *pay this my first bill: this my second bill, the first not paid*, &c. *Mar.* 7.

If the drawer makes himself debtor to him to whom it is directed, he says, *put to my account*. *Mar.* 7.

If he to whom directed be indebted to him, he says, *and put it to your account*. *Ibid.*

Or, he may say, *place to account of A.*, &c. *Ibid.*

So, a bill may be directed within the same paper, or upon the back of it. *Mar.* 11.

But, a witness is not necessary to a bill of exchange. *Mar.* 14.

So, a bill to pay 300*l.* or surrender a person to prison, is not a bill of exchange; for the defendant has election to do the one or the other. *R. in C. B. P. 12 Ann. inter Smith and Bobeme.* (*Vide this case cited in 2 Ld. Ray. 1362. 1396.—Vide 2 Mod. Ca. 362.*)

Or, to pay in three *East India* bonds. *R. in C. B.* (*Vide 2 Ld. Ray. 1361.*)

Or, to pay so much per *ensem* out of his growing subsistence. *R. cont. in C. B. Tr. 12 Ann. inter Foscelin and Losier.* But the judgment was afterwards reversed in *B. R. per Parker, Powis, and Eyre*, P. 1 Geo. (*Vide this case cited in 2 Ld. Ray. 1362. and 1 Str. 591.*)

[A bill to pay 9*l.* 10*s.* "as my quarterly half-pay, to be due from June to September next, by advance," is a good bill of exchange. *Macleod v. Snee*, P. 13 G. Str. 762. *Ld. Raym.* 1481.]

[But a bill to pay money to A., out of a particular fund, is not a bill of exchange. *Jenny v. Herle*, P. 10 G. 2 *Ld. Raym.* 1361. *Str.* 591. *Haydock v. Lynch*, M. 3 G. 2. 2 *Ld. Raym.* 1563. *Dawkes v. E. Delorane*, T. 11 G. 3. 3 *Wils.* 207.]

(F 6.) *How it shall be accepted.* By the custom of merchants, he to whom a bill is payable, ought immediately after his receipt to present the bill to him, to whom it is directed, for his acceptance. *Mar.* 15.

Tho' a bill payable to himself for his own money. *Mar.* 16.

And it is safe to take a copy of a bill sent for acceptance. *Mar.* 10, 11.

When a bill is presented for acceptance, *ex rigore* he ought immediately to accept, or refuse; for he is not allowed three days for deliberation by the custom of merchants. *Mar.* 15.

Yet, twenty-four hours upon demand shall be allowed for consideration, if the post does not depart in the interim. *Mar.* 15, 16.

And a longer time is usually allowed where necessity does not prevent. *Mar.* 15, 16. [An



[An indorsement written on a blank note or check, will afterwards bind the indorser for any sum or time of payment which the person to whom he entrusts the note chooses to insert in it. *Russel v. Langstaffe*, B. R. M. 21 Geo. 3. Dougl. 514.]

[An agreement to accept a bill on certain conditions is discharged if the conditions are not complied with. *Mason v. Hunt*, B. R. M. 20 Geo. 3. Dougl. 297.]

[If there is a *virtual* acceptance, on consideration that goods shall be consigned to the acceptor to answer the bill, together with a policy of insurance upon them, the holder of the bill by taking to the goods and selling them, discharges the acceptance. *Ibid.*

[Upon a request to *A.*, to accept a bill, and draw upon *B.* for the like sum, the mere act of drawing upon *B.* does not amount to an acceptance. *Smith v. Nissen*, B. R. T. 26 Geo. 3. 1 T. R. 269.]

[Where a bill of exchange was drawn upon *A.* residing in *London*, by a consignor of goods living abroad; and, on its being presented for acceptance, *A.* said he could not then accept, because he did not know whether the ship would arrive at *London* or *Bristol*. *B.*, the holder of the bill, agreed to leave it for some time, reserving the liberty of protesting it for non-acceptance from that day, in case *A.* did not accept; on a second application *A.* said, the bill would be paid *even if the ship were lost*. This is only a conditional acceptance, depending on two events, of the ship's arriving at *London*, or of its being lost, and *B.* having the liberty of refusing such conditional acceptance precludes himself from recovering against *A.*, by afterwards noting the bill for non-acceptance. *Sproat v. Matthews*, B. R. E. 26 Geo. 3. 1 T. R. 182.]

[Whether a conditional or an absolute acceptance is a question of law. *Ibid.*]

The usual acceptance is, by subscribing his name. *Mar. 16.*

Or, a verbal acceptance, that it shall be accepted *crassino die*, &c. is sufficient. *Mar. 16.*

Tho' he afterwards refuse to accept at the day promised. *Mar. 16.*

But by the *stat. 9 & 10 W. 3. 17.* and the *stat. 3 & 4 Ann. 9.* every acceptance shall be by subscription, or indorsement of an inland bill.

[A parol acceptance is good against the drawer; for the *stat. 3 & 4 Ann. c. 9.* relates only to charging the drawer with damages and costs. *R.* upon debate, *per B. R.*; and *C. J.* of *C. B.*, who had ruled it *contra* in *Rea v. Meggot*, came over to their opinion. *Lumley v. Palmer*, M. 8. G. 2. Str. 1000. B. R. H. 74.]

[There may be a partial acceptance, by the custom of merchants. *Wegersloff v. Keene*, M. 6 G. Str. 214.]

So, he may accept the bill for part. *Mar. 17.*

Or, at a day, subsequent to the time limited for payment. *Mar. 21.*

[If *A.* writes a letter, "I will pay the bill, if *B.* do not: I do not expect they will pay it, but judge proper to take their answer before I do;" you may "rest satisfied of the payment," is an acceptance, and interest shall be allowed from that time. *Wilkinson v. Lutwidge*, M. 11 G. Str. 648.]

[Acceptance on account of ship *A.*, when in cash for her cargo, good. *Julian v. Shobrooke*, M. 27 G. 2. 2 Wils. 9.]

[If *A.* desires leave to draw on *B.*, and he will reimburse him by drafts

drafts on C. B. consents, A. draws, B. accepts, and then writes to C. to know if he will accept their bills on the credit of A., and C. answers that he will honour their bill; this is in effect an acceptance, and C. shall pay a bill drawn on him by B., after notice from him that A. has failed. *Pellans v. Van Mierop*, P. 5 G. 3. 3 B. M. 1663.]

So, if a bill be directed to A. and B., or either of them, an acceptance by either is sufficient. *Mar.* 16.

If he who ought to accept, loses the bill before acceptance, he must give security for payment, otherwise it shall be protested for non-acceptance, and also afterwards for non-payment. *Mar.* 29, 30.

So, a stranger may accept for the credit of the drawer. *Mar.* 21. 30.

And the acceptor cannot afterwards recall his acceptance. *Mar.* 20.

But an acceptance by a wife, or servant, does not bind the husband, or master, without authority by letter of attorney. *Mar.* 25.

Tho' they have authority by *parol*, or letter under his hand. *Mar.* 25.

Yet, usage of payment upon an acceptance by a wife or servant, will be evidence of a good authority to them. *Mar.* 25, 26.

[If drawee refuses acceptance, not having effects of drawer, and some time after he has effects, and will do what he can; and the bill is again presented, and left with him for ten days, and drawee then offers to let the holder of the bill have some effects to sell and pay himself, this is not acceptance: *Clavey v Dolbin*, T. 9 G. 2. B. R. H. 278.]

[If a man accepts bill of exchange, to pay it when goods consigned to him are sold, it is good against acceptor; tho' the holder of the bill might have refused such acceptance, and protested the bill, yet he might submit to it. *Smith v. Abbot*, P. 14 G. 2. Str. 1152.]

(F 7.) *How paid.*] The acceptor ought to pay the bill, by him accepted within three days after the time limited for payment. *Mar.* 23, 24. i *Sal.* 128.

And the three days shall be computed, exclusive of the day upon which it became payable. *Mar.* 23, 24.

Except where prejudice may happen by the delay: as, where the post will depart in the *interim*, or the third day is a *Saturday*, &c. *Ibid.*

So, if a bill be dated 1st *May* payable at *usance*, it shall be paid three days after the 1st *June*. *Mar.* 18.

If payable at double, or treble *usance*, three days after the 1st *July*, or *August*. *Ibid.*

If dated *ult. February*, three days after *ult. April*, or *May*, and not after the 28th of *April*, or *May*, tho' *February* has but twenty-eight days. *Ibid.*

If payable at a day certain, *viz.* 9th *March*, &c. it ought to be paid, according to the style where payable. *Mar.* 22. 25.

If payable at six days' sight, it ought to be paid so many days after actual acceptance, or in three days after. *Mar.* 19.

[By the custom of merchants in *London*, the payer of a bill has the whole day, on which it becomes due, till five o'clock, to discharge it in. *Colkett v. Freeman*, B. R. M. 28 Geo. 3. 2 T. R. 59.]



[*Quare*. Whether the acceptor of an inland bill is bound to pay it on demand at any reasonable time of the third day of grace, or whether he is allowed the whole of that day to pay it in? *Leffley v. Mills*, B. R. H. 31 Geo. 3. 4 T. R. 170.]

If a bill directs the payment at a certain place, it ought to be paid there, without other demand than at the place, tho' the acceptor lives at a place remote. *Mar. 26.*

If it directs the payment to A. or order to the use of B., it shall be paid to A. or order, who is a trustee for B. *R. 2 Vent. 310.*

If a bill after acceptance be lost, upon notice of the loss by a notary, the acceptor ought to pay it, if a bond or sufficient security be given to him for his indemnity. *Mar. 19, 20.*

But if the deliverer after acceptance countermand his bill, and this be duly notified by a notary to the acceptor before the time of payment, it ought not to be paid: for the deliverer of the money is master of the bill till payment. *Mar. 17, 18.*

And therefore, it ought not to be paid before it is due, and if it be, it will be at his own peril, if it be afterwards countermanded. *Mar. 31, 32.*

(E. 8.) *How protested. For non-acceptance.*] If the person, to whom a bill of exchange is directed, refuses acceptance, a protest of non-acceptance shall be made by a public notary, and thereupon the drawer, or indorser must give security for payment with damages and costs, if it be not paid by him, to whom directed, at the time limited in the bill. *Mar. 24. 27, 28.*

[In an action against the drawer of a foreign bill a protest for non-acceptance must be proved. *Gale v. Walsh*, B. R. E. 33 Geo. 3. 5 T. R. 239. *Rogers v. Stevens*, B. R. M. 29 Geo. 3. 2 T. R. 713.]

So, it shall be protested, if it be accepted only for part. *Mar. 17. 21.*

If it be accepted at a day after the time of payment limited by the bill. *Mar. 21.*

If a bill, directed to two jointly, be accepted only by one. *Mar. 16.*

If it be accepted by a stranger, for the credit of the drawer. *Mar. 21.*

Or, by him to whom directed, for the credit of the drawer, but not for the intent mentioned in the bill. *Mar. 30.*

So, there shall be a protest, if he, to whom it is directed, cannot be found, or is not found at his house. *Mar. 33.*

So, if a bill be accepted, and afterwards the acceptor fails in his credit, other security may be demanded from the acceptor by a notary, and if it be refused, the bill shall be protested for want of better security. *Mar. 27.*

Security, upon a protest for non-acceptance, is usually given by another subscription under the protest, that he will be bound as principal for the sum mentioned in the bill, upon which the protest is made. *Mar. 28.*

But by the *st. 3 & 4 Ann. 9.* a protest need not be on an inland bill, unless it be for value received, and for 20 *l.* or more.

And the drawer is not liable for costs, &c. on non-acceptance, unless protest be made for that cause, and notice given of it in fourteen days after, to him from whom the bill was received. *So,*

So, if he, to whom payable, does not protest the bill for several years after it is due, the drawer shall not be charged. *Per Treby, 1 Sal. 127.*

But an action lies upon an inland bill, since the 3 & 4 Ann. 9. for the original debt upon a bill, without a protest; for that is not requisite, except for extraordinary damages for delay of payment. *R. Mod. Ca. 81.*

(F 9.) *For non-payment.*] So, if a bill be accepted, and not paid in three days after the time limited for payment, a protest shall be made by a notary for non-payment, and thereupon the drawer shall be bound to all damages and costs. *Skin. 410.*

[So, where a bill indorsed over is not duly paid, the indorsee may charge the indorser with interest, exchange, and other incidental expences, beyond the amount of 5 l. per cent. if such charges are reasonable, warranted by usage, and not made a colour for usury. *Auriol v. Thomas, B. R. T. 27 Geo. 3. 2 T. R. 52.*]

[The charge of 10s. per pagoda, on a bill returned protested from India, is not excessive, tho' it was taken in payment here at 6s. 6d. per pagoda. *Ibid.*]

And the drawer shall pay presently, or shall take the same time for it, as was allowed for payment upon the bill of exchange. *Mar. 28.*

And tho' the bill be protested for non-payment, or for want of other security, the acceptor shall not be excused. *Mar. 13.*

If a bill be protested for non-payment, security may be required of the drawer, as well as upon a protest for non-acceptance. *Mar. 28.*

Or, if the bill was before protested for non-acceptance and security then given, it is sufficient that notice be given to the drawer. *Ibid.*

So, if a bill be paid only in part, he may receive so much, and make a protest for non-payment of the residue. *Mar. 17.*

Tho' it was accepted only for part, and protested for non-acceptance. *Mar. 16, 17.*

Or, if a bill be accepted at a subsequent day, and a protest for non-acceptance, according to the tenor of the bill, if the acceptor afterwards refuse payment at the day by him accepted, it shall be protested again for non-payment. *Mar. 21. [2 T. R. 713.]*

If the acceptor dies, the bill shall be demanded at the time it is due, of his executor or administrator, and if it is not paid, there shall be a protest. *Mar. 32.*

So, if he, to whom payable, die, and security be offered for the indemnity of the acceptor, there shall be a protest, if it be not paid, tho' no will be proved, or administration taken. *Ibid.*

(F 10.) *How the protest shall be made.*] The protest must be made by a public notary upon all foreign bills of exchange. *1 Sal. 131.*

[Because he is a public officer to whom credit is given. *4 T. R. 175.*]

And upon the bill itself, not upon a copy, except for special cause. *Sho. 164.*

But where the first bill is lost, and a copy is sent; by reason a third cannot be had, and the second was not sent, the protest may be upon the copy. *R. Sho. 164.*



By the *ft. 9 & 10 W. 3. 17.* the protest on an inland bill shall be by a public notary, or in default by other substantial person of the city, or place, before two witnesses, by writing under a copy of the bill: *Know, &c. I A. on — day of — at the usual abode of — demanded payment of the above bill, which he did not pay, wherefore, I A. protest the said bill. Dated — day of —.*

The protest must be made during the usual time of commerce, *viz.* before sun-set. *Mar. 27.*

It ought to be made, regularly, at some time, upon the third day after the day of payment. *Mar. 24.*

Or, it may be at any day afterwards. *Ibid.*

By the *ft. 9 & 10 W. 3. 17.* it shall be after the expiration of the three days after an inland bill becomes due.

And the protest shall be sent, or notice of it given, in fourteen days to the party from whom the bill was received, who shall pay, on producing it, the principal, interest, and charges, otherwise he that neglects to make and send such protest, or give notice, shall be liable to all costs, damages and interest.

And therefore, for default of a protest of an inland bill proved at the trial, the drawer shall discount the damages, which he sustained by such default. *1 Sal. 131.*

Or, he may have an action for such damages. *1 Sal. 131.*

And the plaintiff shall lose his interest and costs for want of a protest in due time. *Ibid.*

[If the bill is not protested according to the *9 & 10 W. 3.* the drawer cannot be charged for interest, nor can interest be allowed for money lent without a note. *Harris v. Benson, T. 5 G. 2. Str. 910.*]

[The provisions of this act do not apply to such bills as are made payable *after sight*. *Lestley v. Mills, B. R. H. 31 Geo. 3. 4 T. R. 170.*]

[Therefore, an acceptor of such a bill, who refuses payment on the third day of grace, is not liable to any charge for the noting of the bill. *Ibid.*]

[The omitting to allege in the declaration a protest of the bill is only a matter of form, and cannot be taken advantage of on a general demurrer. *Salomons v. Stavely, B. R. M. 24 Geo. 3. Dougl. 684. n. Vide Gale v. Walsb, B. R. E. 33 Geo. 3. 5 T. R. 239.*]

(F 11.) *How a bill of exchange may be assigned.* If a bill of exchange be made payable to B. or order, B. by indorsement may assign it to another. *1 Sal. 125.*

So, the assignee, or indorsee, may assign to another *toties quoties*. *1 Sal. 125.*

So, an inland bill, payable to B. or bearer, may be assigned by B., and he will be liable to his indorsee. *R. 1 Sal. 125.*

[Where a promissory note (or bill of exchange) has been indorsed to the plaintiff after it became due, who sues the maker upon it, the latter is entitled to go into evidence to shew that the note was paid as between him and the original payee, from whom the plaintiff received it. *Brown v. Davies, B. R. H. 29 Geo. 3. 3 T. R. 80.*]

[Where the drawers of a banker's check issued it nine months after it bore date, upon a consideration which afterwards failed, as between them and the persons to whom they delivered it, they cannot be permitted

mitted to object this circumstance in an action brought by a subsequent holder for a valuable consideration, and without notice; tho' by the general rule any person receiving a negotiable instrument after it is due, is deemed to have taken it upon the credit of the person from whom he received it, and subject to the same equities as between him and the party sued on such instrument. *Bochen v. Sterling, B. R. M. 38 Geo. 3. 7 T. R. 423.*

If a bill be payable to B. or order, for the use of C., it may be assigned by B., tho' he be trustee for C. *R. Carth. 5.*

The indorser charges himself as the original drawer, and not only as surety for him. *Cont. 1 Sal. 126. Acc. 1 Sal. 133.*

And therefore in an action against the indorser, there is no need of proof of resort to the drawer, and refusal by him. *Cont. per Holt, 1 Sal. 126, 127. Semb. acc. 1 Sal. 133. Vide post. (F 13.)*

If upon a bill payable to B. or order, B. indorses his name and sends it to another to get it accepted, the other may indorse a receipt for the money, and receive it in his name, or indorse an assignment to himself. *Mar. 30. 1 Sal. 126. 128. 130.*

[A bill of exchange with a blank indorsement, being stolen and negotiated, an innocent indorsee shall recover upon it against the drawer. *Peacock v. Rhodes, B. R. E. 21 Geo. 3. Dougl. 633.*]

But a bill payable to A. or order, cannot be assigned to another for part of the money; for then upon a single contract, a man would be subject to several suits. *R. Carth. 466.*

[And a bill tho' once negotiable, is capable of being restrained by a special indorsement. *Archer v. Bank of England, B. R. E. 21 Geo. 3. Dougl. 638.*]

[An executor or administrator may indorse notes or bills, within the custom of merchants. *Robinson v. Stone, M. 20 G. 2. Str. 1260. Barnes, 164.*]

[And the indorsee being plaintiff need not make a *proferat in curiam* of letters of administration. *3 Wilf. 1. 2 Burr. 1225.*]

[Where the holder of a bill of exchange desired A. to get it discounted, but positively refused to indorse it, and A. delivered it to B. for the same purpose, informing him to whom it belonged; and B. finding that he could not dispose of it without indorsing it, was prevailed upon to do so by A.'s telling him that he would indemnify him; but the indorsee took it on the credit of the names on the bill without any knowledge of the real owner; altho' such original holder afterwards promised to pay the bill, yet such promise cannot support an action brought against him by the indorsee, it being *nudum pactum*; for as A. was a special agent under a limited authority, he could not bind his principal by any act beyond the scope of such limited authority. *Fenn v. Harrison, B. R. T. 30 Geo. 3. 3 T. R. 757.*]

[*Aliter*, where the holder desired A. to get it discounted, but did not say that he would not indorse it. *B. R. H. 31 Geo. 3. 4 T. R. 177. S. C.*]

[In an action against the indorsee by the acceptor of a bill drawn payable "to A. or order," it is competent to the defendant to give evidence that the person who indorsed to the plaintiff was not the real payee, tho' he be of the same name, and tho' there be no addition to the name of the payee on the bill. *Mead v. Young, B. R. M. 31 Geo. 3. 4 T. R. 28.*]

[If



[If a bill be drawn in favour of a *factitious payee*, and that circumstance be known as well to the acceptor as the drawer, and the name of such payee be indorsed on the bill, an innocent indorsee for a valuable consideration may recover on it against the acceptor, as on a bill payable *to bearer*. *Semb. Vere v. Lewis, B. R. E. 29 Geo. 3. 3 T. R. 182. Minet v. Gibson, B. R. M. 30 Geo. 3. 3 T. R. 481. H. 31 Geo. 3. in Parl. 1 H. Bl. 569. Collis v. Emmet, C. P. H. 30 Geo. 3. 1 H. Bl. 313.*]

[Or, may recover on a count stating the special circumstances of the case, if that count do not vary from the verdict. *Ibid.*]

(F. 12.) *Remedy upon a bill of exchange. Against the drawer.*] If *A.* draws a bill of exchange upon *B.* payable to *C.*, and it be protested for non-acceptance, not finding other security, or for non-payment by *B.*; an action upon the case upon *assumpsit* lies against *A.*, by the custom of merchants for the money, and the damages consequent upon non-payment.

[And, on non-acceptance, an action will lie against the drawer before the time when the bill is made payable. *Milford v. Mayor, B. R. H. 19 Geo. 3. Dougl. 55.*]

So, a general *indebitatus assumpsit* lies against the drawer, for money received to his use. *1 Sal. 125.*

So, debt lies against *A.* who was indebted by receipt of the money. *1 Sal. 23. R. cont. T. 11 Geo. in B. R. inter Welsh and Craig, 1 Str. 680.*

And *A.* shall be charged, tho' he be not a merchant; for when he makes a bill of exchange, he shall be liable according to the usage among merchants. *R. 2 Vent. 295. 310. R. 1 Sal. 125. Sho. 125. Carth. 82.*

So, *A.* shall be charged upon an inland, as well as upon a foreign bill of exchange. *1 Sal. 125. Clift. 927.*

So, he shall be charged by *C.*, tho' he has indorsed it to *D.*, for his account, and as servant to him. *R. Sho. 164.*

So, if a bill be payable to *C.* or order, or to *C.* and his assigns, and by indorsement *C.* assigns to *D.*, and he to others, and *B.* does not accept, &c. an *assumpsit* lies against *A.* by an indorsee or assignee. *R. 2 Vent. 308.*

So, if *B.* accepts, and afterwards fails in payment.

So, if an indorser pays to any indorsee, *A.* is afterwards liable to him. *R. Lutt. 888. Carth. 130.*

[If the holder give time to the acceptor of a bill, or drawer of a note, after it has been dishonoured, the indorser is discharged. *Findal v. Brown, B. R. E. 26 Geo. 3. 1 T. R. 167.*]

[Notice of a bill or note being dishonoured must come from the holder. *Ibid.*]

[What is reasonable notice of non-payment is a question of law. *Ibid.*]

[It is necessary to give notice to the drawer that the drawee has dishonoured the bill, that he may have an opportunity of drawing his effects out of his hands. *Bickerdike v. Bollman, B. R. M. 27 Geo. 3. 1 T. R. 405.*]

[But where the drawer is indebted to the drawee no such notice is necessary.]

necessary. *Bickerdike v. Bollman*, B. R. M. 27 Geo. 3. 1 T. R. 405. *Rogers v. Steevens*, B. R. M. 29 Geo. 3. 2 T. R. 713.]

[*A.*, in *England*, draws a bill on *B.* in a foreign country; which, after having been negotiated through another foreign country, is presented to *B.*, who refuses to pay it, on account of the law of the country in which he resides having prohibited such payment. The drawer is liable for the whole amount of the re-exchange between the different countries. *Mellish v. Simeon*, B. R. M. 35 Geo. 3. 2 H. Bl. 378.]

[The purchaser of a foreign bill of exchange, payable at a certain time after sight, which is publicly offered for negotiation, is not bound to send it by the earliest opportunity to the place of its destination. *Muilman v. D'Eguino*, C. P. M. 36 Geo. 3. 2 H. Bl. 565.]

[There is no fixed time when a bill drawn payable at sight, or a certain time after, shall be presented to the drawee. *Ibid.*]

[But it must be presented within a reasonable time. *Ibid.*]

[What is a reasonable time is a question for the jury to decide from the circumstance of the case. *Ibid.*]

[But, *semb.* if the holder of a bill so payable, neither presents it nor puts it in circulation, he is guilty of laches, and cannot recover upon it. *Ibid.*]

[It is sufficient, if notice of a bill drawn in *England* on a person in the *East Indies*, being dishonoured, is sent to *England* by the first direct and regular mode of conveyance, whether it be by an *English* or a foreign ship; the holder is not bound to send such notice by the accidental, tho' earlier, conveyance of a foreign ship not destined to this country. *Ibid.*]

[The indorsee may recover the whole sum against the drawer, tho' the indorser has paid him part of it. *Johnson v. Kennion*, P. 5 G. 3. 2 Wils. 262.]

So, *A.* will be liable, tho' the bill was not presented at the due time, if no accident in the interim. *R. Sho.* 318.

So, *A.* will be liable, tho' the indorser was a trustee for *C.*, against whom an extent was sued. *R. Carth.* 5.

But if the drawer upon protest repay the money to the deliverer, he shall not be afterwards liable to *C.*, or any indorsee. *Mar.* 35.

So, the drawer shall not be charged, if the bill be not, after the time of payment, protested in a convenient time. *Per Treby*, 1 Sal. 127.

If a bill be not payable to another, or order, tho' it be indorsed, the indorsee shall not charge the drawer. *Per Holt*, 1 Sal. 133.

[If the indorsee gives the acceptor time for payment several times, till the acceptor fails, he cannot recover against the drawer. *Gee v. Brown*, M. 1 G. 2. Str. 792. *Ellis v. Galindo*, B. R. M. 24 Geo. 3. Dougl. 250. in not. *Tindal v. Brown*, B. R. E. 26 Geo. 3. 1 T. R. 167.]

[Nothing but an express declaration by the holder will discharge the acceptor of a bill. *Dingwall v. Dunster*, B. R. M. 20 Geo. 3. Dougl. 247.]

[If a bill of exchange accepted and payable on Saturday, is not tendered till Tuesday, when the acceptor stops payment, the drawer is discharged. *Coleman v. Sayer*, H. 2 G. 2. Str. 829.]



[F 13.] *Against the acceptor, &c.*] So, if *A.* draws a bill of exchange upon *B.*, payable to *C.* or order, and *B.* accept it, an *assumpsit* lies by the custom of merchants by *C.* against *B.*, for by his acceptance he undertakes to pay. *R. 1 Rol. 6. l. 45. 2 Cro. 306.*

[Where a bill of exchange was drawn by defendant and others, on the defendant alone, in favour of a fictitious person, (which was known to all parties concerned in drawing the bill,) and the defendant received the value of it from the second indorser; it was holden that a *bonâ fide* holder, for a valuable consideration, might recover the amount of it in an action against the acceptor for money paid, or money had and received. *Tatlock v. Harris, B. R. E. 29 Geo. 3. 3 T. R. 174.*]

So, if *C.* by indorsement assigns to *D.*, and he to others, *B.* will be liable to an *assumpsit*, by any assignee.

So, every indorser shall be liable to any subsequent indorsee. *R. Skin. 343. 410.*

[But not to a preceding one, as that is reversing the order of the proceeding by *Ld. Kenyon C. J. Bishop v. Hayward, B. R. M. 32 Geo. 3. 4 T. R. 470.*]

Tho' the bill was payable to *B.* or bearer; for the indorsement makes a new bill. *R. 1 Sal. 125. 133. Skin. 410.*

Tho' the bill was forged, &c. for the indorsement charges the indorser, and therefore the hand of the drawer to the bill need not be proved. *Per Holt, 1 Sal. 127.*

If *A.* draws two or three bills for the same sum, according to the custom of merchants, the one payable if the other be not paid, and *B.* accepts the second, and not the first, an *assumpsit* lies against him upon the first with an averment, that he has not paid the one or the other. *Dub. T. 12 W. 3. inter Milner and Harrison.*

If *B.* accepts a bill for himself and *C.*, who are joint-traders, in respect of their trade, both are bound. *1 Sal. 126.*

If the acceptance be a year after the bill was payable. *R. Carth. 459.*

So, if *A.* draws a bill payable to *C.*, for the use of *D.*, and *C.* indorses it, an *assumpsit* lies by the indorsee, tho' *C.* had paid it upon an extent at the suit of the king against *D.* For *C.* was the visible owner. *R. Sho. 4.*

Tho' *C.* sold to the indorsee upon a discount, where the bill is payable to *C.* or order, and not bearer. *Per Holt, 1 Sal. 128.*

Tho' a recovery be against the drawer, if no satisfaction thereon, *R. cont. but reversed, 2 Slq. 495.*

[An action lies for the indorsee (*qu.* as to the drawee?) of a bill of exchange against a servant on whom it is drawn and accepted generally, tho' the order is to place it to the account of his masters, and the letter of advice sent to his masters. *Thomas v. Bishop, M. 7 G. 2. Str. 955. B. R. H. 1.*]

[Action lies for the drawer, against the drawee, after acceptance. *Simmonds v. Parmenter, H. 21 G. 2.*]

[Affirmed by House of Lords. *1 Wilf. 185.*]

[If *A.* draws on *B.* for 50 *l.*, in favour of *C.*, who indorses and negotiates the bill, which is sent to *B.*, who keeps it ten days till payable, and then returns it unaccepted, but having put a private mark on it, the indorsee demands and receives the money from *C.*; in the mean

mean time *A.* is bankrupt, *C.* brings bill against *B.*, who answers, and dies, and the cause is revived against his executrix; equity will retain the bill, tho' for a legal demand, (otherwise if *B.* had been alive,) and determine on the facts relating to the legal demand; and will decree *B.*'s executor to pay *C.* the 50*l.* and interest from filing the original bill, and costs from filing the bill of revivor. *Powell v. Monnier*, *P.* 1737, 1 *Atkyns*, 611.]

But debt does not lie against the acceptor; for his engagement is collateral. *R. Hard.* 487. *Acc.* 1 *Sal.* 23.

[If separate actions be brought against the acceptor and indorsers of a bill, the court will stay proceedings against any of the indorsers, on payment of the bill and costs of that action, but not against the acceptor without payment of costs in all the actions, *Smith v. Woodcock*, *B. R. E.* 32 *Geo.* 3: 4 *T. R.* 691.]

So, if the drawer upon a protest repay the money mentioned in the bill to the deliverer, the acceptor cannot be afterwards sued by him to whom the bill was payable, if he was only assignee to the deliverer. *Mar.* 35.

So, if an indorser be not charged in a convenient time after the bill due, an action does not lie against him. *Per Holt*, 1 *Sal.* 128. 132.

And three days seem a convenient time upon an inland or foreign bill; but the usage of merchants ought to govern in such a case. 1 *Sal.* 132, 3.

Or, if there be not a demand, or a prior endeavour to have it from him, who drew the bill, or to whom it was directed. 1 *Sal.* 126, 127. 132. *Vide ante*, (F 11.) *post.* (F 14.)

If there be not a demand on the indorser after the indorsement made. *Per Holt*, 1 *Sal.* 128.

So, if a bill payable to *B.* or bearer, be indorsed to another, the indorsee cannot maintain an action upon it. *R.* 1 *Sal.* 125. *Skin.* 332.

If a bill be accepted by one joint-trader for himself and his partner, when it does not concern their trade, it does not bind his partner. 1 *Sal.* 126.

[The acceptor cannot be sued here, after he has been discharged by the laws of the country where the acceptance was made. *Burrows v. Femino*, in *Canc. M.* 13 *G. Str.* 733.]

[In case against the acceptor, the drawer's hand need not be proved, but the defendant may disprove it. *Wilkinson v. Lutwidge*, *M.* 11 *G. Str.* 648.]

[In an action against an acceptor of a bill, it is necessary to prove the hand-writing of the first indorser, notwithstanding such indorsement was on the bill at the time it was accepted. *Smith v. Chester*, *B. R. E.* 27 *Geo.* 3. 1 *T. R.* 654.]

(F 14.) *How the remedy is to be pursued.*] In an *assumpsit* upon a bill of exchange, the plaintiff must declare upon the custom of merchants; for an *indebitatus assumpsit* does not lie without a consideration proved. *Per two J.* 1 *Vent.* 153. *Semb. Lut.* 1585. 1594. *Carth.* 83. *Skin.* 332. *R.* 2 *Mod. Ca.* 373.

[As between the drawer and payee, the consideration may be gone into; yet, it cannot between a drawer and an indorsee. By *Ashhurst J.* *Lickbarrow v. Mason*, *B. R. M.* 28 *Geo.* 3. 2 *T. R.* 71.]

And



And if the declaration be upon the custom, and also an *indebitatus assumpsit*, and entire damages, there shall be no judgment. *1 Vent. 153. R. 1 Sal. 24. 129. 1 Lev. 298.*

So, it must allege the custom *amongst merchants, &c.*; for if it be alleged amongst all persons, it will be bad. *R. Lut. 892. b.*

Or, that *by the custom of England*, tho' the words, *of England*, shall be rejected as surplusage. *R. Hard. 486. R. 5 Mod. 367.*

So, the declaration must shew the custom pursued; and therefore it ought to shew the time and manner of acceptance. *R. Lut. 233.*

Ought to shew what the time shall be by the usage, if the bill be payable at *usance, &c.* *1 Sal. 131.*

But if the custom be alleged at London, that any merchant, &c. it is well. *R. Lut. 233. 1585.*

And if the plea be general, that *by the custom of merchants, &c.* it is sufficient, without shewing the custom specially; for the court will take notice of it. *R. Sho. 129.*

If the declaration be upon the custom, and that he to whom directed refused payment, per quod the drawer onerabilis devenit, it is sufficient, without an express promise alleged. *R. 1 Sal. 128.*

So, it is sufficient to say, *quod fecit billam manu sua subscript.*, tho' it does not say, *secundum usum mercatorum.* *R. Lut. 279.*

Or, that value was received. *Lut. 889. a.*

That it was accepted and paid for the honour of the drawer, without saying to whom. *R. after verdict, R. Lut. 899. b.*

That the defendant was an indorser, without an averment, that the plaintiff demanded it of the drawer, or former indorser. *Cont. per Holt, 1 Sal. 126. R. acc. 1 Sal. 133. Vide ante, (F 11. 13.)*

That the defendant undertook to pay *secundum tenorem billæ*, tho' the acceptance was after the bill due; for *secundum tenorem* shall be rejected as surplusage. *Per Holt, 1 Sal. 127. 129.*

It is not necessary to make mention of the protest in a declaration upon an inland bill upon the *st. 9 & 10 W. 3. 17.* *R. 1 Sal. 131. 1*

Or, that he inquired for him, to whom the bill was directed, before protest; for *quod non fuit inventus*, is sufficient. *R. Carth. 519.*

Nor, is it necessary to allege a promise after protest. *Ibid.*

[*Per curiam* on consideration. A demand on the drawer of a foreign bill of exchange, is not necessary to make a charge on the indorser, but the indorsee has his liberty to resort to either for the money. *Bromley v. Frazier, T. 7 G. Str. 441.*]

[A demand need not be made on the drawer of a bill of exchange, to entitle an indorsee to an action; for every indorser is a new drawer. *Per Hardwicke C. Lake v. Hayes, H. 1736, 1 Atk. 281.*]

[In actions on inland bills, by indorsee against indorser, plaintiff must prove demand, or due diligence to get the money from *drawee* or *acceptor*, but need not prove demand on *drawer*; on promissory notes, indorsee plaintiff must prove demand or diligence on maker of the note. *Heylyn v. Adamson, M. 32 G. 2. 2 B. M. 669.*]

[The second indorser, in an action against the first, need not shew a demand on the drawer, but he should say he has not paid it. *Lawrence v. Jacob, P. 8 G. Str. 515.*]

[If a bill be drawn payable to *A.* or order, who indorses it to *B.* without the words "or order," and *B.* declares as on an indorsement to him or order, it is good, and *B.* might have indorsed it. *Abbottson v. Fountain, T. 9 G. Str. 557.*]

[The

[The words "or order" are not necessary to be inserted in the *indorsement*, the bill is negotiable without them. *Edie v. East-India Company*, T. 1 G. 3. 2 B. M. 1216.]

So, if the custom be alleged, that the bearer shall maintain an action upon a bill payable to *B. or bearer*, and the defendant demurs, judgment shall be for the plaintiff; for by the demurrer the custom is confessed, tho' there is none such. R. 1 Sal. 125. *Skin*. 346.

So, if the declaration alleges, *quod indorsavit*, without saying that he subscribed it, it is sufficient after verdict for the plaintiff; for a good indorsement must be proved. R. 1 Sal. 130.

So, if the action is upon the first bill, and it is not alleged that the second or third was not paid; for it shall be intended after verdict. R. 1 Sal. 130. *Carth*. 510.

[When a bill is drawn, *pay my first, my second not paid*; in an action on the first, it is not necessary to aver that the second was not paid. The averment on one goes to the other also. *Wegerhoffe v. Keene*, M. 6 G. Str. 214.]

[It is not necessary to lay an express *assumpsit*; nor to allege a request before action brought. *Ibid*.]

So, if the declaration alleges the custom to be, that if a bill be duly accepted and afterwards refused, the drawer shall be liable, and shews that the bill was, after the time it became due, presented and refused, it will be well; for the drawer is liable at any time; and the alleging the custom more strict than was necessary, was surplusage. R. *Sko*. 313.

So, in a plea of a bill of exchange, the custom need not be alleged. R. *Carth*. 83.

[But if in an action against the indorser of a bill, the plaintiff does not in his declaration allege a demand and refusal by the acceptor on the day when the note was payable, it is error, and not cured by the verdict. *Rushton v. Aspinall*, B. R. T. 21 Geo. 3. *Dougl*. 679.]

[In like manner it is error, and not cured by verdict, if he do not allege notice to the defendant of the refusal of the acceptor. *Ibid*.]

[Whether action can be brought against the drawer of a bill protested before the day of payment; *dub*. *Bright v. Purrier*, P. 5 G. 3. 3 B. M. 1687.]

[The indorsee of an administrator may declare, without a *profert* of letters of administration. *Barnes*, 164.]

["Pay the contents" may be wrote in court over the indorser's name. *Barnes*, 453.]

[If the indorsee of an inland bill *not due*, present it for acceptance, which is refused, and delay giving notice to his indorser, the indorser will be discharged. *Goodall v. Dolley*, B. R. E. 27 Geo. 3. 1 T. R. 712.]

[And a subsequent proposal by the indorser to pay the bill by instalments, made without knowledge of the indorsee's laches, is not a waiver of the want of notice. *Ibid*.]

[If the defendant, who is sued as the acceptor of a bill, suffer judgment by default, he admits that he is liable to that amount; and therefore, tho' the bill must be produced, on executing the writ of inquiry, it need not be proved. *Green v. Hearne*, B. R. E. 29 Geo. 3. 3 T. R. 301.]

[The only reason for producing the bill, is to see whether or not any part of it has been paid. *Ibid*.]

[An



[An alteration of the date of a bill of exchange, after acceptance, whereby payment would be accelerated, avoids the instrument, and no action can afterwards be brought upon it, even by an innocent holder for a valuable consideration. *Master v. Miller*, B. R. T. 31 Geo. 3. 4 T. R. 320. 2 H. Bl. 141.]

[It is enacted by the stat. 34 Geo. 3. c. 9. s. 4. that if any resident in Great Britain shall, after Jan. 1, 1794, pay any bill of exchange or order for money drawn since that time for the use of the persons exercising the government of France, or residing within the limits of such government, he shall forfeit double the value of such bill, and the payment shall not be effectual against any person who might have demanded the same. *A.*, a merchant in London, draws a bill of exchange on *B.* at Pisa, payable to the order of *C.* a French merchant resident in France; *C.* indorses it to *D.* of Nice, and *D.* to *E.* of Leghorn. The bill not being paid when due, *E.* draws another bill for the amount of the former on *A.* in favour of *F.* of Leghorn, which is in the course of trade indorsed to *G.* a merchant in London, and accepted by *A.* This statute prevents *G.* from maintaining an action on the latter bill against *A.*; and if such action be brought, the court will stay the proceedings. *Bendelack v. Morier*, C. P. T. 34 Geo. 3. 2 H. Bl. 338.]

(F 15.) Promissory Note.

So, by the st. 3 & 4 Ann. 9. after 1 May 1705, all notes made by any person, (or by the servant or agent of any trader, usually entrusted to sign notes for his master,) whereby promise is made to pay a sum to any or order, shall be payable, indorsible, or assignable, as an inland bill of exchange.

And the person to whom payable, indorsed, or assigned, may maintain an action against him who signed, or whose servant or agent signed it, or against any of the indorsers, as in case of inland bills of exchange.

And notes payable to any, or bearer, shall be construed due to the person to whom made payable, who may maintain an action as in case of inland bills against him who signed, or whose servant or agent signed it.

[Three days' grace are allowed on promissory notes as well as on bills of exchange; for the stat. 3 & 4 Ann. c. 9. puts them upon the same footing in every respect. *Brown v. Harradin*, B. R. H. 31 Geo. 3. 4 T. R. 148.]

[Three days' grace are allowed on notes payable to *A.*, without adding "to his order, or to bearer." *Smith v. Kendall*, B. R. M. 35 Geo. 3. 6 T. R. 123.]

Before that statute, a note payable to *A.* or order, if it was assigned or indorsed to *B.*, could not have been sued by *B.* except in the name of *A.*; for it was not in the nature of a bill of exchange. *R. cont. in C. B. T. 9 W. 3. rot. 500. Cromwell. Dub. B. R. T. 12 W. 3. inter Swift and Butcher. R. acc. B. R. Clerk and Martin, 1 Sal. 129. R. inter Buller and Crips, 2 Ann. Mod. Ca. 29.*

So, upon a note to *A.* or bearer, the law does not presume an assumption to the bearer. *R. 3 Lev. 299. Acc. inter Butcher and Swift, T. 12 W. 3.*

And the plaintiff could not declare upon a promissory note, as upon a bill of exchange. *R. 1 Sal. 24. 129.* But

But now, upon a note to A. or bearer, an *assumpsit* lies by A.

And if a note be payable to A. or order, an *assumpsit* lies by A., or by any to whom it shall be indorsed; for by the *st. 3 & 4 Ann. 9.* the assignee or indorsee may maintain an action against the drawer or indorser, and recover damages. *2 Mod. Ca. 374.*

Yet debt does not lie upon a promissory note, by any against the indorser, or drawer; for it is made by the *st. 3 & 4 Ann. 9.* of the nature of a bill of exchange, which is only evidence of a debt. *R. 2 Mod. Ca. 373.*

[Whether demand on drawer is necessary to charge indorser, is a point in much doubt; but the objection must be made at trial, for on the face of the declaration it is well. *Hamilton v. Mackrell, M. 10 G. 2. B. R. H. 322.*]

[*Eyre C. J.* in *C. B.* directed to find for defendant, indorser of a promissory note, because plaintiff did not prove demand on the drawer. *Syderbottom v. Smith, M. 12 G. Str. 649.*]

[There must be a demand on the drawer of a note before the indorser can be charged; if he is run away, it is not enough to shew that, but plaintiff must prove he attempted to find him out. *Collins v. Butler, H. 11 G. 2. Str. 1087. Per Hardwicke C. J. Sed vide infra, Cooper v. Le Blanc.*]

[*Hardwicke C. J.* said, *Holt C. J.* and *Eyre C. J.* were of opinion that the indorser of promissory note should not be charged, unless a demand had been made on the drawer; but that *Pratt C. J.*, *King C. J.*, *Raymond C. J.*, and himself, were of opinion he might, and determined accordingly in this case. *Cooper v. Le Blanc, T. 9 G. 2. B. R. H. 295. Sed vide Heylyn v. Adamson, supra, (F 14.)*]

[A. draws a promissory note payable to B. or order, which B. indorses, having given no value for it, and knowing A. to be insolvent. In an action by the indorsee against B., it is not necessary to prove that the note was presented for payment to A. immediately when it became due, or that notice was given to B. of A.'s refusal to pay it. *De Berdt v. Atkinson, C. P. T. 34 Geo. 3. 2 H. Bl. 336.*]

[A. makes a promissory note payable to B. or order, with a memorandum upon it that it will be paid at the house of C., who is A.'s banker. In the course of business the note is indorsed to C. In an action by C. against the indorser, it is not necessary to prove an actual demand on A. *Saunderson v. Judge, C. P. E. 35 Geo. 3. 2 H. Bl. 509.*]

[If a note be made payable at a particular house, a demand of payment at that house is as a demand on the maker. *Ibid.*]

[The putting a letter into the post-office to the indorser, in proper time, informing him that the maker has not paid a note when due, is sufficient evidence of notice to the indorser. *Ibid.*]

[A. being in insolvent circumstances, B. undertakes to be a security for a debt owing from A. to C. by indorsing a promissory note made by A. payable to B. at the house of D. The note is accordingly so made and indorsed with the knowledge of all parties. Just before it becomes due, B. being informed that D. has no effects of A. in his hands, desires D. to send the note to him B., and says that he will pay it. C. cannot maintain an action against B. on the note, without having used due diligence in presenting the note as soon as it was due to D. for payment, and in giving immediate notice to B. of the non-

non-



non-payment of *D. Nicholson v. Gouthet, C. P. H. 36 Geor 3: 2 H. Bl. 609.*

[If indorser pays part of a note, it is not necessary to prove demand on drawer. *Vaughan v. Fuller, H. 19 G. 2. Str. 1246.*]

[If the indorsee receives part of the drawer, the indorser is absolutely discharged. *Kellock v. Robinson, H. 13 G. Str. 745.*]

[It is the same thing, whether the drawer, or one for him, pays the money; and so, if the drawer is sued by the indorsee, who obtains interlocutory judgment, and the bail pay the note, and take assignment of note and judgment, they cannot recover against the indorser. *Hull v. Pitfield, H. 17 G. 2. Wilf. 46.*]

[If husband indorses a note given to him by his wife, it is good as between him and the indorsee. *Haly v. Lane, P. 1741, 2 Athyns, 181.*]

[So, if the note be given by an infant. *Ibid.*]

[So, tho' some of the indorsees did not pay a valuable consideration, yet if the last did, it is good as to him, unless fraud or equity appears. *Ibid.*]

[The bearer of a note, "pay to *ship Fortune* or bearer," may bring action in his own name, and declare both as on an inland bill of exchange, and for money had and received. *Grant v. Vaughan, T. 4 G. 3. 3 B. M. 1516.*]

[If plaintiff has indorsed a note in blank, his name may be struck out after the note is delivered in at *nisi prius*. *Theed v. Lovell, M. 12 G. 2. Str. 1103.*]

[Proof of the acknowledgment of indorser of his name, is not evidence against the drawer in action by indorsee; the indorser's hand must be proved. *Barnes, 436.*]

[If a promissory note is wrote in the defendant's own hand, there needs no subscription, nor need it be laid in the declaration that he signed it. *Taylor v. Dobbins, M. 7 G. Str. 399. Elliot v. Cooper, M. 7 G. 2 Ld. Raym. 1376. Str. 609.*]

[If one action is brought against the drawer, and another against the indorser of a promissory note, execution shall be only on one. *Windham v. Wither, P. 8 G. Str. 515.*]

[Promissory note payable to *A.* or order, may be assigned by the administrator of *A.*, and the indorsee may bring action in his own name, without *proferat* of the letters of administration alleging custom of merchants. *Rawlinson v. Stone, in C. B. affirmed on error in B. R. M. 20 G. 2. 3 Wilf. 1.*]

[By *stat. 15 G. 3. c. 51.* negotiable promissory notes and inland bills under 20 *s.* are prohibited under penalty from 20 *l.* to 5 *l.* recoverable before one justice on non-payment and want of distress, three months' imprisonment, to continue five years.]

[By *stat. 17 G. 3. c. 30.* negotiable notes under 5 *l.* shall specify the person to whom payable; the real date; shall be payable within 21 days of it, and not negotiable after that time. Note and indorsement to be attested by one witness. Penalties as in 15 G. 3. c. 51; both acts to continue five years.]

(F 16.) *What words make a promissory note assignable.* A note promissory does not require any express form of words: and therefore a note, whereby *A. promises to account with B. or order for 10 l.* is good and

and assignable; for it is tantamount to, *I promise to pay, &c.* R. 11 Geo. 2 Mod. Ca. 363.

[A promissory note to pay within two months after a ship is paid off. *Andrews v. Franklin*, H. 3 G. Str. 24. *Evans v. Underwood*, H. 23 G. 2. 1 Wilf. 262.]

[A promissory note from A. to pay so much to B. for the debt of C. to B. *Popplewell v. Wilson*, H. 6 G. in error, Str. 264.]

[A promissory note to be accountable to order for 100*l.* value received. *Morris v. Lee*, T. 11 G. Str. 629. 2 Ld. Raym. 1396.]

["I do acknowledge that A. delivered me such bonds and notes, and B.'s receipt and bill on me for 10*l.* which 10*l.* and 15*l.* 5*s.* balance due to A. I am still indebted, and promise to pay." *Chadwick v. Allen*, T. 12 G. Str. 706.]

["I promise to pay to A., &c. three months after date, value received of the premises in *Rosemary-lane*." *Burchel v. Slocock*, M. 2 G. 2. Ld. Raym. 1545.]

[Note given to an infant, payable when he shall come of age, viz. such a day. *Goss v. Nelson*, H. 30 G. 2. 1 B. M. 226.]

[To pay six weeks after the death of his father; for there is no contingency whereby it may never become payable. *Cooke v. Colehan*, M. 18 G. 2. Str. 1217. *Willes*, 393. S. C.]

But, *I promise to pay 70*l.* or surrender A.*, is not assignable; for it was satisfied by surrender. R. 11 Geo. 2 Mod. Ca. 362.

Or, *I promise to pay 10*l.* to B. if my broker does not by such a day.* 2 Mod. Ca. 263.

[Or, to pay to many days after grantor should marry, is not negotiable within the statute. *Beardefley v. Baldwin*, P. 14 G. 2. Str. 1151.]

[Or, to deliver up horses and a wharf, and to pay money at a certain day, within the statute. *Martin v. Chauntry*, T. 21 G. 2. Str. 1271.]

[A note payable eventually, upon an uncertain contingency, can never be a negotiable note; as, to pay on the death of A. if he leaves drawer sufficient to pay it, or he is otherwise able. *Roberts v. Peake*, P. 30 G. 2. 1 B. M. 323. *Carlos v. Fancourt*, B. R. H. 34 Geo. 3. 5 T. R. 482.]

[A note by which A. promises to pay to the bearer 50*l.* "being the portion of a value as under deposited in security for the payment thereof," may be declared upon as a promissory note. *Hausfoullier v. Hartfinck*, B. R. T. 38 Geo. 3. 7 T. R. 733.]

[The plaintiff declared on a promissory note given to him by the defendant, and alleged that before the note was given it was agreed between them, that if the defendant should buy of the plaintiff all the malt expended in his dwelling for three years, the note should be void; averred that the defendant had expended a certain quantity of malt, and had not bought it of plaintiff; and it was holden good on demurrer, because the note formed no part of the agreement, and might have been declared upon singly, or at the most, that the agreement must be considered only as a defeazance, and then if the defendant would take advantage of it, he should shew the performance on his part. *Cornish v. Bolitho*, C. P. E. 12 Geo. 2. *Willes*, 145.]

[The executor or administrator of a payee of a promissory note may assign



assign it over, so as to enable the indorsee to sue in his own name: *Stone v. Rawlinson, C. P. E. 18 G. 2. Willes, 559. Barnes, 164. S. C.*

[The indorsee need not in his declaration make a protest of the letters of administration granted to the indorser. *Ibid.*]

[A note payable on demand with interest, drawn by *A.* in favour of *B.*, as a security for a debt, was by him indorsed to *C.* for the same purpose; after the indorsement it passed backwards and forwards between *B.* and *C.* several times, and previously to its being ultimately deposited with *C.*, he received an intimation from *B.* not to negotiate it, as he should want it when he settled accounts with *A.* It was holden, that *C.* could not after a settlement of accounts between *A.* and *B.*, without a re-delivery of the note, recover on it against *A.* *Roberts v. Eden, C. P. E. 39 Geo. 3. 1 Bos. & Pull. 398.*]

(F 17.) When a Bill, &c. shall be Payment:

If a bill of exchange or promissory note be given to another, and accepted as money, it will be a good payment:

So, if *A.* sells goods to *B.* who agrees to deliver a bill, or note for his satisfaction, if the bill, &c. be delivered, it will be a payment, tho' the bill be never paid. 1 *Sal.* 124.

So, if *A.* gives his own bill of exchange upon *B.* payable to *C.* or order, to *C.* for value received, who keeps it for two years, it will be a payment; for if he does not resort to *A.* in a convenient time, it shall be presumed, that he is satisfied with the bill. *Per Holt, Sho. 155.*

By the *st. 3 & 4 Ann. 9.* an inland bill accepted for satisfaction of a debt shall be deemed full payment, if the person accepting it take not due course to obtain payment, by endeavouring to get it accepted and paid, or protested:

[If a man receives a goldsmith's note at two on Saturday, and does not demand it till Tuesday morning, it is payment. *Manwaring v. Harrison, H. 8 G. Str. 508.*]

[If *A.* indorses a promissory note to *B.* who gives a receipt, "received the contents when the above bill is paid," and keeps it from 28th March, when it became payable, to 13th May, when the giver of the note fails, it is good payment in *A.* *Smith v. Wilson, P. 11 G. 2. Andr. 187.*]

[A goldsmith's note, paid in at half past eleven, and not demanded till next day at two, is payment. *East India Company v. Chitty, M. 16 G. 2. Str. 1175.*]

[And so a bill accepted, by writing an order on his goldsmith to pay it when due, is payment, if not tendered at the same time as a note or draft. *Bishop v. Chitty, T. 16 G. 2. Str. 1195.*]

[If a creditor takes a draft from his debtor, on another, tho' it is not payable to him or order, and keeps it an unreasonable time, and drawee breaks; yet it is payment. *Chamberlyn v. Delarive, T. 7 G. 3. 2 Wils. 353.*]

But, regularly, a bill or note given to a creditor shall not be a discharge of the debt, till payment; unless it be accepted in discharge. 1 *Sal.* 124.

For, without an express agreement to take it in discharge, the acceptance is only, upon condition if it be paid. *Sal. 442. Skin. 410.* [1 *T. R. 655. Owen v. Morse, B. R. M. 37 Geo. 3. 7 T. R. 64.*]

So, if *A.* being indebted to *B.* indorse a bill of exchange, and send it to him; it will not be a payment, tho' it continues in his hands a long time after it is payable. *R. 1 Sal. 124.*

And *B.* may afterwards sue *A.* for his debt; and such bill shall not be allowed in satisfaction. *Per Holt, 1 Sal. 124.*

So, if a bill, sent to a goldsmith by a servant, be paid in part, and another bill given for the residue; the acceptance of the other bill by the servant will not be a payment for the residue; if the other bill be not paid. *R. Mod. Ca. 36. Sal. 442.*

Tho' the master send his servant the next day to receive such bill. *R. Mod. Ca. 36, 7.*

So, if a bill or note be given and received, generally, for a debt, it will not be a payment, if the goldsmith fails before the money paid; tho' the goldsmith continues to pay for all the same day: for he, who takes it, is not bound to receive it immediately, but shall have a reasonable time for it. *R. Sal. 442.*

So, if a bill be given, generally, upon *B.* a goldsmith about ten in the forenoon upon *Saturday*; and the receiver sends all his bills that day received by his servant, who receives several sums upon them, and enters them; and then it was five in the afternoon, after which time it is not usual for goldsmiths to pay upon a *Saturday*, for then they adjust their accounts, for which reason he does not send the bill to *B.* by a servant till ten on *Monday* morning; and *B.*'s cashier cancels the bill, and directs the servant to come half an hour afterwards; but then, and upon two subsequent demands, does not pay, but in the afternoon upon *Monday* gives another bill of the same date and for the same sum, at which time he was a bankrupt; this bill will not be payment, tho' the servant was in fault, that he did not stay to receive the money when the bill was cancelled. *R. Eq. Ca. [2d part of Mod. Ca.] 60.*

[The common usage in transacting affairs of this nature is to be chiefly regarded; so, where it is the custom of a company (as it was of the *Bank*, and of the *Sword-Blade Company*) to send their servant in the morning to leave the notes, and to call for the money in the afternoon, if the goldsmith has stopt payment after the notes left, it is not payment. *Turner v. Mead, coram Pratt C. J. H. 7 G. Str. 416. Contra Hayward v. The Bank of England, coram King C. J. P. 9 G. Str. 550.*]

[A banker's note paid after dinner, and refused payment next morning at nine, is not payment. *Fletcher v. Sandys, H. 19 G. 2. Str. 1248.*]

[If defendant gives plaintiff a goldsmith's note at two in the afternoon, and next morning at nine it is tendred, a quarter of an hour after they had stopt, it is not payment. *Moore v. Warren, and Holme v. Barry, H. 7 G. Str. 415.*]

[If a man receives a goldsmith's note at twelve, puts it into the bank at one, next morning at ten it is carried with others for 2600*l.* and left as usual, called for at eleven, and at two payment refused, but they pay small notes for two hours after; this is not payment. *Hoare v. Da Costa, T. 5 G. 2. Str. 910.*]

[*A.* sold goods to *B.*, which the latter was to pay for by a bill at three months. *B.* gave *A.* a check on his bankers, (who were also *A.*'s bankers,) requiring them to pay *A.* on demand in a bill at three months.



months. *A.* paid the check into the bankers, and took no bill from them; but the amount was transferred in the bankers' books from *B.*'s account to *A.*'s, with the knowledge of both. The bankers failed before the check became due; and it was holden that *A.* could not recover the value of the goods against *B.* *Bolton v. Richard*, *B. R. H.* 35 *Geo. 3.* 6 *T. R.* 139.]

### Feme Sole Merchant.

*Vide Baron and Feme*, (A 2.)—*London*, (N 7.)

### Statute Merchant.

*Vide Statute Staple.*

### MESNE, Writ of.

*Vide Droit* (K).

### MESSUAGE.

*Vide Grant*, (E 6.)

### METROPOLITAN.

*Vide Administrator*, (B 3, 4.)—*Archbishop*.—*Ecclesiastical Persons*, (C 1.)—*Visitor*, (A 5.)

### MILK.

*Vide Dismes*, (H 8.)

### MILL.

*Vide Dismes*, (H 12.)

### Secta ad Molendinum.

*Vide Droit* (H).

### MINES.

*Vide Waife*, (H 1, 2.)

### MISADVENTURE.

*Vide Action upon the Case for Mifseafance*, (A 4.)—*Justices*, (M 19.)

### MISCONTINUANCE.

*Vide Amendment* (I).

### MISDEMEANOR.

*Vide Action upon the Case for Mifseafance*.—*Attorney*, (B 15.)—*Courts*, (P 16.)—*Justices of Peace*, (B 52. 62. 191.)—*Leet*, (L 2, &c.)—*Officer*, (G 14.—K 3.)—*Parliament*, (G 3.—L 34, 35. 44.)—*Pleader*, (S 46, 47.)—*Prærogative*, (D 54.)

## MISFEASANCE.

*Vide Action upon the Case for Misfeasance.—Misdemeanor.—Pleader*  
(2 O).

## MISNOMER.

*Vide Abatement, (E 18, &c.—F 17, &c.)—H 22, 23.—Pleader,*  
(3 I 7.)

## MISPRISION.

*Vide Justices, (N 1, &c.)—Justices of Peace, (B 2.)*

## Misprision of the Clerk.

*Vide Amendment (D 1, &c.—E 1, 2.—F—G 1, 2.—H 3.—T 1,  
&c.—V 1, &c. and many other Places in the same Title).*

## MISTAKE.

*Vide Abatement, (G 3.—H 25, &c.)—Misprision.*

## MITIORI SENSU.

*Vide Action upon the Case for Defamation, (F 16, &c.)*

## MITTIMUS.

*Vide Certiorari, (A 2.)*

## MODUS DECIMANDI.

*Vide Dismes, (E 10, &c.)—Prohibition, (G 10.)*

## MOLLITER MANUS IMPOSUIT.

*Vide Pleader, (3 M 16.)*

## MONASTERY.

## (A) How dissolved.

**B**Y the *stat.* 27 *H. 8.* 28. all monasteries, and other religious houses of monks, canons, or nuns of whatever habit, rule, or order, not having lands, &c. or other hereditaments above 200 *l. per annum*, and all their manors, lands, &c. and hereditaments, the king shall have and enjoy to him and his heirs for ever.

And all monasteries, abbeys, &c. given to his majesty by any abbot, &c. under the convent seal within a year, or otherwise suppressed and dissolved: and all goods, debts, &c. belonging to the chief governor in right of his house, 1 *Mar.* 1535, or since.

And the king shall be in actual possession, &c. and may dispose of them at his will and pleasure.

H 2

And



And patentees, &c. shall enjoy, &c. according to tenor of their letters patent.

And all fraudulent estates in fee-tail for life or years, or charges, &c. within a year before, shall be void.

And by this statute appropriations to a religious house are also given to the king. *R. per three J. 2 Cro. 608.*

So, by the *st. 31 H. 8. 13.* the king shall enjoy to him and his heirs, all monasteries, &c. colleges, hospitals, and other religious and ecclesiastical houses, since *4th Feb. 27 H. 8.* dissolved, given up, or by any means come to the king. And all their manors, lands, &c. and other hereditaments, or which shall hereafter be dissolved, &c.

By this act all religious and ecclesiastical houses, of whatever annual value, were given to the king. *2 Co. 49.*

And tho' by the *st. 32 H. 8. 24.* the corporation of the knights of *St. John of Jerusalem* in England was dissolved, and their hospital and all manors, lands, &c. given to the king, yet their possessions were given to the king within the *st. 31 H. 8. 13.*; for it was a religious and ecclesiastical corporation. *R. per three J. Jon. 183.*

By the *st. 1 Ed. 6. 14.* all colleges, free chapels, and chauntries, and all manors, lands, &c. or hereditaments belonging to them, or which have been given or assigned to the finding of a priest, or of any anniversary or obit, &c. to have continuance for ever, shall be in the possession and seisin of the king.

If a monk now be professed beyond sea, he may inherit in England. *Dub. Ca. Eq. [2d part of Mod. Ca.] 55.*

*Vide Hospital.*

## MONEY.

### (A) The Advantage of Money.

*MONETA est mensura rerum, per quam omnium rerum, quæ in mundo sunt, fit justa æstimatio. Dav. 19.*

### (B) What shall be Current Money.

(B 1.) What Weight it ought to have.

SIX circumstances ought to concur to make lawful and current money: a fixt weight, alloy, impression, and valuation, the king's authority, and proclamation. *Dav. 19. b.*

And therefore, every piece of current money ought to have a certain weight. *Ibid.*

The pound Troy of gold is divided into 24 carats, and every carat contains 4 grains of gold. *Assay for Amendment of the Coin, 17.*

A pound Troy of silver is divided into 12 ounces, every ounce contains 20 pennyweights, every pennyweight 24 grains. *Essay, 18.*

Payment in the *Exchequer* was antiently made *ad scalam*, or *ad pensum*, viz. by weight: payment *ad scalam* was, when 6 *d.* was added to every 20 *s.*, to make due weight: *ad pensum*, when every thing necessary to make due weight was supplied, tho' above 6 *d.* *Mad. 187. Hale Sh. Accounts, 21, &c.*

(B 2.)

## (B 2.) What Alloy.

Gold and silver were antiently coined without alloy.

But now they have a certain proportion of alloy, whereby it is called *sterling* or *standard* money. *Eff. for Coin*, 17. *Hale Sh. Acc.* 5. *Hard.* 501.

The antient standard for gold *temp. Ed. 3. usqu. H. 8.* was, in every pound *Troy* 23 carats 3 grains  $\frac{1}{2}$  of gold and  $\frac{1}{2}$  grain of alloy. *Eff.* 20. *Hale Sh. Acc.* 10.

The standard for silver was antiently and is now, in every pound 11 ounces and two pennyweights of silver, and 18 pennyweights of alloy. *Ibid.*

The sovereigns of gold, angels, &c. 34 *H. 8.* had in every pound one carat of alloy; and 37 *H. 8.* sovereigns four carats; but 4 *Ed. 6.* they were reduced to the antient standard. *Eff.* 22.

So, 6 *Ed. 6.* 1 *Mar.* 2 *El.* sovereigns and angels were of the antient standard, other coin of gold had two carats alloy. *Eff.* 24.

So, 43 *El.* angels, 3 & 10 *Jac.* 2 *Car.* 1. and 12 *Car.* 2. rials and angels were of the antient standard. *Eff.* 25, 26.

But other coin of gold, 35 and 43 *El.* 2 *Jac.* 2 *Car.* 1. 12 *Car.* 2. unites, &c. and 22 *Car.* 2. guineas were and now continue with two carats of alloy. *Eff.* 25, &c.

So, coin of silver had 34 *H. 8.* two ounces of alloy; 36 *H. 8.* six ounces; 37 *H. 8.* eight ounces; and 5 *Ed. 6.* nine ounces; but 6 *Ed. 6.* were reduced to 19 pennyweights of alloy; and *temp. Ph. & M.* to the antient standard, which has continued from that time to this. *Eff.* 23.

Antiently, if money was paid at the *Exchequer*, it was examined or an assay made of it, by burning some part. *Mad.* 187. 192.

Or, 12*d.* was added to every 20*s.* to countervail such assay. *Mad.* 192.

So, when coinage was used, *viz. temp. Ed. 3.* 12*d.* in every 20*s.*, *viz.* 105*l.* was paid in respect of the alloy in *sterling* coin for every 100*l.* rent in fine silver, and it seems to have been settled by parliament. *Hard.* 501.

If the alloy exceeds the due proportion, whereby the coin is debased, that tends to the detriment of the public. 3 *Rush.* 1217.

## (B 3.) Ought to have an Impression.

So, money ought to have an impression; for metal is not money without an impression; *et dicitur moneta quia impressione monet, cujus sit moneta.* *Dav.* 19. b.

## (B 4.) And a fixed Denomination or Value.

So, every piece of gold or silver coin ought to have a certain denomination, or valuation set upon it. *Dav.* 19. b.

And the king by his prerogative may set upon his coin what value he pleases. *Dav.* 20. a. *Vide post.* (B 5, &c.)

The pound *Troy* of gold, 18 *Ed. 3.* was divided into fifty florins to be current at 6*s.* each, and afterwards *eodem anno* ought to contain in it thirty-nine nobles and an half, at 6*s.* 8*d.* the noble. *Eff. for Coin*, 35.



20 *Ed.* 3. it was divided into 42 nobles of the same value; 27 *Ed.* 3. 45 nobles; 9 *H.* 5. 50 nobles. *Eff.* 36.

1 *H.* 6. it was advanced to 45 rials of 10*s.* the rial, or 67 angels and  $\frac{1}{2}$  of 6*s.* 8*d.* the angel; but reduced 4 *H.* 6. to the same standard as 9 *H.* 5.; yet 49 *H.* 6. and afterwards 5 *Ed.* 4. advanced as before. *Eff.* 38.

1 *H.* 8. it was divided into 24 sovereigns at 22*s.* 6*d.* or 48 rials at 11*s.* 3*d.*, or 72 angels at 7*s.* 6*d.* *Eff.* 41.

34 *H.* 8. it was divided into 28 sovereigns; and 36 *H.* 8. into 30 sovereigns at 20*s.* per sovereign; 3 *Ed.* 6. into 34 sovereigns; and 6 *Ed.* 6. into 24 sovereigns at 30*s.* per sovereign, or 72 angels at 10*s.*, and 43 *El.* into 73 angels. *Eff.* 43.

The pound which had two carats alloy was divided 6 *Ed.* 6. and 2 *El.* into 33 sovereigns at 20*s.* per sovereign; and 43 *El.* into 33*½*; and 2 *Jac.* into 37 unites at 20*s.* and one thistle crown at 4*s.* *Eff.* 48.

The pound of the antient standard 3 *Jac.* was divided into 81 angels; 10 *Jac.* [into 88 angels,] and 2 *Car.* into 89 angels; and the pound of two carats alloy 10 *Jac.* was divided into 37 unites at 22*s.* and one thistle crown at 4*s.* 4*d.*; and 2 *Car.* 1. into 41 unites at 20*s.* *Eff.* 53.

The pound was divided 22 *Car.* 2. and still continues, into 44 guineas and a half, at 20*s.* the guinea. *Eff.* 55.

The pound *Troy* of silver 28 *Ed.* 1. was divided into 20*s.* and 3*d.*; 20 *Ed.* 3. into 22*s.* 6*d.*; 27 *Ed.* 3. into 25*s.*; 9 *H.* 5. 30*s.*; 1 *H.* 6. 37*s.* 6*d.* which was reduced to 30*s.*, 4 *H.* 6., but 49 *H.* 6. advanced to 37*s.* 6*d.*, and 1 *H.* 8. to 45*s.*, 34 *H.* 8. 48*s.*, 3 *Ed.* 6. 72*s.*; but 6 *Ed.* 6. it was reduced to 60*s.*, and 43 *El.* advanced to 62*s.*, and so from thence hath continued. *Eff.* 34, &c.

The penny was 20<sup>a</sup> *pars uncia*; 9 *Ed.* 3. 26<sup>a</sup> *pars*; 2 *H.* 6. 32<sup>a</sup> *pars*; 5 *Ed.* 4. 40<sup>a</sup> *pars*; 36 *H.* 8. 45<sup>a</sup> *pars*; 2 *El.* 60<sup>a</sup> *pars*; and so remains to this day. *Hale Sh. Acc.* 12.

(B 5.) The Authority of Coinage belongs to the King.

By the civil law, *jus cudenda moneta ad solum principem de jure pertinet.* *Dav.* 20.

So, by the common law, the power to make or coin money within his dominions belongs only to the king. *R. Dav.* 19. a. *Hale, Sh. Acc.* 3.

But by a grant from the emperor, the inferior princes and states of Germany have the privilege of coining. *Dav.* 20. b.

And the same privilege was granted to several great personages in France. *Ibid.*

So, antiently, the archbishop of York, and bishop of Durham might coin. *Ibid.*

So, *temp. Steph.* thro' the confusion of the times, *tam episcopa quam comites et barones suam faciebant monetam.* *Hale Sh. Acc.* 4.

[By 12 G. 2. c. 5. 15,000*l.* per annum is given to the king for seven years, for the coinage; made perpetual, by *stat.* 9 G. 3. c. 25.]

[*Stat.* 14 G. 3. c. 70. directs the taking of light gold coin, under certain regulations, and recoinning the same.]

## (B 6.) The King may make Coin current.

So, the king by his proclamation may make any coin current in England. 5 Co. 114. b.

As, a talent or bezant of uncertain value, and may set a value upon it. Dav. 20. a.

May establish the standard as he pleases. Dav. 19. b.

So, coin impressed at the mint shall be of value proportionable to other coin, without proclamation. Per Holt, Sal. 446.

## (B 7.) And change it at his Pleasure.

So, the king may enhance, debase, or change the coin at his pleasure. Dist. that he cannot change it without assent of the counties. Mir. Jus. 10. b. 2 Rol. 166. l. 35.

But it is now allowed that he may change it as he pleases. R. Dav. 20. b.

That he may advance the value. Vide ante, (B 4. 6.)

So, he may debase it at his pleasure. Dav. 21.

And if the king by proclamation makes a mixt or base money current, it shall be so. R. Dav. 22. b.

So, the king by his proclamation may change, &c. his money in Ireland, as well as in England. Dav. 21.

## (B 8.) The Effect of the Change.

If the king by proclamation decries any coin, it cannot afterwards be tendred as money, but shall be only bullion. Dav. 20. b.

If he makes base money current, it shall be taken as sterling. R. Dav. 22. b. 25.

And therefore, if an obligation be to pay so much in current money at such a day, and before the day the money be enhanced by proclamation, payment or tender of the sum in the enhanced money is sufficient. R. Dav. 26. b.

Tho' the obligation was made in England, for payment in Ireland, and the money is enhanced there only; for the time and place of payment shall be principally regarded. R. Dav. 25. b. 27, 28.

Tho' the money was tendred after the day of payment, and before the enhancement; for there was a default by not tendring it at the day. Semb. Dy. 83. a.

So, if an obligation be to deliver so much corn, which before the day is diminished in value. Dy. 82. in marg.

But if money be tendred in pure coin at the day, and afterwards the money is debased, he shall have the value of the coin current at the time of the tender. Semb. Dav. 27. Dy. 82. b.

Or, if one receives pure coin, and is afterwards bound to a restitution. Dub. Dav. 27. b.

So, if a receiver, who ought to pay upon request, receives pure coin, which, before the request, is enhanced. Per two J. Dy. 83. a. in marg.

So, if A. draws a bill of exchange to pay 100 rees dollars to B. in Portugal at such a day, and before the day, after the bill drawn, the king of Portugal enhances the rees; if the rees are not paid, as current at the date of the bill, B. may protest the bill, and resort to the



drawer ; for a foreign prince cannot alter the property of a subject of England. *R. Skin.* 272.

*Vide Abatement, (D 8.)*

Penalty for counterfeiting Money, or bringing false Money into the Kingdom.

*Vide Justices, (K 7.)*

Money decreed in Specie.

*Vide Chancery, (4 W 10. 16.)*

Bringing Money into Court.

*Vide Pleader, (C 10.)*

### M O N K.

*Vide Ecclesiastical Persons, (B 2, &c.)—Monastery.*

### M O N O P O L Y.

*Vide Bye-Law, (B 3.—C 3.)—Trade, (D 4.)*

### M O N S T R A N S D E D R O I T.

*Vide Prerogative, (D 81, 82.)*

### M O N S T R A N S D E F A I T S.

*Vide Pleader, (O 1, &c.)*

### M O N S T R A V E R U N T.

*Vide Ancient Demesne (H.)*

### M O N T H.

*Vide Ann (B.)*

### M O N U M E N T.

*Vide Cemetery (C.)*

### M O R T D' A N C E S T O R.

*Vide Affise, (C 1, &c.)*

### M O R T G A G E.

(A) Mortgage ; By Pledge of Goods.

**A** Mortgage, *quasi mortuum vadium*, is when things moveable or immoveable, as goods or lands, are pledged, as a security for repayment of money. *Co. L. 205. a. Blo. Nom. Verb. Mortgage.*

If goods are pledged for the security of money, the pawnee has a special property in them. *Sal. 522. R. Ow. 124.*

If the custody of the goods is a charge to him, he may use them as a recompence for his charge: as, he may ride an horse put in pledge. *Sal. 522. R. per three J. Ow. 124.*

So, tho' the custody be no charge, if the using is no prejudice to the goods, he may use them, but it shall be at his peril if he loses them. *Sal. 522. Ow. 124.*

If a cow be pledged, he may milk her. *Ow. 124.*

So, if the pawnee lose the goods without any default in him, it shall be the loss of the owner, and the pawnee shall have an action against him for the money. *Sal. 522. Vide post. (B).*

So, the pawnee has such a property as he may assign to another. *Ow. 124.*

But by tender of the money, his property is determined, and the pledge ought to be restored. *Sal. 522, 3. R. 2 Cro. 245. Tel. 178.*

And if he refuses to restore the pledge upon tender of the money, trover lies against him. *Sal. 522. R. 2 Cro. 245. Vide Action upon the Case upon Trover (D).*

So, he may be indicted; for perhaps it was delivered in secret without witnesses. *Per Holt, 1 Sal. 522.*

So, if the pawnee be robbed of the goods after tender, he shall answer for them. *Sal. 523.*

So, if he loses them by his using them. *Sal. 522.*

So, if the using be a prejudice, he cannot use them. *Ibid.*

So, if a pawnee assign the goods pledged to another, *detinue* lies by the owner, if he detains them after the money tendred to him. *Ow. 124.*

So, goods pledged cannot be taken in execution for the debt of the pawnee. *Ibid.*

[Where money is generally lent on a pledge, it does not deprive the lender of his remedy against the person, unless a special agreement to stand to the pledge only. *South-Sea Company v. Duncomb, M. 5 G. 2. Str. 919.*]

[After foreclosure and sale, the mortgagee may bring an action for the residue. *2 Brown. Ch. Rep. 125.*]

[A mortgage of goods and choses in action is fraudulent as against creditors, if the goods, &c. be not delivered to the mortgagee. *1 Will. 260. 2 T. R. 587.*]

[But a delivery of the grand bill of sale of a ship at sea is equivalent to a delivery of the ship itself. *2 T. R. 462.*]

[A ship at sea may be mortgaged, and if mortgagee takes proper methods to get it in possession, as bill of sale, &c. it will not be within *stat. Ja. 1.*; otherwise, if he suffers the ship to go on another voyage. *Ex parte Matthews, P. 1751, 2 Ves. 272.*]

[*Quere.* Is a mortgagee of a ship out of possession liable for the repairs? *Westerdell v. Dale, B. R. T. 37 Geo. 3. 7 T. R. 306.*]

### (B) At what Time it shall be redeemed.

**I**F a man pledge goods for money lent, he may redeem tho' he does not come at the day fixt for payment.

So,



So, if no day be appointed for payment, he may redeem at any time. 2 Cro. 245.

So, if the pawnee die, he may tender the money to his executor or administrator. 2 Cro. 245. Yelv. 178. 1 Bul. 29.

So, if he that pledges dies, his executor or administrator may tender the money. Dub. 2 Cro. 245.; for it was said, that the condition is personal, and it ought to be redeemed during his life. Yelv. 178. 1 Bul. 29.

If a day be appointed for redemption, and he that pledges dies before, his executor may redeem. 1 Bul. 29.

If a man that pledges goods be attainted, the king upon payment may redeem. Yel. 179. 1 Bul. 29.

If a man pledges goods to A. and in his sickness his wife with his consent delivers the goods to B., and if after the death of A. the money be tendred to his executor, and B. afterwards refuses delivering them, *trouer* lies against him; for B. had the custody only, and not any property. R. 2 Cro. 244. Yel. 178. 1 Bul. 29.

So, if the goods are delivered to B. upon consideration; for B. was not privy to the delivery upon the first contract, or to the condition. Yel. 178.

But by 1 Bul. 29. it seems as if then the tender ought to be to B.

If a man pledges goods perishable, and does not redeem them till they are perished, (no time being fixt for the redemption,) debt lies for the money. *Per Ch. J. and not denied by the Court.* Yelv. 179.

So, if the pawnee lose them without his default. Sol. 522.

[A pawnbroker has no lien on plate, after the death of tenant for life, who pawned it with him, as against the remainder-man, altho' the pawnee had no notice of the settlement. *Hoare v. Parker, B. R. E. 28 Geo. 3. 2 T. R. 376.*]

### Mortgage of Land; What shall be; and how redeemable.

*Vide Chancery, (4 A 1, &c.)*

### M O R T M A I N.

*Vide Capacity, (B 2, 3.)*

### M O R T U A R Y.

*Vide Prohibition, (G 11.)*

### M U L I E R.

*Vide Bastard (F).*

### M U R A G E.

*Vide Toll (A).*

### M U R D E R.

*Vide Admiralty, (E 1.)—Justices, (M 1, &c.—Y 5.)*

## MUTUAL AGREEMENTS.

*Vide Pleader, (C 53, 54, 55.)*

## MUTUAL REMEDIES.

*Vide Pleader, (C 56.)*

## NAME.

*Vide Abatement, (E 18, &c.—F 17, &c.)—Capacity, (B 4, 5.)—Feit, (B 1.—E 3, 4.)—Fine, (E 4.)—Franchises, (F 9.)—Grant, (A 2.—E 1, &c.)—Parliament (A).—Process, (A 2.)*

## NATIVO HABENDO.

*Vide Villenage, (C 1.)*

## NATURALIZATION.

*Vide Alien, (B 2.)*

## NAVIGATION.

*Vide Parliament, (H 25.)*

## (A) The Sea.

**N**AVIGATION is used upon the sea, or navigable rivers. The sea is, where the water flows and reflows, and is so spacious, that a man cannot see land from one shore to the other. 2 *Roll.* 169. l. 20. *Vide Admiralty.*

The king has the property *tam aquæ quam soli*, and all profits in the sea, and all navigable rivers. *Cal.* 17. *Dav.* 56, 57.

The jurisdiction and interest of the king extends over the whole sea between *Britain* and *Ireland*. 3 *Leo.* 73.

So, between *Britain* and *France*. *Ibid.*

So, to the middle of the sea between *Britain* and *Spain*. *Ibid.*

So, the property of the soil in all rivers, which have the flux and reflux of the sea, belongs to the king, and not to the lord of the manor adjoining, without grant or prescription. 1 *Sid.* 148. [*Dougl.* 441.]

[The public are not entitled at common law to tow on the banks of ancient navigable rivers; the right must be founded either on statute or on usage. 3 *T. R.* 253.]

So, the soil between high water-mark, and low water-mark, is part of the county, and may be within a manor. *Semb.* 1 *Ann.* 89.

As to fishery in the sea, or rivers, *vide Prerogative, (D 50.)—Piscary (A).*

As to the sovereignty of the sea, *vide Prerogative, (B 1.)*



## (B) An Arm of the Sea.

**A**N arm of the sea is, where the sea flows and reflows. 2 Rol. 169. l. 12.

And every arm of the sea, or navigable river so high as the sea flows and reflows, belongs to the king, and he has the same property therein as *in alto mari*. Dav. 56. 2 Rol. 170. l. 20.

But, by grant, or prescription, a subject may have the interest in the water and soil of navigable rivers; as, the city of London has the soil and property of the Thames, by grant. R. Dav. 56. b.

## (C) A Creek.

**A** Creek is an inlet of the sea, extending within the land, which gives no harbour to ships, nor is endowed with any privileges. Cal. 34.

## (D) An Haven.

**A**N haven is an harbour for ships; but it is not necessary that it should have privileges annexed to it. Cal. 34.

All havens and ports are *infra corpus comitatûs*. 4 Inst. 148.

And the water, banks, &c. within ports and havens, are within the power of the commission of sewers. Cal. 38.

[By stat. 19 G. 2. c. 22. ballast shall not be thrown out into any haven, port, road, channel, or navigable river, but only on land where tide or water never flows or runs, on pain of from 5 l. to 50 s. before one justice.]

[If a ship is sunk or stranded, the owner shall give security to remove it, or one justice may sell it, and with the money remove it, and render the surplus to owner.]

[Putting ballast into an hopper, with an intent to have it carried into the high and open sea, and its being thrown into the sea at fourteen fathom deep, is an offence against 19 G. 2. c. 22. *Brucklebank v. Smith*, M. 32 G. 2. 2 B. M. 656.]

*Vide post.* (E).

## (E) A Port.

**P**ORTUS est locus, in quo exportantur, et importantur merces. 4 Inst. 148.

Every haven and port of common right belongs to the king. Dav. 56.

[And it is part of the king's prerogative to create ports, which was lately exercised at Liverpool. By *Ld. Kenyon Ch. J. Ball v. Herbert*, B. R. E. 29 Geo. 3. 3 T. R. 261.]

And a grant to the subject is not good; for a subject cannot have it. 1 Rol. 5.

Every port is an haven for ships, which enjoys several privileges by prescription, or the king's grant. Cal. 34.

By the *st. M. Ch. 9. barones de 5 portubus, et omnes alii portus habeant omnes libertates, et consuetudines suas.*

A port has usually a port-reeve, and port-mote. 4 Inst. 148.

By

By the *st.* 1 *El.* 11. no wares, &c. shall be exported or landed, unless fish and salt, but at some open place, key, or wharf, as by commission shall be appointed, &c.

And by the *st.* 13 & 14 *Car.* 2. 11. a commission out of the *Exchequer* shall go from time to time to assign such ports for landing or shipping goods, &c. and to appoint the limits of such port, &c. And none shall ship any goods or land them, fish, coal, stone, or bestials except, but at such port, &c. [*Vide Case of the Extension of the London Wharfs.* 1 *Bl. Rep.* 581.]

[By *st.* 22 *Car.* 2. c. 11. *f.* 21. such rates and no other shall from time to time be taken for wharfage and crantage, as by his majesty with the advice of his privy council shall be assessed and allowed to be taken; a table of which rates shall be hung up at every one of the wharfs to be appointed in consequence of that statute.]

[By *f.* 44. there shall be left a continued tract of ground from *London Bridge* to the *Temple*, of the breadth of 40 feet of assize from the North side of the *Thames*, to be converted to a key, or public and open wharf.]

[By *f.* 45. the said tract of ground shall lie open and at large, without any division or separation, and the bounds of each proprietor's ground therein shall be distinguished only by denter stones to be placed in the pavement thereof; and no lighter, boats, or other vessel, shall lie before any the said wharfs or keys between the places aforesaid, on the North side of the river, longer than shall be necessary for the lading or unlading of goods, without the consent and permission of the wharfingers or proprietors thereof.]

[By *f.* 46. any person may lade or unlade any goods or merchandize at any of the said wharfs or keys for wharfage or crantage, whereof every proprietor, wharfinger, or other person concerned, shall and may demand and receive such rates and no other, for the same, as shall from time to time be set out and appointed by his majesty, with the advice of his privy council.]

[This statute does not give a right to the wharfingers which they had not by common law, and therefore they are not entitled to wharfage for goods unladen into *lighters* out of barges tho' fastened to their wharfs. 1 *Bl.* 413. 423.]

### (F 1.) Islands.

**A**N island is defined by the Imperial law to be *locus undique circumdatus aquis.* *Cal.* 20.

### (F 2.) Isle of Man.

The *Isle of Man* was antiently governed by its own king, who was subject to the king of *England.* *Cal.* 20. 4 *Inst.* 283. 7 *Co.* 21. a. *Calvin.*

And being a kingdom of itself, is no part of the realm of *England.* 4 *Inst.* 201. 283. *R.* 40 *El.* 4 *Inst.* 284.

But the lord of this isle is called king, and has a crown of gold. 4 *Inst.* 283.

*Anno* 18 *Ed.* 1. it was granted to *Walter de Huntercomb*; by *Ed.* 2. to *P. Gaveston*; and afterwards to *H. de Bellomonte.* 4 *Inst.* 284.

A. D.



A. D. 1393, 17 R. 2. William lord Scroop purchased it of W. lord Montacute. 4 Inst. 283.

1 H. 4. Wm. lord Scroop forfeited it for high treason, and the forfeiture was confirmed by act of parliament. 4 Inst. 283.

And afterwards H. 4., by letters patent, granted *insulam, castrum, gelam, et dominium de Man*, and all isles belonging thereto, to Hen. earl of Northumberland and his heirs. 4 Inst. 283.

And when, by the attainder of Hen. earl of Northumberland, 5 H. 4. it came to the king, and was confirmed by parliament, the king, 7 H. 4., granted it *una cum patronatū episcopatus* to Sir John Stanley, for life, and afterwards to him and his heirs. Ibid.

Sir John Stanley was grandfather to Hen. lord chamberlain to H. 6. and by him created lord Stanley. Ibid.

Hen. lord Stanley was grandfather to Thomas, created by H. 7. earl of Derby, to him and the heirs males of his body. 4 Inst. 283, 4.

And therefore, it shall be grantable by the king's letters patent. Co. L. 9. a. 4 Inst. 284. 2 And. 115, 116.

And when granted, it descends according to the rules of the common law. R. 4 Inst. 284. Co. L. 9. a.

So, the king by patent may enable the governor to make a justice there. Pal. 345.

And the construction of the patent shall be determined by the common law. Ibid.

But no one has an estate of inheritance there, except the lord, and the bishop. 2 And. 116.

And the bishop there is not created by *congè d'elire*, but by presentment of the king of Man. Pal. 345.

In the kingdom of Man are two castles, 17 parishes, four markets, and many villages. 4 Inst. 283.

A bishop was there appointed by Gregory 4th, who is subject to the archbishop of York. 4 Inst. 285.

The inhabitants have a peculiar language. Ibid.

And are governed by their own laws: by their ecclesiastical law they are cited, the cause determined, and within eight days they obey, or are imprisoned. 4 Inst. 285. 2 And. 116.

Every contract shall be completed *per traditionem stipulae*. 4 Inst. 285.

And this upon a contract for lands, as well as for personal things; for the parties appear in court, declare the contract, and deliver a straw in feisin, and the contract is recorded.

Anno 1583, by a law in the same isle, a sale of lands without licence of the lord, or his council, or three of them, viz. his lieutenant, receiver, and comptroller, shall be void, and each party forfeits 3 l.; such licence to be made by the clerk of the rolls, and to be under the hand of the council, or those three of them.

And now, tho' made *per traditionem stipulae*, if it be not with licence, &c. it will be void. R. at a court within the isle, 1611, inter Callow and Sir Hagb Cannel. R. 14 May 1641, inter Thompson and Calister.

But if made with licence, &c. without *traditionem stipulae*, it will be void.

So, in the isle of Man taking a capon, or pig, &c. will be felony. 12 H. 8. 5. a.

But not taking an horse, or ox; for they cannot hide them. Ibid. An

An act of parliament in *England* does not bind them, unless they are expressly named. *R. 4 Inst. 284. R. 2 And. 116. 4 Mod. 223.*

And therefore, the *st. W. 2. de donis* does not extend to them. *R. 4 Inst. 284.*

Nor, the *st. 27 H. 8. 10. of uses. 4 Inst. 284. 2 And. 116.*

Nor, the *st. 32 & 34 H. 8. of devises by will. 4 Inst. 284. 2 And. 116.*

So, *breve domini regis* does not run there: and therefore, a wife cannot sue to be endowed there. *4 Inst. 284.*

An office upon a death cannot be sued out of *Chancery. Ibid.*

Nor, any office to entitle the king. *4 Inst. 284. 1 Rol. 246.*

Yet the king by commission under the great seal may seize lands forfeited to him, which, being returned upon record, gives seisin to the king. *R. 4 Inst. 284.*

So, the king may grant a commission for redress of wrong, but the commissioners must proceed according to the law there. *4 Inst. 285.*

So, an appeal lies to the king from a judgment there, *ut superiori domino. R. coram concilio Jan. 1716, inter Christian and Corrin. Acc. Jan. 281.*

So, the judges will take notice of the laws of the isle of *Man. Pal. 345.*

So, the isle of *Man* appertains to the crown of *England*, tho' it be not parcel, nor held of it. *Per Co. 1 Rol. 246.*

[The *Isle of Man* is not part of the realm of *England*, but parcel of the king's crown of *England*, held as a feudatory dominion, by liege homage of the kings of *England*. *Earl of Derby v. Duke of Athol, T 1751, 2 Ves. 337.*]

[A question relating to the right and title to the *Isle of Man*, may be determined in *England*, in *Chancery*, the King's Bench, or (*qu.*) before the king in council. *Earl of Derby v. Duke of Athol, H. 1748, 1 Ves. 202.*]

[By letters patent 7 *J. 1.* a grant was made by the crown of the *Isle of Man*, and of all the rectories and tithes, by name, to *William* earl of *Derby* for life, to his wife for life, to their son *James* lord *Stanley* in fee, to be held of the king by liege homage, rendering immediately after that homage two falcons, and so to his successors every coronation-day two falcons: this is a socage tenure, and (*semb.*) petty serjeanty. *Earl of Derby v. Duke of Athol, T. 1751, 2 Ves. 337.*]

[By private act of parliament, 7 *J. 1.* *William* earl of *Derby*, and his wife for life, and the longest liver; then their son *James*, and the heirs male of his body; then *Robert Stanley*, and the heirs male of his body; then the heirs male of the body of earl *William*; then the right heirs of *James* lord *Stanley*, shall hold against the king, &c. and against the widow and daughters of earl *Ferdinand*, (earl *William's* elder brother,) all the *Isle of Man*, with the appurtenances: and neither *James*, nor the heirs male of his body, nor *Robert*, nor the heirs male of his body, nor any of the heirs male of *William*, shall have power to alien it, but it shall continue as above limited; only they may make leases, as tenants in tail may do in *England* by *stat. H. 8.*]

[In 1666, *Charles* earl of *Derby* makes a lease for 10,000 years, of the rectories and tithes in *Man* for the benefit of the poor clergy; and by deed, as collateral security, conveys lands in *Lancashire*, in trust,



trust, to permit him and his heirs to hold said lands, and receive the rents, till interruption in receipt of the rectories and tithes by him or those claiming under him or his ancestors, and then to enter and receive.]

[In 1735, *James* earl of *Derby* (heir male of *James* lord *Stanley*, in the grant and act mentioned) devises to Sir *Edward Stanley* (who on his death became earl of *Derby*, and his heirs for ever) all his honours, real estate, and hereditaments, whatsoever and wheresoever.]

[In this *James* ended the male-line of earl *William*.]

[The devise in 1735 was void, by force of the private act of parliament, whereupon the *Isle of Man* descended to *James Duke of Athol*, as right heir of *James* lord *Stanley*, (afterwards earl of *Derby*, beheaded at *Bolton* in *Lancashire* in 1651,) being his great grandson by *Charlotte* his third daughter.]

[The lease of the rectories and tithes was also void, and the trustees were entitled to the rents of the lands in *Lancashire*, from the time the tithes were evicted by the duke of *Athol*. *Earl of Derby v. Duke of Athol*, T. 1751, 2 *Ves.* 337.]

[By *Stat. 5 Geo. 3. c. 26.* in consideration of 70,000 *l.* to the duke and duchess of *Athol*, the island, castle, pele, and lordship of *Man*, and all royalties, &c. are unalienably in his majesty; except the land-property rights, as lord of manors, patronage of bishopric, &c.]

[By *Stat. 5 G. 3. c. 30.* bounties on corn exported from *Britain* or *Ireland* to *Man*, are discontinued.]

[*Stat. 5 G. 3. c. 39.* provides against smuggling with the *Isle of Man*.]

[*Stat. 5 G. 3. c. 43.* permits importation of several commodities of *Man*, and grants bounties on linens made in *Man*, and exported from *Britain*.]

[*Stat. 6 G. 3. c. 50.* extends the act 29 *Car. 2.* relating to taking affidavits in the country, to the *Isle of Man*, and empowers the king to appoint ports therein for landing and shipping goods.]

[*Stat. 7 G. 3. c. 45.* encourages and regulates the trade and manufactures of *Man*.]

[*Stat. 11 G. 3. c. 52.* provides for repairing the harbours in *Man*.]

[*Stat. 12 G. 3. c. 58.* is for encouraging the herring-fishery of *Man*.]

#### (F 3.) *Jersey*.

The islands of *Jersey* and *Guernsey* were parcel of the duchy of *Normandy*, and with that united to the realm of *England* by *H. 1.* after the conquest of *Robert* his brother. 4 *Inst.* 286.

And tho' *Normandy* was lost by king *John*, and afterwards the loss confirmed by *H. 3.*, yet these islands continue part of the dominion of *England*. 4 *Inst.* 286.

*Jersey* antiently was *Gearsey*, olim *Casarea*. *Ibid.*

And had temp. *Jac.* 12 parishes and 4 castles. 4 *Inst.* 287.

But these islands are not parcel of the realm of *England*. 7 *Co.* 21. a. *Calvin*.

It seems to be meant that they were not so originally. *Cont. Seld. de Ma. Cl.* 4 vol. 1351. *Acc. App. H. Jer.* 440.

*Jersey* is governed by its own laws and customs. 7 *Co.* 21. a. *Calvin*.

And the king's writ does not run there. 4 *Inst.* 286.

The usual way of proceeding there is according to the customs of *Normandy*. *Ibid.* But

But king John constituit 12 coronatores ad placita et jura coronæ conservanda, et concessit quod ballivus per visum coronator. placitare sine brevi poterit de assisa novæ disseisinæ, de morte antecessor., et de dote, infra annum. 4 Inst. 286. App. H. Jer. N. 1.

The twelve coroners are elected by the country upon death, and sworn and ought with the justices, or (if they are absent) by themselves, *judicare de omnibus casibus in insulâ emergent. (exceptis nimirum arduis, as high treason, &c.) amerciamenta taxare, &c.* App. *ibid.*

*Placitum insulâ coram aliquibus just. inceptum non debet extra insulam adjournari.* App. *ibid.*

*Nullus de tenemento quod per annum et diem quiete tenuit, sine brevi de rancel. respondere teneatur.* App. *ibid.*

*Nullus debet imprisonari in castro, nisi in causa criminali, et hoc per judicium coronator. jurat.* App. *ibid.*

So, a commission and grant of the king under the great seal has its force there. 4 Inst. 286.

[The royal court of Jersey cannot transmit a cause to the king for difficulty, but must proceed to judgment. *Magoons v. Dumaresque, M. 13 G. 2d. Raym. 1448.*]

The king granted the isle, royalty, and government there. *Vide App.*

The king grants the office of bail, that he shall not be named by the governor. *Vide App.*

[By stat. 9. G. 3. c. 28. Jersey and Guernsey may export to America, directly, goods necessary for the fishery; and import non-enumerated goods, except rum.]

(F 4.) Guernsey.

So, Guernsey was united with Normandy to the crown of England temp. H. 1. and has so continued. 4 Inst. 286. *Vide ante, (F 3.)*

And has been governed as Jersey by its own laws. 4 Inst. 286.

(F 5.) Isle of Wight.

The isle of Wight is part of the county of Hampshire, and governed by the laws of England. 4 Inst. 287. Cal. 21.

(G) The Plantations.

(G 1.) Their Government.

THE plantations are colonies of the kingdom of England, which belong to the crown and kingdom, and are part of their dominion. *Ca. Parl. 31.*

The inhabitants there are within the king's allegiance, and subject to the laws of England. *Ca. Parl. 32. Vide Ley (C).*

The king by his letters patent constitutes a governor.

And he must act pursuant to law.

And for misfeasance shall be punished by action at law. *Adm. Ca. Parl. 30.*

So, if a governor there makes a provost-marshal, or other officer of justice there, he may make a deputy. 4 Mod. 222.

And upon the deputation may reserve an annual rent with covenants, &c. to pay, and it will not be within the *st. 5 (or 5 and 6) Ed. 6. 16.* against the sale of offices. *R. 4 Mod. 222.*



[Proprietors of provinces may settle boundaries between themselves: as, the lords marchers and counties palatine might do. And this is not an alienation, for these shall be presumed the true and antient limits. *Penn v. Lord Baltimore*, 1750, 1 *Vez.* 444.]

(G 2.) Courts.

In *Virginia*, by a *statute* there 1662, c. 19. the governor and council shall hold a general court thrice a year, viz. 20 *March* for 18, 20 *September* and 20 *November*, for 12 days each, and shall sit each day from eight to eleven in the morning, and from one to three in the afternoon.

By *st.* 1666, c. 3. first court shall begin 15 *April* instead of 20 *March*.

By *st.* 1662, c. 31. by commission in each county, four most judicious shall act as justices of peace, (one *Qu.*) according to the laws of *England*, whose courts shall be called county courts, and each justice not attending, unless just cause, forfeits 300*lb.* of tobacco.

By c. 25. the governor, and one or two of the council commissioned by him, shall go the circuit yearly in *August*, and determine all causes then depending in the county courts, provided no counsellor go in the river where he inhabits.

By *st.* 1662, c. 26. general court shall take cognisance of no cause under 20*s.* or 200*lb.* of tobacco.

Causes under, any justice may hear and determine.

The action shall be entred, and by the *st.* 1662, c. 32. till then no sheriff shall arrest, on pain of 500 *lb.* of tobacco.

By c. 22 & 33. plaintiff shall file a declaration three days at least before hearing in the general and county courts, to which an answer shall be put in, in writing.

By *st.* 1663, c. on the day for hearing, the plaintiff, upon call, not appearing, shall be nonsuit, and the defendant, upon call, not appearing, shall have judgment against him.

So, by *st.* 1662, c. 4. on *non inventus* returned, judgment shall be for what the plaintiff swears due; so, against bail.

By the *st.* 5 G. 2. 7. if a suit depends in the courts of law or equity in any of the plantations for a debt to the king, or debt, or account, where any residing in *Great Britain* is party, the plaintiff or defendant, or a witness to be made use of, may prove any matter by *affidavit*, or if a quaker by affirmation, made before the mayor, &c. of a corporation, city, or borough, which transmitted under the common seal or seal of office, shall be of the same force, as if the party was examined *viva voce*, &c.

And by the same *statute*, houses, lands, negroes, &c. in any of the plantations, shall be liable to the debt of the king, or any of his subjects, and shall be assets in like manner as real estates to a debt on specialty, and shall be seized, sold, &c. as personal estates are in the plantations.

[If a party appeals from a court in one of the plantations to the privy-council, he must procure the proceedings to be transmitted, and proceed within a year after the appeal allowed in the plantations, or the appeal will be dismissed with 5*l.* costs, without notice to the appellants. *Gordon v. Lowther*, M. 13 G. Ld. Raym. 1447.]

[The original jurisdiction as to the boundaries of provinces in *America*

*Vide* is in the king in council, but by the contract of the parties, as by executing articles in *England*, the courts in *England* may have jurisdiction. *Penn v. Ld. Baltimore*, P. 1750, 1 *Ves.* 444.]

## (G 3.) Laws.

The laws of the plantations are the same, by which they were governed before their conquest, or accession to *England*, except where new laws are obtained since their conquest. *R. 4 Mod.* 225. *Vide Ley (C).*

And if new laws are given, their antient customs, if not abolished, may remain. *4 Mod.* 225.

And therefore, a new statute made since their conquest, does not bind them, unless they are particularly named. *R. 4 Mod.* 225.

## (H) Beacons, &amp;c.

FOR the direction of mariners, beacons, light-houses, and sea-marks are erected. *4 Inst.* 148.

Before the time of K. *Ed.* 3. stacks of wool were burnt to give notice of the approach of enemies upon the coast, and in his reign, beacons. *4 Inst.* 148.

Light-houses are *phari*, built for the direction of mariners in the night. *Ibid.*

Sea-marks are steeples of churches, castles, trees, &c. for their direction by day. *Ibid.*

By the common law, the king only could direct the erecting of any of these by his commission under the great seal. *Ibid.*

But now the king, by his letters patent, grants a power to the admiral to erect. *4 Inst.* 149.

And by the *st.* 8 *El.* 13. the corporation of the *Trinity-house* at *Deptford* may erect so many beacons, and sea-marks on the sea-coast as to them shall seem meet. *Ibid.*

By custom, a customary payment, called *beaconage*, is due in many places for the maintenance of them. *Ibid.*

And a prescription in the Cinque-Ports to make tallage for such purpose, will be good. *R. Ray.* 448.

And an order for it will be good, tho' it does not shew that they are in decay. *R. Ray.* 449.

[*British* ships in passing by the *Edystone*, and other light-houses in the channel, not touching at any place in *Great Britain* or *Ireland*, are not liable to pay the light-house duties to the *Trinity house*. *Trinity-house v. Sorbie*, B. R. T. 30 *Geo.* 3. 3 T. R. 768.]

## (I 1.) Navigation shall be free.

AS to the freedom of trade, *vide Trade*, (A 1, &c.)

By the *st.* 18 *Ed.* 3. *st.* 2. c. 3. the sea shall be open to all.

[*Stat.* 26 *G.* 2. c. 6. directs the performance of quarantine, the manner, penalties, &c.]

(I 2.) But it shall be in *English* Ships, &c.

But by the *st.* 5 *R.* 2. 3. and 6 *R.* 2. 8. none shall import, or export goods but in ships of the king's allegiance, (unless such ships able



and sufficient are not to be had,) on pain of forfeiture of the goods. [The *st.* 5 *R.* 2. 3. is repealed by the *st.* 1 *El.* 13.]

By the *st.* 14 *R.* 2. 6. merchants of *England* shall freight only ships of the realm, so as the owners will take reasonable gains.

By the *st.* 4 *H.* 7. 10. and 23 *H.* 8. 7. [the *st.* 23 *H.* 8. 7. is expired] importing wines in any but *English* ships was prohibited; but the *st.* 4 *H.* 7. 10. is altered by the *st.* 5 & 6 *Ed.* 6. 18. and repealed by the *st.* 1 *El.* 13.

By the *st.* 5 *El.* 5. [expired] none shall import wine or woad from *France*, but in a vessel whereof a subject is owner, or part owner.

So, by the *st.* 1 *El.* 13. revived by the *st.* 13 *El.* 15.

By the *st.* 12 *Car.* 2. 18. no goods shall be imported, or exported, into, or out of any lands, islands, &c. belonging, or which may belong, to the king, his heirs or successors, in *Asia*, *Africa*, or *America*, but in such ships as truly belong to the people of *England*, *Ireland*, *Wales*, or *Berwick*, or are of the built of and belonging to such lands, islands, plantations, &c. as the right owners, and whereof the master and three-fourths of the mariners are *English*, on pain of loss of all the goods and also the ship, &c. one third to the king, &c.

[In an information on this statute, it was determined that a ship which was manned by mariners resident for some years in *Russia*, but who were not natives of the country, was exempt from the penalties of the act. *Scot v. Schawartz*, *Scac. M.* 11 *Geo.* 2. *Com.* 677.]

And by the same statute, *f.* 3, 4. no goods of the growth or manufacture of *Africa*, *Asia*, or *America*, shall be imported into *England*, &c. but in such ships, &c. And no goods of foreign growth or manufacture, to be imported, &c. in such ships, shall be shipped from any places, but those of such growth or manufacture, or from such ports, &c. where they only can, or usually are, first shipped for transportation, on pain of the like forfeiture; one moiety, &c.

[If a ship be seized, as forfeited by this act, by a governor of a foreign country belonging to *Great Britain*, the owner cannot maintain trespass against him, altho' he has not proceeded to condemnation; for by the forfeiture the property is divested out of the owner. *Wilkins v. Despard*, *B. R. H.* 33 *Geo.* 3. 5 *T. R.* 112.]

Provided, not to extend, 1. To goods or commodities of the streights, or *Levant* seas, loaden in such shipping from the usual places of lading them in the streights, or *Levant* seas; nor, 2. To *East India* commodities loaden in such shipping in any of those seas southward and eastward of the *Cape Bona Speranza*, tho' not at the place of the growth; nor, 3. To any goods loaden in such vessels from *Spain*, *Portugal*, *Azores*, *Madeira* or *Canary* islands, of the growth or manufacture of any of those places; nor, 4. To bullion or goods taken by way of reprisals, by such ships having commission from the king.

So, by the *st.* 7 & 8 *W.* 3. 22. *f.* 2. no goods shall be imported to or exported from any colony or plantation that is or may be the king's in *Asia*, *Africa*, or *America*, or carried from one plantation to another, but by ships, &c. belonging to the people of, and being of the built of *England*, *Ireland*, or the plantations, whereof the master and three-fourths of the mariners be of the same people, except prizes, or by contract with commissioners, &c. for masts, &c. on pain of forfeiture *ut supra*.

But

But if a foreign ship be naturalized, importation in it will be lawful.

So, if a foreign ship be naturalized, and afterwards sold to a foreigner, who resells it to an *Englishman*, it shall be used without taking the new oath required by the *st. 12 Car. 2. 18. R. Hard. 311.*

[But now by *st. 26 G. 3. c. 60.* no ship built out of his majesty's dominions, except prizes, shall be entitled to the privileges of a *British* ship.]

[And by *st. 17.* when and so often as the property in any ship or vessel belonging to any of his majesty's subjects, shall be transferred to any other or others of his majesty's subjects, in whole or in part, the certificate of the registry of such ship or vessel shall be truly and accurately recited, in words at length, in the bill or other instrument of sale thereof, and that otherwise such bill of sale shall be utterly null and void, to all intents and purposes.]

[An *absolute* bill of sale of a ship at sea is void under this section, unless the certificate of the registry be recited in it. *3 T. R. 406.*]

[Altho' the vendee give at the same time an undertaking to restore the ship on a future day on payment of a certain sum advanced by him on the credit of this security; and tho' the vendee have also the grand bill of sale, and have taken possession of the ship immediately on her arrival, he cannot retain the ship as having a lien on her, against the assignees of the vendor, who became a bankrupt after this transfer of the ship. *Ibid.*]

[But a mere clerical mistake will not vitiate it. *Rolleston v. Smith, B. R. H. 31 Geo. 3. 4 T. R. 161.*]

[*A.* and *B.* being joint-owners of a ship, *A.* conveyed his moiety to *B.*, but in the bill of sale the certificate of registry was not truly recited; *B.* took possession, and afterwards mortgaged the whole ship to *A.* who did not take possession; then *B.* ordered *C.* to repair the ship, afterwards *B.* conveyed one half of the ship to *A.* and the other to *D.* It was holden, that the first bill of sale was an absolute nullity under this statute, and that *A.* was liable to *C.* for the repairs in an action for work and labour brought by *C.*, *A.* not having pleaded in abatement, that *B.* ought also to have been sued. *Westerdell v. Dale, B. R. T. 37 Geo. 3. 7 T. R. 306. Supra, in Merchant, (E 9.)*]

So, the importation of wine from *Spain*, or other country in *Europe*, need not be in an *English* vessel, or in which the master and three-fourths of the mariners are *English*. *Semb. Hard. 487, 8.*

[The husks and shells of cocoa nuts, separated from the nut by fire, is not a manufacturing, but liable to the act of navigation. *Anon. H. 1725, Bunb. 212.*]

[Information of debt will lie for duties on *French* wines imported from *Holland*, tho' they might have been seized as forfeited. *Attorney-General v. Jewers, M. 1726, Bunb. 225.*]

[On an information for a ship forfeited for bringing over goods not of the growth, &c. notice in the master is not necessary. *Per totam Curiam, Idle v. Vanbeck, P. 1727, Bunb. 230. Mitchel v. Torup, H. 6 G. 3. Parker, 227.*]

[But a distinction shall be made, whether the goods were part or not part of the cargo; and if passenger privately brings over a small parcel, it shall not be deemed part of the cargo, nor the ship forfeited. *Semb. Greeby v. Palmer, H. 1733, Bunb. 232.*]



[If a ship comes into port on pretence to refit, and the sailors run teas, it is a forfeiture of the ship, tho' she was seized and in the possession of the officers before the running. *Attorney-General v. Jackson*, T. 1727. *Bunb.* 236.]

[By 13 G. 2. c. 3. in time of war, three-fourths of the crews of privateers or merchant ships may be foreigners.]

[And any foreign seaman, who has served two years in time of war, on board a man of war, merchant ship or privateer, is thereby naturalized.]

[By *stat.* 14 G. 2. c. 36, trade to and from *Persia*, thro' *Russia*, is permitted.]

[By *stat.* 18 G. 2. c. 17, a reward of 20,000 *l.* is given for the discovery of a passage by sea from *Hudson's Bay* to the Western and Southern ocean of *America*.]

[*Stat.* 16 G. 3. c. 6, grants reward of 20,000 *l.* for discovering a passage between the Atlantic and Pacific Oceans North of 52d latitude, and 5000 *l.* to such as shall first approach within one degree of the North Pole.]

[By *stat.* 13 G. 3. c. 26, no alien may purchase any share of a ship belonging only to natural-born subjects, without consent in writing of the owners of three-fourths in value.]

[*Stat.* 17 G. 3. c. 48. empowers commissioners to give rewards under 5000 *l.* for probable proposals for discovering longitude.]

### (I 3.) Owner of Ship.

(I 3.) *The major part of the owners over-rules all.*] If there are many owners; the ship shall be employed by consent of the majority, *Sho.* 13.

And the others, who do not consent, shall have their share of the profit. *Ibid.*

Or, by order in the Admiralty, the owners who consent may give security, that they will satisfy him who does not consent for his share, if the ship perish, and will render his share, if the ship return; whereupon the owner who does not consent, shall have no part of the freight, 2 *Ca. Ch.* 36. (*Vide Carth.* 27.) [*Vide Ambler*, 255.]

Nor, shall be relieved for it in equity. *R.* 2 *Ca. Ch.* 36.

If there are many part-owners of a ship, and the major part agrees to the voyage, the assent of all shall be intended, who do not express a dissent. *R.* *Skin.* 230. *Adm. Carth.* 27.

If any dissent, an action upon the case lies against him for the damage in the loss of the voyage. *Per Holt*, *Carth.* 27. *Comb.* 110.

So, it was allowed, that upon security for the shares of the lesser part of the owners, given by recognizance in the Admiralty, the voyage should proceed. *R.* *Skin.* 230.

But now it is adjudged, that the voyage cannot proceed, but a prohibition goes, if there be a suit in the Admiralty upon such recognizance. *R.* *Carth.* 27.

[The voyage shall proceed on the recognizance being given in the Admiralty, 1 *Will.* 101.]

[If exorbitant fees be taken by a custom-house officer from the master of a vessel on his taking out a cocket and bond pursuant to *st.* 13 & 14 *Car.* 2. c. 11. s. 7. tho' the statute imposes the duty on the master

master personally, the owners may recover the excess in assumpsit for money had and received. *Cowper*, 805.]

(14.) Master.

The master of a ship has the custody and trust of the ship and the goods in it. 3 *Lev.* 38. *De Jure M.* 209. *Vide Merchant*, (E 5, 6.)

And therefore, he shall answer for all goods, which are lost by his default; for he has a recompence for the carriage. *De Jure M.* 209. *Vide Action upon the Case for Negligence*, (C 1.)

And shall be charged for the duty, at any port, for weighage, &c. of the goods. *R.* 3 *Lev.* 38. *R.* 1 *Sal.* 249.

If the master contract and bind the ship to such a value by assent of the owner, he shall be bound by the contract of the master. 2 *Ca. Ch.* 238.

Otherwise, if the contract be without the allowance of the owner. *Ibid.*

Or, if the master makes a deviation, or barratry, whereby the goods are lost; tho' the owner allowed the master to make the contract, he shall not answer for the deviation. *R.* 2 *Ca. Ch.* 239.

So, if the master buy victuals for the ship, and do not pay for them, the owners are responsible to the vendor; for the master is but their servant. 2 *Ver.* 643.

Tho' the owners give the master money for the victualling. *Ibid.*

[If master orders necessaries (as sails, &c.) for the ship, both owner and master are liable, unless it appears that credit was given to the owners only, and then they only are liable. *Hoskins v. Slayton*, T. 10 & 11 G. 2. B. R. H. 376. 1 T. R. 108.]

[As where the goods are ordered for a ship by the owners, before the appointment of the captain, tho' some are not delivered till afterwards, yet as no personal credit is given to the captain, he is not answerable for any of them. 1 T. R. 108.]

[The tradesman furnishing the goods has also a specific lien on the ship. *Ibid.*]

[A promise by the captain on behalf of his owners, when the ship was taken, to pay monthly wages to one of the sailors, in order to induce him to become an hostage, is binding on the owners, tho' they abandon the ship and cargo. 1 T. R. 73.]

[The owner of a ship is not liable beyond the value of the ship and freight under 7 G. 2. c. 15. s. 1. in the case of a robbery in which one of the mariners is concerned by giving intelligence, and afterwards sharing the spoil. 1 T. R. 18.]

[The master of a ship has not a lien on the ship for stores and provisions furnished on his credit. *Doug.* 101.]

[The *stat.* 5 Geo. 2. c. 20. which inflicts a penalty of 20 l. on persons piloting down the Thames, &c. only extends to vessels sailing on foreign voyages, and not to those which, having performed their voyages, are steered from one wharf to another on the river for the purpose of unloading their cargoes. *Rex v. Lambe*, M. 33 Geo. 3. 5 T. R. 76. *Rex v. Neale*, E. 39 Geo. 3. 8 T. R. 241.]

[By *stat.* 31 Geo. 3. c. 54. s. 7. for regulating the African slave-trade, it is necessary that the certificate, of the captain's having served, as that act requires, should be attested by the owner or owners of the



ship or ships in which the service was performed. *Farmer v. Legg*,  
B. R. E. 37 Geo. 3. 7 T. R. 186.]

(15.) Mariners.

Mariners must be obedient to the master; for if one of them creates an open debate, he may be put out of the ship upon land, and shall lose his goods in the ship, and the half of his wages. *De Jure M.* 220.

If he use arms or weapons, the others may apprehend, imprison, and bring him to justice.

If he conspire to force the master to another port out of his voyage, it will be a capital crime.

They must be mutually aiding and assisting to one another upon the sea. *De Jure M.* 220.

They must remain in the ship till it be discharged, and the tackle taken down and ballasted anew.

Every one must work with his companion during the lading and discharge of the ship.

And shall not only deliver goods out of his ship, but must carry them for a reasonable hire to the place upon land where they ought to be put, if there are no other carriers or porters for it.

By the custom of merchants, mariners are entitled to wages at every delivering port. 2 *Ver.* 728.

Tho' an agreement be made with them, that they shall not demand wages till a return to the port of London. *Ibid.*

When the freight was also to be paid; and provision was made before the voyage begun, that, every six months, wages should be paid for one month, during the voyage. *Ibid.*

But a mariner shall lose his wages from the last port, if the ship or goods are lost. 1 *Sid.* 179. [*Dougl.* 539.]

[Wages in general are due upon the ship's arrival at the first port of destination or delivery. And in a voyage from England to Newfoundland, and thence with fish to Spain, Newfoundland is not a port of delivery; and if the ship is taken between Newfoundland and Spain, the mariner loses his wages. *Hernaman v. Barwen*, H. 6 G. 3. 3 B. M. 1844.]

So, he shall lose his wages, if he rebels, and does not repent in due time, and tender amends. *De Jure, M.* 220.

If he refuses aid and assistance to his companion upon the sea. *Ibid.*

If he does not help to save the goods when the ship perishes.

If he absents himself when the ship is ready to sail.

[There are several statutes, namely, 31 Geo. 2. c. 10. 26 Geo. 3. c. 63. 32 Geo. 3. c. 33. and 32 Geo. 3. c. 67. which regulate the modes by which seamen and marines may convey their prize-money or wages in the hands of the public officer. And every instrument of conveyance for this purpose must be conformable to the regulations of these statutes. *Turtle v. Hartwell*, B. R. M. 36 Geo. 3. 6 T. R. 426.]

[C., by virtue of an order from B. to receive all money due to him for prize-money, obtains three out of four instalments due from A. to B. on that account: these payments are afterwards questioned by B., who brings his action against A. for the whole sum, and at the same

same time C. demands the fourth instalment: an application to the court by A. to stay proceedings in the action against him by B., on his paying the fourth instalment to such person as they should appoint, was refused. *Macdonald v. Pasley, C. P. M. 38 Geo. 3. 1 Bos. & Pull. 161.*]

[*Semb.* That nothing but a power of attorney, or a will complying with the provisions of the above acts, will warrant the payment to third persons of money due from the public to sailors and marines, *Ibid.*]

NE ADMITTAS.

*Vide Pleader, (3 I 3.)—Quare Incumbavit (A).*

NECESSITY.

*Vide Chancery, (4 O 4.)—Pleader, (3 M 20. 30.)*

NE EXEAT REGNO.

*Vide Chancery (4 B.)—Prerogative, (D 3, 4.)*

NEGATIVE AND AFFIRMATIVE.

*Vide Pleader, (R 3.)*

NEGATIVE PREGNANT.

*Vide Mandamus, (D 5.)—Pleader, (R 5, 6.)*

NEGLIGENCE.

*Vide Action upon the Case for Negligence.—Pleader (2 P 1, &c.—2 Q—2 R.)—Return, (D 2.)—Viscount, (D 1.)*

NE INJUSTE VEXES.

*Vide Droit (I).*

NE UNQUES ACCOUPLE.

*Vide Pleader, (2 Y 10.)*

NE UNQUES EXECUTOR.

*Vide Pleader, (2 D 7.)*

NE UNQUES SEISIE.

*Vide Pleader, (2 Y 7.)*

NEWGATE.

*Vide Imprisonment (E).*

NEW TRIAL.

*Vide Pleader, (R 17.)*



NIGHT.

*Vide Temps* (E—F).

NIL DEBET.

*Vide Pleader*, (2 V 6.—2 W 13. 17. 43. 47.)

NIL DETINET.

*Vide Pleader*, (2 W 44.—2 X 3.)

NIL DICIT.

*Vide Pleader*, (E 42.)

NIL HABET IN TENEMENTIS.

*Vide Pleader*, (2 W 48.)

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NOBILITY.

**A**S to names of dignity, and how created, *vide Dignity*, (A—B 1, &c.—C 1, &c.)—*Prerogative*, (D 31.)

How the trial shall be, whether one be noble, *vide Dignity* (D).

How a dignity will be forfeited, *vide Dignity* (E).

Privileges of the nobility, as to trials by peers, &c. *vide Dignity*, (F 1, &c.)—*Parliament*, (L 16, &c.)

As to the right, style, coronation and dignity of the king, *vide Roy*.

As to his prerogatives, *vide Prerogative*.

As to the queen, and the king's children, *vide Roy* (F 1, &c.—G).

As to the privy council, and other council of the king, and guardian of the kingdom, *vide Roy*, (E 2.—H 1, 2.)

(A) Precedence.

**B**Y the *stat.* 31 H. 8. 10. none but the king's children shall have place on either side the throne in parliament, whether the king be present or absent.

By the common law, the king may give such precedence to his counsellors and subjects as he pleases. 4 *Inst.* 361.

And therefore, by the king's grant, a duke may be placed by his patent next to such, and before such a duke. *Ibid.*

Or, that he be *præcomes*, and shall have precedence before all earls. R. 4 *Inst.* 361.

By the *stat.* 31 H. 8. 10. the king's vicegerent in ecclesiastical causes shall sit on the right-hand of the parliament-house on the same form with, but above the archbishop, then the archbishop of *Canterbury*, *York*, *London*, *Durham*, *Winchester*, then the other bishops according to antienty, on the same side and form.

The archbishop of *Canterbury* precedes, then the archbishop of *York*, then the bishop of *London*, the bishop of *Durham*, the bishop of

*Winchester*,

*Winchester*, and afterwards every bishop of the one province or the other, according to his antienty. 4 *Inst.* 361.

The two archbishops have precedence of all other nobility in parliament, council and commissions, except where the lord chancellor presides. *Ibid.*

A bishop has precedence of all other barons, not of dukes, marquises, earls, or viscounts. *Ibid.*

NON AGE.

*Vide Enfant.*

NON ASSUMPSIT.

*Vide Action upon the Case upon Assumpsit, (H 5.)—Pleader, (2 D 8.—2 G 1.)*

NON ASSUMPSIT INFRA SEX ANNOS.

*Vide Action upon the Case upon Assumpsit, (H 6, 7.)*

NON-CLAIM.

*Vide Claim, (B 1, 2, 3.)—Fine, (K 1, 2.)*

NON COMPOS MENTIS.

*Vide Capacity, (D 5.)—Chancery (3 Q.)—Devise, (H 1.)—Discent, (D 9.)—Idiot, (D 1, &c.)—Testmoigne, (A 1.)*

NON-CONFORMIST.

*Vide Justices of Peace, (B 20.)*

NON DEMISIT.

*Vide Pleader, (2 W 48.)*

NON EST FACTUM.

*Vide Pleader, (2 D 8.—2 V 7.—2 W 18.)*

NON INFREGIT CONVENTIONEM.

*Vide Pleader, (2 V 5.)*

NON-OBSTANTE.

*Vide Pardon (G—H).*

NON OMITTAS.

*Vide Return, (B 2, 3.)*

NON RESIDENCE.

*Vide Esq[ui]se, (N 4.)—Pleader, (2 S 23.)*



## NONSUIT.

*Vide Appeal, (G 14.)—Evidence, (A 5.)—Pleader, (X 1, &c.)*

## NON SUM INFORMATUS.

*Vide Pleader, (E 42.—Y 1.)*

## NON-SUMMONS.

*Vide Abatement, (H 53.—I 26.)*

## NON-TENURE.

*Vide Abatement, (F 14.)*

## NON-USER.

*Vide Liberties, (C 1, 2.)*

## NORROY.

## (A) The Antiquity and Diversity of Heralds.

**T**HERE are three kings of arms, who have several heralds under them: Garter, Clarencieux, and Norroy. *Vide Courts, (E 3.)*

*Herald, est von incerta radice, sed verifimilior derivatio est a Saxon. Here, exercitus, et. ald, famulus sive minister, quasi minister exercitus vel armorum. Spel. Gloss. Herald.*

*Temp. H. 3. fuerunt in Anglia reges heraldorum, heraldi, et persui-vandi. Spel. ibid.*

*Reges toti Anglia duo tantum ab antiquo, unus Australium partium cis Trentam, alter Borealiū trans Trentam. Spel. Herald. hic Norroy, ille Clarencieux nominatus. Spel. ibid.*

*Garter nullā donatus provinciā in primum locum ab H. 5<sup>o</sup> fuit super-inductus. Spel. v. Herald.*

*R. 3. 1<sup>o</sup> regni primus heraldos incorporavit. Spel. v. Herald. 4 Inst. 126.*

*Ph. & M. anno regni 3<sup>o</sup> granted to them a new charter, whereby garter rex armorum, clarencieux rex armorum partium Australium, norroy rex armorum partium Borealiū, 6 heraldi inferiores, Windsor, York, Chester, Richmond, Somerset, Lancaster, et omnes prosecutores sive persui-vandi armorum sunt incorporati. Spel. v. Herald.*

## (B) The Office.

**M**UNUS heraldorum domi est, quicquid ad nobilitatem spectat, et rem honorariam: foris sunt legati, belli, pacis fœderisque nuncii. *Spel. v. Herald. 4 Inst. 126.*

*In coronationibus, nuptiis, exequiis, principum congressibus, pompas ducunt. Spel. v. Herald.*

*Curant illustria spectacula, hastiludia, duella, curant nobilium insignia et genealogias. Spel. v. Herald.*

## (C) The Antiquity of Arms.

THE antiquity of arms and armories is very antient, which by the advice of *Aristotle* seem to have been given to martial men for reward of their service by *Alexander* the Great, to scholars by the emperor *Charles* the Fourth.

The usage to distinguish families seems to have been introduced after the voyage for recovery of the Holy Land, *temp. R. 1.* After which, the descendants of the chiefs in that voyage used the same coat that was there used by their ancestors, and so those became hereditary. 1 *Std.* 354.

## (D) The Right to them.

A Man now has an inheritance and fee-simple in his arms, armories, and shield. *Co. L. 27. a.*

Which descend, in the nature of *gavelkind*, to all the male issue, except that the eldest bears them without addition, the others shall give an addition; for *additio probat minoritatem.* *Co. L. 27. a. 140. b.*

And therefore, every son is as great a gentleman as the eldest. *Lit. f. 210.*

So, the king may grant arms to a man and his heirs male, without saying, *of his body*, and he shall have a fee. *Co. L. 27. a.*

But the issue female, if there be a son, shall not take the arms of the father by descent.

Yet a daughter may bear her father's arms, in a lozenge, or under a mantle, to shew her family. *Co. L. 27. a.*

So, her husband may impale, or quarter them, as the case requires. *Co. L. 27. a.*

So, a man, with the king's licence, may grant his arms to another. 4 *Inst.* 126.

So, he may grant his surname with his arms. 4 *Inst.* 126.

## N O T G U I L T Y.

*Vide Appeal, (G 7.)—Pleader, (2 L 2.—3 M 11.)*

## N O T A R Y P U B L I C.

*Vide Merchant, (F 8, &c.)*

## N O T E.

The Note and Foot of a Fine.

*Vide Fine, (E 16.)*

Promissory Note.

*Vide Merchant, (F 15, &c.)*



## NOTICE.

## (A) Notice.

**W**HEN notice is necessary, or not, *vide Bye-Law*, (B 5.)—*Condition*, (G 9.—L 8, &c.)—*Disfmes*, (E 21.—I 2.)—*Esglise*, (N 11.)—*Pleader*, (C 73, &c.—2 S 7.)

What shall be notice in equity, and of what regard it shall be, *vide Chancery*, (4 C 1, &c.—4 I 3, &c. 11.)

How notice shall be given, and to whom, *vide Pleader*, (C 73, &c.)

If an obligation be to pay 300*l.* at his age of twenty-one, or within twenty days after marriage upon notice, which of them first happens, notice ought to be given of the age, as well as of the marriage. *R. Latch*, 158. *Vide Pleader*, (2 Z 1.)

## NOVEL DISSEISIN.

*Vide Affise*, (B 1, &c.)

## NULLIUS IN BONIS.

*Vide Biens* (F).

## NULLUM TEMPUS OCCURRIT REGI.

*Vide Prærogative* (D 86.)

## NUL TIEL PERSON.

*Vide Abatement*, (E 16.)

## NUL TIEL RECORD.

*Vide Bail*, (R 8.)—*Certiorari*, (A 1.)—*Pleader*, (2 W 13. 38.)

## NUL TIEL VILL, &amp;c.

*Vide Abatement*, (H 18, &c.)

## NUNCUPATIVE WILL.

*Vide Devise* (C).

## NUPER OBIT.

*Vide Affise* (E).

## NURTURE.

*Vide Guardian* (D).

## NUSANCE.

*Vide Action upon the Case for a Nuisance*. *Chafe* (K).—*Justices of Peace*, (B 24, &c.)—*Leet*, (L 12, 13.)—*Pleader* (2 N).—*Prescription*, (F 2.)—*Prohibition*, (A 3.)

## OATH.

*Vide Abjuration.* — *Allegiance*, (B 1, &c.) — *Dignity*, (F 3.) — *Enquest* (D). — *Justices*, (S 11.) — *Justices of Peace*, (B 23, 24.) — *Leet*, (M 8.) — *Officer*, (K 7.) — *Pleader*, (2 S 6.) — *Serement*.

## OBLIGATIONS.

*Vide Dismes*, (B 1.) — *Prohibition*, (G 11.)

## OBLIGATION.

## (A) Obligation; What shall be.

**A**N obligation is a deed, whereby a man binds himself under a penalty to do a thing.

If he be bound without a penalty it shall be called a single bill. *Vide* for this *post*. (C).

If it be acknowledged before a mayor of the staple, chief justice, &c. it shall be called a statute, or recognizance. *Vide post*. (K). — *Statute Staple*.

In every obligation there must be an obligor, an obligee, and a sum in which he is bound. *Peark. Fait*, 119. *Yel.* 194.

An obligation, as another deed, must be sealed and delivered. *Vide* for this *Fait*, (A 1, 2, 3.)

Must be written on paper, or parchment. *Vide Fait*, (A 1.)

But it need not to be read to the obligor, or subscribed by him. *Vide Fait*, (B 1, 2.)

There is no need of date, or witness, or mention of the sealing, &c. *Dy.* 19. a. *R. Dal.* 1. *Vide Fait*, (A 2. — B 3, 4.)

What shall be a sufficient delivery, or not, *vide Fait*, (A 3, 4.)

What shall be part of an obligation, *vide Fait*, (E 2.)

By whom or to whom an obligation may be made, *vide Capacity*.

By what name an obligor ought to be described, *vide Fait*, (B 1. — E 3.)

[Bond to a woman for cohabitation *had* with her is good. *Turner v. Vaughan*, P. 7 G. 3. 2 *Wils.* 339.]

[A., B., C., D., and E., indicted for perjury by F., agree that G. should give him a note for 350*l.* not to appear at the trials, and that A., B., and H. should give a bond to indemnify G. against the note, the bond is given for an illegal consideration. *Collins v. Blantern*, P. 7 G. 3. 2 *Wils.* 341. 347.]

[A bond given for an illegal consideration is void at common law *ab initio*. *Ibid.*]

## (B 1.) By what Words it may be.

**A**N obligation does not require any prescribed form of words: and therefore, if a man by his deed say, *I shall pay you 20*l.** that will be a good obligation. 2 *Rol.* 146. l. 37. *Per Brian*, 22 *Ed.* 4. 22. a.

Or, *concedo vobis solvere*. 2 *Rol.* 146. l. 40. *Per Catesby*, 22 *Ed.* 4. 22.

[*I am*



[I am held and firmly bound in 20 l. to be paid to the same Richard Lambert is good; tho' there be no person mentioned before to whom he is bound or to whom *idem* can refer. 2 Str. 945.]

Or, memorandum that I have received of B. 20 l., which sum I promise to pay to the same B., &c. 2 Rol. 146. l. 35. R. 22 Ed. 4. 22. a. Dy. 22. b. R. Cro. El. 729. Mo. 667. Ow. 127. Tel. 23.

So, I have agreed to pay, tho' it be in the *preter tense*. R. 1 Leo. 25.

So, I am content to pay 10 l. at M., and 10 l. at Lady-Day. R. 3 Leo. 119.

I acknowledge to B. by me 20 l. on demand. R. 1 Vent. 38. Dy. 22. b.

So, every deed, by which a man acknowledges himself to be indebted to another. Dy. 21. a.

Or, to have his money in his hands. *Ibid.*

So, if a deed say, I am bound to A. in 100 l. for which payment I authorise him to levy the money on the farm of B. It will be a good obligation, upon which debt lies, tho' he has power to levy it otherwise. R. 3 Leo. 223.

If it says, I acknowledge to owe to A., for which payment I bind, &c. to B. It is a good obligation to A., and the last words are void. Cro. El. 886.

So, I appoint A. to take 100 l. out of the first money he receives of mine, and makes A. his receiver; for every deed, which acknowledges a debt to another, will be an obligation. Dub. 3 Mod. 154.

So, I bind myself to pay all my brother owes him, with an averment that he owed him 40 l. R. Cro. El. 561.

Or, I bind myself to save A. harmless, &c. in 200 l. *solvend. cum requisit.* Cro. El. 613.

So, if an obligation, or words that make a bill obligatory, be wrote in a book and there sealed, it will be an obligation. R. Cro. El. 613.

#### (B 2.) What Words are sufficient.

(B 2.) *Tho' they are uncertain.*] So, if, by a bill obligatory, A. acknowledges himself to owe 10 l. to B., to be paid such a day, and by the same bill binds himself in 20 l. and does not say to whom he is bound, it will be good; for it shall be intended to him to whom he was indebted. R. 2 Rol. 148. l. 10.

So, if it be upon condition, to stand to the award of B. and C., and if they do not agree, to the umpirage of D., without saying, to what, do not agree; for it shall be intended, to make an award. R. Cro. Car. 226.

So, if it be upon condition to pay fifty pounds, without saying, of money, yet it is sufficient; for it shall be intended. R. 1 Sid. 151.

So, if an obligation be, *teneri A. in 20 l. solvend. dicto attorn. et assign. suis*, omitting A. to whom he is bound. R. Sal. 659.

(B 3.) *Tho' false Latin.*] So, an obligation will be good, tho' barbarous or false Latin be used: as, if a man be bound in *septuagint libris*, it shall be intended 700 l. tho' it be barbarous Latin. R. 2 Rol. 147. l. 2. Mo. 645. *Vide Abatement*, (H 2.)

So, if he be bound in *quinquegent. or quinquagint. libris*, for *quincent.* R. cont. but afterwards in error acc. 2 Rol. 146. l. 50. Hob. 119. 2 Cro. 146.

In *triginti libris*, for, *triginta*. R. 2 Rol. 146. l. 45.

In *sexigint. libris*, for, *sexagint*. R. 2 Rol. 147. l. 10. Hob. 20.  
2 Cro. 338.

Or, *sessanta*, for, *sexaginta*. R. 2 Rol. 147. l. 20. Hob. 19. 2 Cro.  
208.

In *septuagint. et quinquagint. libris*, for 750 l. R. 2 Rol. 147. l. 5.  
Hob. 116. 10 Co. 133. a. Cro. El. 896.

In *sexingent.*, for, *sexcent libris*. R. 2 Rol. 147. l. 15. 2 Cro. 338.

In *trigintata*, for, *triginta libris*; for the syllable *ta* is surplusage.  
R. 2 Rol. 147. l. 20. Hob. 18. R. cont. Yel. 225. R. 2 Cro. 309.  
355.

In *viginti libris*, for, *viginti*. 10 Co. 133. a.

So, if a man be bound by an *English* bill in *sewteen*, for *seventeen*  
pounds. 10 Co. 133. 2 Rol. 147. l. 42.

Or, *threty ponds*, for, *thirty pounds*. R. 2 Cro. 607.

Or, in *sex triginta*, for, *triginta et sex libris*. R. Sal. 462. R.  
Skin. 310.

In *quinginta et duabus libris*, for, *quinguinta et duabus*. R. Jon.  
366. *Vide infra*.

So, if an obligation be, *noverint*, &c. *me A. tenerie et obligarie B.*  
*in 10 l. ad quam*, &c. *obligamus me*, &c. it will be good: for the parties  
and sum are well, and any words, whereby it may be collected that  
he binds himself, are sufficient. R. Yel. 193. 2 Cro. 261.

So, if there be a blank for the christian name of the obligor, if his  
name be subscribed. R. 2 Cro. 261.

So, if the name be *Joaem*, without a dash, for it shall be intended  
*Johannem* abbreviated. R. Cro. Car. 417, 418.

So, if the bill be, *cognovit se debere et indebitat. fore sumam 20 l.*  
*solvere B.*, &c. it will be good. R. 2 Vent. 106.

So, where the words are not *Latin*, if the sense or intention may  
be collected by the condition, or other words of the obligation, it  
is good: as if a man be bound in 20 *nobilis*, for, 20 *nobles*; for there  
is no proper *Latin* word for *noble*. 2 Rol. 146. l. 42. 2 Cro. 203.

If he be bound in *octiginta libris*, with a condition for payment of  
40 l., it will be good; for it shall be intended for 80 l. R. 2 Rol. 147.  
l. 30. 10 Co. 133. Osborn was *octaginta*, and good. *Vide Hob.* 19.  
cont. but the condition not there mentioned. *Vide post.* (B 5.)

Or, *octogesimo*, for, *octoginta libris*. R. 2 Rol. 147. l. 27. Hob. 75.  
Mo. 864.

So, if he be bound in *septuaginta libris*, with a condition for pay-  
ment of 350 l., for it shall be intended 700 l. R. 2 Rol. 147. l. 37.  
10 Co. 133.

In *quingint. duabus libris*, with a condition for payment of 26 l., for  
it shall be intended an abbreviation of *quinguinta*. R. 2 Rol. 147.  
l. 45. Cro. Car. 416. 418.

In *quinqueessimis libris*, for, *quinguinta*. R. 2 Cro. 290.

In *quadrans libris*, with a condition to pay 20 l., shall be intended  
*quadragint*. R. Sal. 462.

So, if it be *quadrant*, in a bail-bond for appearance; for the statute  
directs 40 l. Semb. 2 Mod. Ca. 342.

(B 4.) *Tho' there be a small variance.*] So, a small variance between  
the obligation upon oyer and the declaration does not avoid it: as, if



the declaration be upon a bill, *that he will pay, &c.* And the bill says, *if he pay, &c.* R. 3 Lev. 66.

If the obligation in the declaration be 30 D. anno D. 1701, and the obligation itself upon *oyer* be 30 D. 1701. R. Sal. 658.

Or, in such a year of the king, and the obligation omits *anno regni*. Sal. 658.

(B 5.) *But not insensible words.*] But where words are insensible, and the intent of the parties cannot be known, the obligation will be void :

As, if a man be bound in 20 *liveries*, it is void; for it does not appear whether it was intended *libris*. R. 2 Rol. 146. l. 47.

Or, 20 *litrīs*, or *lib'is*. R. Noy, 109.

Or, in *sexgint. libris*; for there is no such word, and it does not appear what was intended. R. 2 Rol. 147. l. 12. 2 Cro. 190.

Or, *oſſigenta libris*. 2 Rol. 147. l. 30. Hob. 19. *Vide ante*, (B 3.)

So, if a man be bound to the sheriff in *quadragent. libris*, with a condition for appearance; for *gent.* imports *centum*, and therefore it cannot be taken for 40 l., and the condition being collateral, does not shew the intent. R. 2 Rol. 147. l. 55.

If he be bound in *libris*, without saying, *how many*. R. Yel. 225.

Or, in *viginti literis*. 2 Cro. 203. 603.

So, if it be *terengentate libris*. R. 2 Cro. 603.

In *quantoginta libris*. R. 2 Lev. 166.

So, if an obligation be to two in 200 l. *ſolvend.* 100 l. to one, and the other 100 l. to the other, it will be repugnant and void. Qu. Dy. 350. a. Acc. per Hob. 172. Dy. 350. a. in marg.; for the last words shall be rejected, and the obligation stand joint for 200 l.

### (C) Single Bill.

A Single bill is, when a man is bound to another by bill, or note, without a penalty.

Upon such a single bill, of a distant time, interest may be recovered in damages. Per Holt, Mod. Ca. 167.

Tho' payable upon demand, and no demand proved, where the defendant pleads *non est factum*. Ibid.

*Vide post.* (E).

### (D) Bill obligatory.

A Bill obligatory is, when he is bound in a penalty, without a condition; as, if A. acknowledges himself indebted 20 l., and for payment binds himself in 40 l. Crs. Car. 515. 2 Vent. 106. *Vide Merchant*, (F 2.)

So, if he acknowledges himself *debere* 20 *quarteria frumenti*, &c. and if he do not pay it at the day, that he shall lose 40. Dy. 24. b.

In an action upon such a bill, the plaintiff cannot declare for the penalty, without an averment that the single sum was not paid at the day limited for it by the bill. R. Cro. Car. 515.

So, if the bill be for 14 l. *ſolvend. una cum* 6 l. upon account, he must declare only for the 14 l.; for that which comes after the *ſolvend.* is no part of the bill. R. Cro. El. 537.

## (E) Condition.

A Condition is in the nature of a defeazance, subscribed or indorsed, upon the obligation. *Vide Defeazance.*—*Fait*, (E 2.) *Vide* title *Condition*, (A 5.—D 1, 7, 8.)

[If, by the condition of an arbitration-bond, the time for the arbitrator's making his award be limited, but afterwards enlarged by consent, the bond is not forfeited by not performing the award made during the enlarged time. 3 *T. R.* 592. *b. n.*]

The words of a condition ought to have a reasonable construction: and therefore, if it recites *that 500 l. was a portion for A., and if the defendant pay interest yearly, viz. at Christmas and Midsummer next, and the principal when a settlement is made*; he ought to pay interest for the whole time, after *Midsummer next*, till the principal is paid. *R. Ray.* 420.

[If the condition be, that a clerk shall faithfully serve and account for all money, &c. to the obligee and his executors; this does not make the obligor liable for money received by the clerk in the service of the executors of the obligee who continue the business, and retain the clerk in the same employment, with the addition of other business, and an increase of salary. 1 *T. R.* 287.]

[But such a bond is not discharged by the obligees taking another partner into their house: it is only a security to the house of the obligees. *Ibid.* 291. *n.*]

If the condition be, *to pay 2 s. per week till 7 l. paid, and if he fail to pay the 2 s. the obligation shall be void*; it shall be construed, that if he pay 7 l. the obligation shall be void, and if he fail to pay the 2 s. it shall be in force. *R. 1 Lev.* 77. *R. 2 Mod.* 285. [*Dougl.* 284.]

If the condition be, *to give an account 2d Nov. or to render him to prison upon an action then commenced*; it shall be intended of an action commenced 2d Nov. and not of any action that shall be commenced at any time after during his life. *R. 3 Lev.* 137.

[Where the condition of a bond is, "to render a fair, just, and "perfect account in writing of all sums received," if the obligor neglect to pay over such sums, he is guilty of a breach of the condition. *Bache v. Proctor*, *B. R. E.* 20 *Geo.* 3. *Dougl.* 382.]

But if the words of a condition are insensible, the obligation will be single; as, if it be, *to pay 2 s. per week, and if default be in payment, that the obligation shall be void.* *R. 1 Sid.* 105. *Ray.* 68. 1 *Lev.* 77.

If the condition be, *Whereas A. stands indebted in 50 l., if the said A. do not pay the 50 l. the obligation shall be void.* *R. Sal.* 463.

*Whereas the above-bounden A. shall and will pay, without saying, if he shall, &c.* *R. 2 Bul.* 133.

If the condition does not mention any sum. *R. 2 Bul.* 156.

So, an obligation will be single, if the condition was impossible, at the making, or against law. *Vide Condition*, (D 1, 7, 8.)

[Where the condition is to perform a collateral act, damages may be recovered beyond the penalty; and therefore, in such a case, the court will not stay proceedings on payment of the money into court. 2 *T. R.* 388.]

[Where there is a bond for payment of rent, the bond is a security only to the amount of the penalty. *White v. Sealy*, *B. R. M.* 19 *Geo.* 3. *Dougl.* 49.]



[Under a bond of indemnity given by *A.*, that *B.* (who was appointed general agent to *C.*, the receiver of his rents, and the manager of his estates) should pay over to *C.* all rents he should receive, as also the increase and improvements thereof, upon any new contracts or renewals of leases; *A.* is answerable for all fines received by *B.* on renewing the leases, which were not paid over by him. *Irish Society v. Needham*, *B. R. M. 27 Geo. 3: 1 T. R. 482.*]

### (F) When an Obligation will be Joint.

**I**F many bind themselves by these words, *obligamus nos*, it will be a joint obligation, and all must be joined in an action thereon. *Vide Pleader*, (2 V 2.)

So, if the words are, *obligamus nos et quemlibet nostrum conjunctim*.  
3 *Leo. 206. Mo. 260.*

If three are bound to account for all money received by himself, or by others by his means or procurement, it will be joint. *Hard. 314.*

So, if an obligation be to two for 20 l. solvend. 10 l. to the one, and 10 l. to the other, it will be joint, and the last words shall be rejected. *Qu. Dy. 350. Acc. ibid. in marg. et per Hob. 172.*

### (G) When Joint, or Several.

**B**UT if many bind themselves by these words, *obligamus nos et utrumque nostrum*, the obligation is joint and several, and all may be sued jointly, or each severally. 2 *Rol. 148. l. 35. Dy. 310. b. Cont. Dal. 85.*

Or, *obligamus nos vel utrumque nostrum*, in the disjunctive. 2 *Rol. 148. l. 40.*

So, if it be *obligamus nos et quemlibet nostrum*. 2 *Rol. 148. l. 33 Dy. 310. b. Dal. 85.*

So, if two bind themselves, *et alter eorum*. *Dy. 310. b.*

Or, several, *et quilibet eorum*.

Or, two *et uterque eorum* in 60 l. *R. 2 Cro. 45.*

So, a bill obligatory may be several to many; as, if *A.* acknowledge, that he has received 20 l. to the use of *B.* and *C.* equally to be divided, each has an action for 10 l. For there may be several bills to several persons in the same deed. *Dy. 350. a. in marg. R. Cro. El. 729.*

### (H) When Several only.

**B**UT if many execute an obligation, with a condition, to pay all money received by himself, or by others for him, or by his procurement, each shall be bound for himself only. *R. Hard. 314.*

### (I) Who are bound by an Obligation.

#### (I 1.) An Executor, or Administrator.

**A**N executor or administrator is bound by an obligation, tho' he be not named. 2 *Rol. 149. l. 50. Dy. 23. a. Vide Covenant*,  
(C 1.)

So, the ordinary, if he administers. 2 *Rol. 149 l. 55.*

(I 2.)

## (I 2.) A Survivor.

Where the act to be done ought to be by all jointly, if one of them dies, the survivor shall not have advantage of it: as, if by indenture tripartite between *A.* of the first, *B.* of the second, and *C.* of the third part, it be agreed, *that A. shall find diet, &c. for B. and C. his wife, and if A., B. and C. dislike to live together, A. shall permit B. and C. to have such land: if B. die, and C. will not live with A., she shall not have the land, for the power to dislike does not survive. R. Latch, 162.*

(K) When a Bond shall be presumed to have been discharged.

[The circumstance of 20 years having elapsed without any demand made is of itself a presumption that a bond has been satisfied. 1 *T. R.* 270.]

[But satisfaction may be presumed within a less period, if any evidence be given in aid of the presumption; as, if an account between the parties has been settled in the intermediate time; without any notice having been taken of such a demand. *Ibid.*]

[Yet length of time is no legal bar; it is only a ground on which the jury may presume satisfaction. *Ibid.*]

## (K) Recognizance.

*A* S to a recognizance by the *st. 23 H. 8. vide Statute Staple (B).*

By the common law, the chancellor, the chief justices, and justices itinerant, have power to take recognizances,

So, every judge of the realm. *Vau. 103.*

And this he may do in any part of *England*, in term or out of term. *Bro. Recognizance, 20. Hob. 195. Vau. 103.*

So, the king may give authority to any by commission to take recognizance of such a one, and return it into *Chancery. F. N. B. 267. A.*

And upon such a recognizance returned, execution shall be sued in *Chancery*, as upon another recognizance there.

So, if a suit be depending in a county court between *A.* and *B.*, by writ or by plaint, the sheriff may take a recognizance of the one or the other. *F. N. B. 133. A.*

So, the sheriff shall take a recognizance under 40 s. tho' no suit be there depending. *Ibid.*

A recognizance in *Chancery* shall be inrolled.

And if the time be elapsed, and it be afterwards inrolled by special order, it shall have relation to the date. 2 *Ver. 234.*

Tho' a judgment, &c. intervene. *Ibid.*

But a recognizance is not usually allowed to be inrolled, after the time elapsed, but with caution, that it shall not prejudice purchaser. 2 *Ver. 751.*

And if it be not inrolled, it shall be taken or paid, only as a obligation, or a specialty. *R. 2 Ver. 750.*

If a recognizance before a sheriff be not paid, there shall be a writ to the sheriff, that he, by a *levari facias*, levy the money. *F. N. B. 133. B.*



If the sheriff does not do it, there shall be an *alias*, *pluries*, and attachment against him. *F. N. B.* 133. *B.*

So, the sheriff may levy by *distingas*, upon which also lies an *alias*, *pluries*, and attachment. *Ibid.*

And the sheriff may sell the goods levied. *Ibid.*

But if the recognizor plead payment, or deny the recognizance, the sheriff cannot make execution. *Ibid.*

### Pleadings concerning Obligations.

*Vide Pleader*, (2 G 12. — 2 W 9. 16, &c. 46.)

### Relief in Equity concerning Obligations.

*Vide Chancery*, (4 D 1, &c.)

### O B S T R U C T I O N.

*Vide Action upon the Case for a Disturbance*, (A 2.) — *Chimin*, (C 5, &c. — D 8.)

### O B V E N T I O N S.

*Vide Dismes*, (B 1.) — *Prohibition*, (G 11.)

### O C C U P A N T.

*Vide Chancery*. — *Estates*, (F 1, 2.)

### O D I O E T A T I A.

*Vide Imprisonment*, (L 3.)

### O F F I C E.

*Vide Action upon the Case for a Deceit*, (A 6.) — *Action upon the Case for a Disturbance*, (A 5.) — *Action upon the Case for Negligence*, (A 2.) — *Condition*, (S 1, 2.) — *Franchises*, (F 30, &c.) — *Leet*, (L 11.) — *London*, (K 1, &c. — L 4.) — *Officer, per Totum*. — *Parliament*, (L 29, &c. 33. 37.) — *Pleader*, (2 P 1. — 2 W 25. 27.) — *Prerogative*, (D 67, &c. 83, 84. 89.) — *Privilege* (B). — *Prohibition*, (F 4. — G 4.)

### O F F I C E R.

(A 1.) Officer; how created.

**T**HE king is the fountain of all power and authority, and by his prerogative has the nomination of all officers originally. *Vide Prerogative*, (D 37.) *Vide Justices*.

[So, the king may exempt from serving particular offices, provided there is a sufficient number of persons left to serve the office. *Rex v. Clarke*, E. 27 Geo. 3. 1 T. R. 679.

The king cannot create an officer without the words, *constituimus*, such

*such an one in such an office, &c. for the words concessimus, the office to him, without the other, are not sufficient. 2 Rol. 152. l. 40. Hard. 351. 356.*

He cannot grant ancient offices in other manner or form than was usual, if the form be not altered by parliament: as, creating by writ, where before it was by patent. 4 *Inst.* 75.

Or, for life, where always before it was granted at will only. 4 *Inst.* 87.

The grant of an office, *una cum feodis pertinen.*, does not grant any fees, if it be not an office by prescription. *Jon.* 281.

He cannot grant an office to a bishop for his life, to his successors for ever; for he takes the office in his natural, and not in his politic capacity; and therefore, the grant over to his successors is void. *R. Mo.* 809.

But in a grant of the mastership of an hospital, &c. words of nomination are sufficient; for he shall be in by the constitution upon the foundation. *R. Ca. Ch.* 215.

So, in a grant of a new office, the gift of a fee, casual or annual, is not necessary. *Cont.* 27 *H.* 8. 28. *R. acc. Mo.* 809.—*Acc.* for he shall have a *quantum meruit* for his labour. *Hard.* 351. 356.

So, a grant of a relative office, as parker, house-keeper, &c. is sufficient by the word *concessimus*. *Hard.* 356.

#### (A 2.) Without Brocage or Affection.

By the *stat.* 12 *R.* 2. 2. the chancellor, treasurer, privy seal, lord steward, chamberlain, clerk of the rolls, justices of the one bench and the other, and barons of the *Exchequer*, &c. shall be sworn, not to make justices of peace, &c. or other officer or minister of the king, for any gift, favour, or affection.

And none who pursues by himself, or other, privily or openly, to be put in any office, shall be put therein, or in any other, but they shall make all such officers of the best and most sufficient.

This statute is worthy to be put in execution. *Co. L.* 342. a.

#### (B) Grant of an Office.

##### (B 1.) To whom it may be made.

THE grant of an office generally may be made to any person whom the king pleases; for the king has an interest in his subject, and a right to his service. 1 *Sal.* 168.

And therefore, an information lies against him who refuses an office, being duly elected.

And he shall not be excused for his neglect to qualify himself according to law. *R.* 1 *Sal.* 168.

(B 2.) *To a woman.*—So, the grant of an office of government, which may be exercised by a substitute or deputy, to a woman, will be good: as, a woman may be made regent of the kingdom. *Cal.* 201. So, an office of inheritance may descend to a woman, and by consequence may be granted to her; as, the office of marshal of *England*. *Cal.* 201.

So, a woman may be a gaoler. 2 *Inst.* 382.

A commissioner of the sewers. *Cal.* 202.



So, she may have the custody of a castle. *R. 2 Cro. 18.*

So, she may be a forester, who shall make a deputy to attend the *ore*, and he shall be there sworn. *4 Inst. 311.*

[A woman may be sexton of a parish, and may vote in the election of one. *Olive v. Ingram, T. 12 G. 2. Str. 1114.*]

[So, a woman may be appointed an overseer of the poor. *Rex v. Stubbs, E. 28 Geo. 3. 2 T. R. 395.* where all the cases, as to the offices women are capable of filling, are collected.]

(B 3.) *To an infant.*] So, a ministerial office may be granted to an infant, *exercend. per se vel deputat. suum.* *R. 2 Rol. 155. l. 10.*

As, the office of register of a bishop, granted to *A. exercend. per se vel deputat. suum* after the death of *B.*, will be good, whether *A.* be of full age at the death of *B.*, or an infant. *R. 2 Rol. 153. l. 10. 20. Jon. 311. Cro. Car. 280. 556.*

So, the steward of a court-baron. *Cont. Co. L. 3. b. R. Cro. Car. 556. Vide Copyhold, (R 5.)*

So, the custody of a gaol. *2 Inst. 382.*

(B 4.) *To several.*] So, a ministerial office may be granted to two or more; as, the office to be clerk of the crown in *B. R.* or *Chancery.* *11 Co. 3. b. 2 Rol. 152. l. 50. Vide 4 Mod. 17.*

Steward of a court-baron. *2 Jon. 127. Vide Copyhold, (R 5.)*

*Custos breviarum.* *Sho. 289. Cont. Dy. 149. b.*

So, an office established by act of parliament, tho' it be in part judicial; as, auditor of the court of wards. *R. 11 Co. 3. 2 Rol. 152. l. ult. Adm. 4 Mod. 17.*

So, chancellor of a bishop, where it is warranted by usage. *R. 4 Mod. 18. Sho. 289. Sal. 465.*

So, a corody certain may be granted to two. *Dy. 149. b.*

So, a grant to two, to be one of the auditors, or a clerk of the crown, &c. will be good; for they are but one officer, tho' two persons. *R. 11 Co. 3.*

If a grant be to two, without saying, *and to the survivor*, if one die, the survivor shall not have it. *Sal. 465. R. 11 Co. 3. b.*

But a judicial office, established at common law, cannot be granted to two or more; as, the office of chief justice, or other judge. *4 Mod. 17. 2 Rol. 152. l. 47.*

Nor, the office of admiral, for it is judicial. *4 Inst. 146.*

Nor, the office of prothonotary. *2 Rol. 152. l. 45. in C. B.* for it is not warranted by usage; but the office of prothonotary in *B. R.* may be in two persons. *Per Holt, Sho. 289.*

Nor, a corody uncertain. *Dy. 149. b.*

If the king grants an office to two and the survivor, and afterwards grants to *A.* when the office *vacare contigerit*; the grant shall not take effect, tho' it may be granted in reversion, till both die, &c.; for during the life of either, the office is not entirely vacant, *11 Co. 4. b.*

#### (B 5.) To whom not.

(B 5.) *To a person who is incompetent.*] But an office, which concerns the administration or execution of justice, the king's revenue, the public good, the interest or safety of the subject, if it be granted by the king, or a common person, to him who has not knowledge to execute

execute it, it will be void. 2 *Rol.* 153. l. 30. *Co. L.* 3. b. 2 *And.* 119.

And the court may refuse his admittance, if he does not make a sufficient deputy. *Hard.* 130.

(B 6.) Or, has an office incompatible. What shall be such.] So, the grant of an office to one who has another office incompatible, is not good; for the first office will thereby be void. *Doug.* 398. (383.) n.

As, if a forester by patent for life, be made justice in eyre of the same forest, *pro hac vice*, the office of forester will be void; for it is incompatible, being subject to correction by the justices in eyre. 4 *Inst.* 310.

So, if the warden of a forest be made justice in eyre. *Ibid.*

Or the steward, or justice of the forest be made justice in eyre. *Ibid.*

If a justice of *C. B.* be made a justice of *B. R.* *Dy.* 159. *Cro. Car.* 127, 8.

If the remembrancer of the *Exchequer* be made a baron of the *Exchequer*, the first office becomes void. *Dy.* 197. b.

So, if a town-clerk be made alderman. *Dy.* 332. b. in marg. *Vide post.* (K 5.) *Vide Franchises*, (F 27.)

Or, mayor. *Semb.* 1 *Sid.* 305.

[Or, if a jurat be elected town-clerk. 2 *T. R.* 81.]

So, if a forester, keeper of a walk, or other inferior officer, in a forest accept of being verderor. *R. Jon.* 295.

So, a justice of *B. R.* or *C. B.* cannot take another office, or fee, except of the king. 4 *Inst.* 100.

So, the chief justice of *C. B.* cannot be prothonotary, or clerk of the papers in the same court. 1 *Sid.* 305 \*.

A bishop cannot have a benefice by *commendam* in his own diocese; for he cannot visit himself. *Ibid.*

But the chief justice of *C. B.* being made keeper of the great seal continues chief justice. *Cro. Car.* 600. 1 *Sid.* 338.

So, a justice of *C. B.* may be chief baron of the *Exchequer*. 1 *H.* 7. 10. b.

So, by a custom, the same person may be a judge, and an officer to execute process, for he acts in different respects; as, where bailiffs, or mayor and bailiffs are judges in the court of a borough, they may also be officers to execute the process of the same court. *R. Cro. Car.* 138. *Jon.* 193.

The bailiff of a manor may be steward of the same manor. 2 *Cro.* 178.

A mayor, who is judge of the court, may also be the gaoler, who has the custody of the prisoners committed by the same court. *R. Cro. El.* 76.

(B 7.) For what Estate it shall be granted.

(B 7.) In fee.] The king may grant an office, which relates to the execution of justice in fee; as, the office of sheriff. 9 *Co.* 97. b.

\* *Knowit* was chief justice and chancellor together in the time of *Edward* the Third. *Dyer*, in marg. 159. a.; and *Lord Hardwicke* in the time of *George* the Second. 2 *T. R.* 86.

Or,



Or, the office of the custody of a gaol. 9 Co. 97. b.

(B 8.) *In tail.*] So, an office may be granted to one and his heirs male of his body; as, a grant of the office of chamberlain of the *Exchequer*. 11 Ed. 4. 1. a.

(B 9.) *For life.*] So, an office, that concerns the administration of justice, may be granted to one for his life. 9 Co. 97. b.

So, it may be assigned to trustees in trust for the assignor for his life. *Dub. 3 Mod.* 145.

(B 10.) *Quamdiu se bene gesserit.*] So, by an address to the king by the parliament, it was desired, that the office of judges should be granted *quamdiu se bene gesserint*. 3 *Rusb.* 336. [*Vide the st. 1 Geo. 3. 23.* whereby the commissions of judges are continued, notwithstanding the demise of the king.]

(B 11.) *At will.*] So, an office, that concerns the administration or execution of justice, may be granted at will. 9 Co. 97. 3 *Mod.* 149.

If it be granted *durante bene placito*, it shall not be determined at the will of the party, but only at the will of the king; and therefore, the party may surrender, and if forfeited, it shall be found by inquisition, and till a surrender, or forfeiture, he continues officer. *R. Sal.* 466.

(B 12.) *For years.*] But an office, to which a trust is annexed, or which concerns the administration of justice, cannot be granted for years; for then it would go to the executor, or administrator, or ordinary, and might be seized, upon outlawry, &c. *R. 9 Co.* 97.

And therefore, a grant of the office of marshal of *B. R.* for years will be void. *R. 9 Co.* 97. *R. Cro. Car.* 587. *Jon.* 463.

Or, a grant of the office of chirographer, *custos brevium*, or king's siver. 9 Co. 97. b.

So, a grant of the office of clerk of the crown. *Ibid.*

And of clerk of the pipe, remembrancer, &c. in the *Exchequer*. *Ibid.*

Yet an office which does not concern justice, may be granted for years; as, the office of garbler of spices granted by the mayor and commonalty of *London*, pursuant to the *st. 1 (2d) Jac.* 19. [or 6 *And.* 16.] *R. Hard.* 48.

The office of aulnage, prisage, &c. for no attendance upon a court is required. *Hard.* 48, 9.

The office of policies of insurance. 1 *Ver.* 12. *R. Hard.* 351. 357.

The office of king's printer. *Hard.* 352.

So, the office of postmaster. *Ibid.*

(B 13.) *When in reversion.*] A ministerial office may be granted in reversion. 11 Co. 4. a. 2 *Rol.* 154. l. 5.

As, the office of register of a bishop. *R. 2 Rol.* 154. l. 20. *R. Jon.* 264. *Cro. Car.* 259. 279. *Jon.* 311.

Steward of a court-baron. 2 *Lev.* 245.

The office of commissary or official to a bishop, where the grant in reversion is warranted by usage. *R. Jon.* 264. *Cro. Car.* 259. *R. 4 Mod.* 17. *Vide Estates*, (G 5.) So,

So, by custom and usage, a judicial office may be granted in reversion. *Hard. 357.*

(B 14.) *When not.*] But a judicial office cannot be granted in reversion. *11 Co. 4. a.*

Nor, an office partly judicial, and partly ministerial; as, the office of auditor of the court of wards. *R. 11 Co. 4. b.*

Or, the master, surveyor or attorney of the court of wards. *11 Co. 4. a.*

Steward of a court-leet. *R. 2 Lev. 245. Acc. Dy. 80. b.*

So, the reversion of an office cannot be granted, by the name of a reversion: for there is no reversion in it. *Cro. Car. 279.*

So, the office of register shall not be granted in reversion, where the usage does not warrant it. *Jon. 311. Cro. Car. 259. 279.*

So, if an office be granted in reversion, the grantee, upon the death or forfeiture of the former officer, must discharge his duty at his peril, without notice given to him of the vacancy. *1 Sid. 81.*

### (C) Who may assign his Office.

**A**N office in fee granted by a subject generally, may be assigned. *Semb. 9 Co. 48. b. Jon. 113. Hard. 425.*

Tho' it be an office of trust; for *heir* includes assigns. *Jon. 113.*

So, it may be settled and confined to the heir male of the body of the grantee. *Jon. 114.*

Or, granted by him to *A.* and *B.* to be re-granted to himself and the heirs males of his body. *Ibid.*

Or, a covenant may be, to stand seised of it to the use of another. *Jon. 118. Comb. 96. 3 Mod. 145.*

So, an office granted to one and his assigns may be assigned. *Hob. 170. Jon. 113.*

And the office of a teller in the *Exchequer* may be granted to a man and his assigns. *1 Ver. 12. Hard. 425.*

But an office of trust cannot be assigned, without the assent of him who granted the office. *Jon. 121. R. 11 Ed. 4. 1.*

Or, if the patent does not mention deputy, or assigns. *Jon. 113. 11 Ed. 4. 1.*

Tho' it be granted in fee. *Jon. 121. Hard. 426.*

As, if the marshal of *B. R.* in fee assigns his office without assent of the court. *Dub. 3 Mod. 151.*

So, the office of carver, granted to *A.* and his heirs, cannot be assigned to another; for it is an office of trust and confidence. *Jon. 121.*

Nor, the office of forester. *4 Inst. 315.*

### (D) Deputy.

(D 1.) Who may make one.

**E**VERY officer, who may assign his office to another, may make a deputy: for *cui licet quod est majus, quod minus est magis licet.* *9 Co. 48. b.*

And therefore, every officer in fee may make a deputy. *Ibid.*

So, he who holds in fee by a personal service, may make a deputy; for



for the estate may descend to a woman, infant, &c. who may be incapable to do it in person. 2 *Inst.* 34.

So, where nothing is required in an officer but superintendency, he may make a deputy. 3 *Mod.* 150.

And therefore, a constable may make a deputy; for he is not a judicial officer. R. 1 *Rol.* 591. A. *Mo.* 845. 3 *Bul.* 78. 1 *Rol.* 274. *Per two J.* 1 *Lev.* 233.

So, a woman forester in fee may make a deputy in the eyre, who shall be sworn. 4 *Inst.* 311.

So, every ministerial officer may make a deputy; as, a chamberlain, or alderman. 1 *Rol.* 274.

An auditor in the *Exchequer*. 4 *Inst.* 106.

An escheator, sheriff, &c. 1 *Rol.* 274. 4 *Inst.* 226.

A dean. 1 *Rol.* 274.

A parish clerk. *Dub. F. g.* 273.

So, if an office of labour of small regard be granted to a peer, he in respect of the dignity of his person may make a deputy; as, if a peer be made steward of a court-baron, parker, &c. 9 *Co.* 49.

[If parceners cannot agree in nominating a deputy or clerk, Chancery will direct them to draw lots who shall nominate first. *Seymour v. Bennet*, M. 1742, 2 *Atk.* 482.]

*Vide post.* (D 2.)

(D 2.) Who not.

But a judicial officer cannot make a deputy; as, lord chancellor. 4 *Inst.* 88.

A justice of the one bench or the other.

A justice in eyre, till authorized by statute. 1 *Rol.* 274.

High-steward of the realm; for he is a judge upon the trial of peers. 4 *Inst.* 59. *in marg.*

So, a ministerial officer, where the office is granted to be executed by him in person, cannot make a deputy. 3 *Mod.* 150.

Nor, if it imports a trust or confidence in the person; as, to be squire to the king's body, if a deputy is not allowed by his patent. 11 *Ed.* 4. 1.

Yet if a judicial office be granted *tenend. per se vel deputatem*, he may make a deputy: as, the recorder of London. 1 *Lev.* 76.

So, the recorder in several other cities and boroughs. *Ibid.*

Steward of the borough court in Southwark. *Ibid.*

So, steward of the palace court. *Cont. per two J. but by the other acc. Ibid.*

So, where antient usage allows a deputy, a judicial officer may make one; as, constable, and earl marshal. 4 *Inst.* 126. 128.

(D 3.) Power of a Deputy.

A deputy has power to do every act which his principal might do. R. 1 *Sal.* 95.

And he cannot be restrained to some particulars of his office; for that would be repugnant to his being deputy. *Ibid.*

So, a deputy may depute another to do a particular act in his office. 1 *Sal.* 96.

But a deputy cannot make a deputy; for that imports an assignment of all his authority, which is not assignable. *Ibid.* 39 *H.* 6. 33. 4.

[If

[If a deputy covenants to execute the office for certain fees, and to account for the rest, and new duty and new fees are afterwards added by statute, the deputy shall account for the new fees. *Per Hardwicke C. J. and Eyre C. J. Bullstrode v. Gilbourne, H. 9 G. 2. Str. 1027.*]

(D 4.) How his Act affects his Principal.

An officer, generally, shall answer for his deputy. 2 *Inst.* 466.

So, generally, an act of the deputy without the assent of his superior, will not be a forfeiture of the office; as, an act of an under-sheriff or under-bailiff is not a forfeiture of the office of sheriff or bailiff in fee. 2 *Inst.* 190.

(D 5.) How a Deputy ought to act.

A deputy, regularly, ought to act in his office in the name of his principal. 1 *Sal.* 96.

As, an under-sheriff does all acts in the name of the sheriff. *Ibid.*

And all his acts are in right of his principal, and as his servant. 11 *Ed.* 4. 1. b.

But an act by a deputy in his own name will be good, except in special case. 1 *Sal.* 96.

(E) Officers of State.

OFFICERS are public or private.

Public are, officers of state, officers of justice, or officers of the king's household.

As to the chancellor, master of the rolls, and other officers in Chancery, *vide Chancery*, (B 1, &c.)

As to the judges and officers in B. R., C. B., and Exchequer, *vide Courts*, (B 4.—C 2, &c.—D 8, &c.)

As to justices of assize, *vide Assize*, (B 21, &c.)

As to justices in eyre, oyer, and terminer, gaol delivery, &c. *vide Justices* (E 1, &c.—F—G 1, &c.—H).

As to justices of peace, *vide title Justice of Peace*.

As to sheriff, *vide Viscount*.

(E 1.) High Treasurer.

A prime officer of state is the high treasurer. *Vide Courts*, (D 8.)

The chief justicier had the management of the king's treasure, as it seems *temp. W.* 1 & 2. *Mad.* 54.

*Temp. Steph.* & *H.* 2. &c. he was a distinct officer. *Mad.* 54.

(E 2.) High Constable.

The office of high constable was hereditary at first. *Sp. Gl.* 184. *Mad.* 27.

So, formerly, there was a high constable by tenure.

And if a manor held by such service descended to co-heirs, the husband of the eldest, or if none of the women was married, a deputy might officiate, such as should be approved by the king. *Sp. Gl.* 184.

The office of constable was eminent in war and peace. *Sp. Gl.* 185. *Mad.* 27.

So,



So, it may be granted for special cause *hâc vice*, as it was 7 Car.—  
2 *Rush.* 112.

[A high constable may be appointed *de novo* for a town erected into a county of itself by charter many years before, altho' no such officer from the time of granting the charter had been appointed. *James v. Green, B. R. E. 35 Geo. 3. 6 T. R. 228.*]

But by the *st. 13 R. 2. st. 1. c. 2.* upon complaint, that the court of the constable and marshal had incroached to itself contracts, covenants, trespasses, debts, *detinues*, and other actions, &c. it is declared, that the consueance of contracts, touching deeds of arms, or war out of the realm or within, which cannot be determined by common law, with other usages to those matters pertaining which other constables have used, belong to the constable. *Vide Courts, (E 1, &c.)*

(E 3.) Marshal.

Many of the king's officers are called *marshals*. *Mad. 29.*

The principal is *marescallus regis vel marescallus Angliæ*, called *Earl Marshal*. *Mad. 30.*

And this office was granted for life, in tail, or in fee. 4 *Inst.* 128.

Was exercised in war in the army, in peace within the king's court. *Mad. 33.*

In the king's court, he provides for the security of the king, for the distribution of the apartments, for the order and peace of the house, and for the determination of controversies there. *Mad. 33. Vide Courts, (E 1, &c.)*

The marshal of *B. R.* was his deputy, and derived from him. *Mad. 33. Sal. 439. 602.*

So, his office cannot be granted, reserving the place of chamberlain of the prison of *B. R.*, for it is incident. *R. Sal. 439.*

(E 4.) High Steward.

(E 4.) *The antiquity and authority of his office.*] The *high steward* was an office at the time of the Conquest, or before, of great authority. 4 *Inst.* 58. *Mad. 34.*

The office was hereditary from the time of the conqueror till *H. of Bolingbrook*, son of *J. of Gaunt*, *D. of Lancaster*; for *temp. W. 2.* and *H. 1.* it was enjoyed by *Hugh Grantsmenel*, who held the barony of *Hinkly* by his office, and by the marriage of *Petronel*, his daughter and heir, to *Bellamont* earl of *Leicester*, came to the earls of *Leicester*, till it was forfeited *temp. H. 3.* by the attainder of *Simon Montfort* earl of *Leicester*, who anno 50 of his reign granted it to *Edmund* his second son, from whom it descended to *H. of Bolingbrook*, who was the last that had inheritance in the office. 4 *Inst.* 58. *Mad. 35.*

The authority of high steward was to survey and rule *sub rege totum regnum et omnes ministros legum tempore pacis et guerre, &c.* 4 *Inst.* 59.

And therefore, since the time of *Hen. of B.* it hath been granted only *hâc vice*. *Ibid.*

(E 5.) *Upon the trial of a peer.*] Since the time of *H. 4.* he hath ever been appointed but *hâc vice* for the trial of a peer. 4 *Inst.* 49. *Vide Dignity, (F 1, 2.)*

And

And then his authority is confined to the particular indictment.

4 *Inst.* 59.

If the chancellor is a peer, he is usually appointed high steward.

Or, the lord treasurer. *Mo.* 620.

Or, any other lord may be appointed.

And he shall be appointed by patent, *hâc vice, ad audiend. et terminand.* the high treason, &c. for which such an one is indicted, &c. *Mo.* 620.

And tho' he does not take any oath, he must proceed according to the laws and customs of the realm. 4 *Inst.* 59, 60.

After the trial the high steward cannot adjourn, but must dissolve his commission. *R. Mo.* 622.

Yet it was adjourned *temp. H. 8.* to the next day and then dissolved. *Mo.* 622. and *R.* that it might. *Kelg.*, 57. 3 *Inst.* 31.

So, after trial the high steward, if execution be not done, by his precept, may direct execution. 3 *Inst.* 31.

And after all the service is performed, his commission shall be dissolved by his breaking the white rod over his head. *Ibid.*

[The court of the high steward, and the court of the king in parliament, are different.]

[In the first, by the commission, (which is but in the nature of a commission of *oyer and terminer*,) the sole right of judicature is vested in the high steward, and resideth in his person, and without the commission no step can be taken in order to the trial; and when his commission is dissolved (which he declares by breaking his staff) the court no longer exists: he alone is judge of law and practice; the peers triers, mere judges of fact, are summoned by precept from him to appear before him on the day appointed by him for the trial. *E. Ferrer's Case*, 1760, *Foster*, 138.]

[For the court of the king in parliament, *vide Parliament*, (L 16.)]

(E 6.) *Upon claims at a coronation.*] So, usually upon every coronation, he has a commission *hâc vice* to hear and determine all claims of services to be done at the coronation. 4 *Inst.* 59.

#### (E 7.) High Chamberlain.

The office of *high chamberlain*, or *magistra cameraria*, was also hereditary, and by *H. 1.* granted to *Alb. de Ver.* and his heirs, as now to the earl of *Lindsey*. *Mad.* 38.

And therefore, the office shall descend to his heir general, and not to the heir male. *R. Jon.* 130.

Tho' it was covenanted 4 *Eliz.* that *L. earl of Oxford* should stand seised of the office to himself for life, and afterwards to the use of his son and the heirs male of his body. *Jon.* 110.

#### (E 8.) Secretary of State.

By the *st.* 31 *H. 8.* 10. a secretary of state, being a baron, shall take place of all other barons in parliament, not having any superior office.

And if no baron or peer, he shall sit on the uppermost part of the benches in the midst of the house.

If the secretary be a bishop, he shall have precedence of all the bishops, except the archbishops. 4 *Inst.* 362.

But



But the secretary being a viscount, earl, duke, &c. shall not have precedence of others of the same degree. 4 *Inst.* 362.

A secretary of state *ratione officii*, has authority to commit any, accused of treason or other crime against the state. R. 1 *Sal.* 347. 5 *Mod.* 84. *Adm.* 2 *Leo.* 175. 1 *Leo.* 71.

[Has not power to grant *general* warrant to apprehend the authors, printers and publishers of a libel. *Huckle v. Money*, M. 4 G. 3. 2 *Wilf.* 105. *Money v. Leach*, in *Error in B. R. M.* 6 G. 3. 3 *B. M.* 1742.]

[Nor, a warrant to enter the house of a person by name, author of a libel, to seize his papers, and detain him and them. *Beardmore v. Carrington*, P. 4 G. 3. 2 *Wilf.* 244.]

[*Note*; This warrant, which was not only to apprehend *Breadmore*, the author of a seditious libel, but also to seize his books and papers, was called illegal in the gross; but had it been only to apprehend the person, *qu.*]

[He has no power to grant warrant to search for, and seize a man's papers, in the first instance, on information of his being the author of a libel. *Entick v. Carrington*, M. 6 G. 3. 2 *Wilf.* 275.]

[He is not a conservator or justice of the peace, *quasi* secretary, within 24 G. 2. c. 44. *ibid.*

[He hath power to commit for treason, and seditious libels, but (*per Pratt C. J.*) not for smaller crimes. *Ibid.*]

[And a commitment by him for *treasonable practices*, without stating them, is sufficient. *Rex v. Despard*, T. 38 *Geo.* 3. 7 T. R. 736.]

(E 9.) President of the Council, and Privy Councillors.  
*Vide Roy*, (E 2, &c.)

### (F) Officers of the Household.

IN the king's house are many officers: as, steward, treasurer, chamberlain, master-comptroller, cofferer, &c. 4 *Inst.* 131.

### (G) Coroner.

THE coroner is an antient officer of the crown, who shall hold pleas of things concerning the crown. 2 *Inst.* 31. 4 *Inst.* 271.

And shall be, of the county at large, or of a particular jurisdiction; as, of the verge, where by the common law the coroner of the county does not intermeddle. 4 *Co.* 46. b.

#### (G 1.) Coroner in the King's House.

By the *st.* 33 *H.* 8. 12. the coroner of the king's household shall hereafter be named by the lord great master, or lord steward of the household.

And all inquisitions upon view of persons slain, in any palaces or houses of the king, shall ever be taken by the coroner of the household, without the assistance of the coroner of any shire, by twelve or more of the yeomen officers of the king's household, returned by the two clerks comptrollers, the clerks of the check, and clerks marshal, or one of them, on the coroner's precept to them.

And

And such inquisition by the coroner of the county is void, and shall be discharged. *R. 4 Co. 46. b.*

But, if the same person be coroner of the verge, and also of the county at large, an inquisition before him will be good. *R. 4 Co. 46. a.*

So, the coroner of the verge shall not take an inquisition, where the fact does not appear to be done within the verge. *R. 4 Co. 47. a.*

Tho' the coroner of the county join, and it be taken in the name of both. *Ibid.*

(G 2.) Coroner in a County.

*Temp. R. Alfred*, coroners were ordained in every county. *2 Inst. 31.*

And in some counties there are six, in some four, or two, in some but one; for no precise number is required. *2 Inst. 175. F. N. B. 163. L.*

(G 3.) *How chosen.*] The coroner shall be always chosen in full county by the freeholders, upon a writ *de coronatore eligendo*. *2 Inst. 174. By the st. 28 Ed. 3. 6.*

And none can prescribe to make a coroner. *Co. L. 114. a.*

And therefore, upon the death or amoval of a coroner, a writ goes to the sheriff to choose another coroner. *Reg. 177. a. F. N. B. 163. M.*

Or, if more are dead, &c. to choose two or more. *F. N. B. 164. A.*

The election shall be upon view, or by a poll, as of knights of parliament or verderors.

When chosen, the sheriff shall give him the oath to do his office. *F. N. B. 163. M.*

And shall certify his election into *Chancery*. *F. N. B. 163. K.*

And being chosen, his office does not determine upon the demise of the king. *2 Inst. 175. D. 1 Lev. 120.*

(G 4.) *Who may be chosen.*] By the *st. W. 1. 3 Ed. 1. 10. per tous les counties soient eslieus suffisant homes coroners, des plus loyals et plus sages chivaliers, queux melius sachent, puissent, et violent a cel office entendre, &c.*

By the *st. 14 Ed. 3. 8.* none shall be chosen coroner, if he have not land in fee, in the same county, sufficient to answer all people.

By the *st. 28 Ed. 3. 6.* the coroner shall be chosen of the most convenient and lawful people in the same county.

So, a coroner ought to be of sufficient ability and knowledge to do his office. *2 Inst. 176.*

And therefore, he shall be discharged, if he have not land, *cent. solid. terre* in the same county. *2 Inst. 176. Reg. 177. b. F. N. B. 163, 164. N.*

And where he cannot answer the dues in respect of his office, the county, as his superior, shall answer for him. *2 Inst. 175. 4 Inst. 114.*

So, he shall be discharged, if he be *minus idoneus*. *Reg. 177. F. N. B. 163. N.*

If he be *communis mercator*. *2 Inst. 32.*

If, *negotius occupatus*, *quod officio coronatoris vacare non possit*. *Reg. 177. a. F. N. B. 163. N.*

Or, *moratur in extremis partibus comitatus*, *per quod officium commodè exercere nequit*. *Reg. 177. b. F. N. B. 164. N.*

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If,



If, *sit languidus, senio, or paralyt, &c. confect.* *Reg.* 177. *b.* *F. N. B.* 164. *N.*

If he be elected sheriff or verderor. *Ibid.*

Yet it is not necessary that he should be a knight. *F. N. B.* 164. *N.*

(G 5.) Jurisdiction of the Coroner.

(G 5.) *To take an appeal, &c.*] The court of the coroner is a court of record. 4 *Inst.* 271.

And he has jurisdiction with the sheriff to take an appeal of robbery, or other felony, in the same county, in the county court; by the *st.* 3 *H.* 7. 1. *H. P. C.* 171. *Vide Appeal*, (F—G 4.)

And such appeal may be by bill. *H. P. C.* 171. 2 *Inst.* 32.

So, by the *st. de off. coron.* he may take an appeal of rape. *Semb.* *H. P. C.* 171.

And upon such appeal the coroner alone is judge, tho' by the *st. W.* 1. 10. the sheriff has the counter-rolls of appeals and inquests, with the coroner. 2 *Inst.* 176.

And therefore, a *certiorari* to the sheriff alone, for removing an appeal, is not well; for it ought to be to the sheriff and coroner. 2 *Inst.* 176. *H.* 171.

By the *st.* 4 *Ed.* 1. *de off. cor.* if the appeal be fresh, and there appear apparent signs, as effusion of blood, or open cry, the appellee shall be attached, and find four or six pledges, otherwise but two pledges.

On appeal of wounds, the appellee shall be kept, till known if the party will live or die; and if he die, shall be kept; if he recover, and be maimed, or have a great wound, the appellee shall find four or six pledges; if but a small wound, two pledges.

One appealed as accessory shall be kept till the principal is attainted.

But the coroner shall not proceed beyond an entry of the appeal and the count, and then deliver it to the justices. 2 *Inst.* 32.

The coroner may grant process to outlawry, but shall not award the exigent. *H. P. C.* 171.

(G 6.) *By an approver.*] The coroner alone may take an appeal of an approver of a felony in any county. *H. P. C.* 172.

And the confession of the felony by the approver before him is not traversable. *H. P. C.* 171.

But the coroner shall not make process upon such an appeal by an approver, but shall enter it upon the roll, and send it before the justices of gaol-delivery, who shall issue process to the sheriff of the foreign county to take the appellee. *H. P. C.* 172.

(G 7.) *Abjuration.*] The coroner shall take the abjuration of him that acknowledges a felony in the same, or another county. By the *st.* 22 *H.* 8. 14.; and 32 *H.* 8. 12. *H. P. C.* 172. *Vide Abjuration* (C).

And such abjuration is not traversable. *H. P. C.* 171.

(G 8.) *Breach of prison.*] The coroner may inquire of breach of prison. *Semb.* *H. P. C.* 171.

And shall take the confession of such breach of prison, which is not traversable. *Ibid.*

(G 9.) *Treasure-trove.*] By the *st. 4 Ed. 1. de off. cor.* the coroner ought to inquire of treasure-trove, who the finders, and who suspected of it, &c. in the same manner as of death.

And the persons suspected may be attached.

(G 10.) *Wreck.*] The coroner has jurisdiction upon an arm of the sea, where a man may see from one shore to the other. *H. P. C. 171. 4 Inst. 140. 271.*

By the *st. W. 1. 3 Ed. 1. 4.* the coroner shall seize the wreck, and see it valued, and delivered to the town.

So, by the *st. 4 Ed. 1. de off. cor.*

(G 11.) *To take an indictment.*] By the *st. M. Ch. 9 H. 3. 17. nullus coronator teneat placita coronæ nostræ.*

But by the *st. W. 1. 3 Ed. 1. 10. coroners loyalment attachent et representent les plees de la corone.*

By *st. 4 Ed. 1. de offic. coron.* the coroner, when certified, shall go to the place where any is slain, suddenly dead, or wounded, and command four, five, or six, of the next towns, to appear before him at a certain place, and by their oaths inquire, if they know where the person was slain, whether in a house, field, bed, tavern, or company, who guilty, or who present, men or women, and of what age; whether slain in the field or wood, where found, or brought thither, and how, on horse or cart, if known, or a stranger, and where he lodged last.

So, if a man die in prison, the coroner shall make inquiry. *H. P. C. 170. Fl. 1. c. 26. ff. 5.*

If any are found guilty, they shall be committed, and those present, tho' not guilty, shall be attached till the coming of the justices. And the coroner shall go to the house of the guilty, and inquire what goods, and what lands he hath, and of what value, and when valued deliver them to the township, who shall answer for all.

And after such inquiry, the deceased shall be buried.

And horses, boats, carts, &c. which are deodands, shall be valued and delivered to the township.

So, that the coroner, notwithstanding *M. Ch. 17.* may take an indictment upon the death of a man. *2 Inst. 32.*

But only upon the death of a man, not for other felony. *4 Inst. 271.*

And this shall be, *super visum corporis*, otherwise it is void. *4 Inst. 271. H. P. C. 170.*

And the body shall be dug up, if it be interred before the coming of the coroner. *H. P. C. 170.*

And the township shall be amerced for the interment, or suffering the body to putrify, before the coroner be sent for. *Ibid.*

So, if an indictment *super visum corporis* be insufficient, the coroner may dig up the body to take another indictment. *R. 2 R. 3. 2.*

But after being long buried, the coroner cannot dig it up without leave of the court. *R. 1 Sal. 377.*

If the body cannot be viewed, justices of peace shall inquire. *H. P. C. 170. R. 2 Rol. 96. l. 30.*

Or, justices of oyer and terminer. *D. 1 Vent. 182.*

Or, B. R. may appoint commissioners to inquire. *Ibid.*

Or, the grand inquest may inquire. *D. 1 Vent. 352.*



The coroner shall inquire of the flight of the felon. *H. P. C.* 170.  
And such presentment is not traversable. *H. P. C.* 170. *Per Hale, 1 Vent. 239. Per Cur. 1 Vent. 278.*

By the *st.* 3 *H.* 7. 1. he shall inquire, if the town permitted the felon to escape.

By the *st.* 1 & 2 *Ph. & M.* 13. the coroner may bail as before, and shall take the examination of the felon and obligation, and shall certify them to the next gaol-delivery.

(*G* 12.) *Inquisition.*] By the *st.* 3 *H.* 7. 1. the coroner shall certify an inquisition at the next gaol-delivery on pain of 5*l.*

By the *st.* 1 & 2 *Ph. & M.* 13. on an inquisition for murder or manslaughter, or accessory before, the coroner shall put in writing the effect of the evidence given to the jury, and shall bind over the evidence to the next gaol-delivery, on pain of being fined by the judge, and then certify such obligation and inquisition.

[The coroner, on returning a *felo de se non compos*, is not obliged to return the depositions. *Coroner of Westminster's Case*, *P.* 10 *G.* 2. *Str.* 1073.]

But the coroner need not take an inquisition *ex officio*, if he be not required. *R.* 1 *Sal.* 377.

If there are several coroners in a county, any of them may take an inquisition of the matters aforesaid. *H. P. C.* 172.

But the first inquisition shall stand. *Ibid.*

And upon such an inquisition process lies to an outlawry. *R.* 2 *Leo.* 200.

The inquisition need not say, that the jury came out of the four next towns. *R.* 1 *Sid.* 204.

And if it finds a deodand, it is good, tho' *super sacramenta* is not repeated. *Ibid.*

And tho' the word *prædict.* is wanting. *Ibid.*

And tho' it does not shew the place of the death. *Ibid.*

Tho' it has words superabundant. *R.* 3 *Mod.* 100.

And if it finds the substance, tho' defective in form, it may be amended. *R.* 1 *Sid.* 225. 259. 3 *Mod.* 101.

As, if it omits, *that he threw himself into the water*, if it be found, *felonice submersus est.* *R.* 1 *Sid.* 259.

Or, omit the word, *murdravit*, if found a felonious killing. *Per Twissd.* 1 *Sid.* 259. *Per Holt, 1 Sal.* 377.

But it shall not be taken by intendment: and therefore, if found, *quod A. jugulum suum felonice et ut felo secuit*, without saying, *that it was mortal*, and *that he died thereby*, it is bad. *R.* 1 *Sid.* 377.

If found, *quod A. felonice put himself in rivo et seipsum emergit, et sic se murdravit*; for, *emergit*, imports, that he came out of the river. *R.* 2 *Lev.* 140.

An inquisition *super visum corporis* is not traversable. *Carth.* 72. 2 *Lev.* 140.

[Inquisition *super visum corporis* of a man that hanged himself; filing of it stayed, on affidavit that the man died five years before, and the coroner only dug up a skull, which he assured the jury he knew to be the deceased's, and thereupon the inquisition was taken. *Rex v. Bond, H.* 3 *G.* *Str.* 22.]

An inquisition may be quashed, if there be proof of a misdemeanor in

in the coroner; as, refusal of evidence, &c. 1 *Vent.* 182. *Per Cur.* 1 *Vent.* 352. 3 *Mod.* 80.

[If in an inquisition *super visum corporis*, the year of our Lord in the caption is in common figures, it shall be quashed, for it should be in words at length, or at least in Roman numerals. *Rex v. Phillips*, H. 6 G. Str. 261.]

Or, if it finds a man *felo de se*, it may be traversed. *Per Hale*, 1 *Vent.* 239. *Per Cur.* 1 *Vent.* 278. R. 2 *Jon.* 198. 2 *Lev.* 152.

And after an inquisition quashed, the coroner shall take a new inquest *super visum corporis*. 1 *Sal.* 190.

[A new inquisition *super visum corporis* may be taken by leave of the court, but not without. *Rex v. Saunders*, P. 5 G. Str. 167.]

[The court will make a rule to take up the body, on first inquisition being quashed. *Anon. M.* 9 G. Str. 533.]

But a *melius inquirendum* will not be granted. *Per Hale*, 1 *Vent.* 182. *Semb.* 2 *Jon.* 198. unless it be for a misdemeanor in the coroner. 3 *Mod.* 238. *Carth.* 72.

And an inquisition that acquits a man shall not be traversed. *Per Hale*, 1 *Vent.* 239.

Yet, upon misdemeanor in the jury, a *melius inquirendum* shall be granted. *Semb.* 3 *Mod.* 80.

So, upon a misdemeanor in the coroner, and then a *melius inquirendum* goes to the sheriff, or commissioners, or justices of assize, who shall take examination upon *affidavit*, not *super visum corporis*. R. 1 *Sal.* 190. 2 *Lev.* 141. 152.

And a *melius inquirendum*, not being *super visum corporis*, may be traversed. *Carth.* 72. 2 *Lev.* 141.

[The coroner may take an inquisition on board a man of war, lying *infra corpus comitatus*, as in *Portsmouth* harbour; and if he is opposed by the captain, an information shall be granted. *Rex v. Solgard*, T. 11 G. 2. Str. 1097. *Andr.* 231.]

[If the coroner omits to take an inquisition upon an untimely death, it may be done by justices of gaol-delivery, *oyer and terminer*, or of the peace; but it must be openly; (*qu.* if notice is not necessary, for it is an office of intitling?) and if secretly, it shall be quashed. *Rex v. Killinghall*, M. 30 G. 2. 1 B. M. 17.]

[By *stat.* 25 G. 2. c. 29. for every inquisition on a body, (not in prison,) in any place subject to county-rates, coroner shall be paid 20s., and 9d. *per mile* for his journey.]

[But where they do not contribute to county-rates they are not entitled to those fees. *Rex v. West Riding of Yorkshire*, M. 37 Geo. 3. 7 T. R. 52.]

[For inquisition on body dying in prison, what quarter sessions shall allow, not exceeding 20s.]

[For a body slain he shall have also 13s. 4d. by 3 H. 7.]

[If he takes more, he is guilty of extortion.]

(G 13.) *Process to coroners.*] *Process* shall be directed to the coroners, where the sheriff is a party, plaintiff or defendant.

Or, if the sheriff be cousin to the plaintiff or defendant.

Or, if the array be quashed for partiality of the sheriff.

But if the sheriff be dead or amoved, *process* does not go to the coroners,



So, if any process goes to the coroners, all subsequent process issues to them, tho' the sheriff be removed. *R. Mo. 356. 422.*

And if the subsequent process be to the new sheriff, it is error. *R. Mo. 356.*

And shall not be helped after verdict by the *st. 32 H. 8. 30.* which remedies the misawarding of process. *R. Mo. 356.*

Yet, process to the coroner, where it ought not to be, is aided by the *st. 32 H. 8. R. Dy. 367. a.*

(G 14.) Coroner, how punished.

(G 14.) *For misdemeanor in office.*] By the *st. 14 Ed. 1. exon. de inq. super coron.* the inquirers shall command the sheriff to summon the coroner or his heirs, and all his bailiffs and beadles, and shall swear the bailiffs to return eight men out of every town, six out of each village, and four out of each hamlet, out of which number the inquirers shall swear twelve, to make true presentment on such articles as they shall give them, viz.

*Si coronator personaliter accesserit pro officio faciendo de omnibus murdris, felonis, aut alium substituerit, et quoties, et quem. Fl. l. 1. c. 18.*

*Si gratis accesserit quoties requisitus, vel aliquid petiit, aut receperit. Ibid.*

*Si catalla felon. legaliter fuerint appreciata, et villata liberata. Ibid.*

*Si munera accepit pro falsa inquisitione faciendâ, catallis appreciend. ad minorem valorem. Ibid.*

*Si catalla falso irrotulavit, aut aliquid detinuerit. Ibid.*

*Si appella falso fecerit irrotulari, vel de rotulis extrahi. Ibid.*

*Si quid acceperit de villatâ ubi fecerit inquisitiones, vel de corporibus mortuorum. Fl. l. 1. c. 18.*

*Si aliquem attach. ut ipsum gravaret. Ibid.*

*De thesauro invento. Ibid.*

*Si officium suum in omnibus, sine dilatione, et gratis, fecerit, &c. Ibid.*

*Et si coronator coram eis convictus sit de prædict. vicecomiti liberetur donec manucapt. sit ad satisfaciend. regi, &c. Ibid.*

By the *st. 3 H. 7. 1.* if a coroner neglect to make inquisition, or certify it, he forfeits *5 l.*

If he refuse to execute his office, when sent for, he shall be fined and imprisoned. *H. P. C. 170.*

[On inquisition on one that hanged himself, jury satisfied of his lunacy, coroner tells them finding him *felo de se* was matter of course, and thereupon they find accordingly; afterwards hearing what the consequence would be, they apply to coroner to take the verdict lunacy; he drew up the inquisition so, and they all set their hands and seals. But on *certiorari*, he returned the first inquisition, and the court stayed filing, and committed coroner. *Rex v. Wakefield, M. 4 G. Str. 69.*]

[If a coroner misbehaves, or lives out of the county, on petition from the freeholders, and affidavit of service at his last place of abode, the court of Chancery will issue a writ *de coronatore exonerando*; but the new one must be elected by the freeholders. *Freeholders of Warwick, T. 1744, 3 Atkyns, 184.*]

[By *stat. 25 G. 2. c. 29.* coroner convicted of extortion, wilful neglect or misdemeanor, shall be removed.]

*Vide ante, (G 12.)*

(G 15.) *For taking fees not due.*] So, by the *st. W. 1. 10. nul coroner reins demanda, ne preign. de nulluy pur faire son office, sur paine de la greeve forfeiture al roy.*

And this was in affirmance of the common law. 2 *Inst.* 176.

And therefore, where a coroner takes 2*s.* 6*d.* for himself, and 2*s.* for his clerk, before he will view the body, he shall be fined. 3 *Inst.* 149.

So, by the *st. 1 H. 8. 7.* he shall take nothing when any is dead by misadventure, on pain of 40*s.*

And therefore, in such case, he shall not take the fee allowed by the *st. 3 H. 7. 1. 2 Inst.* 176. *Vide infra.*

By the *st. 1 H. 8. 7.* justices of assise, or of the peace, may hear the offence by examination or presentment.

But a coroner may take the customary payment of 1*d.* from every town that comes to the *eyre*; for it is a payment due in respect of his office, and not for doing his office. 2 *Inst.* 176.

So, by the *st. 3 H. 7. 1.* he shall have 13*s.* 4*d.* on every inquisition taken on view of a body slain, out of the goods of the murderer, or if he hath none, out of the amerciamment of the township for the escape of the felon. *Vide supra.*

(G 16.) *Exemption.*—[A coroner is exempted from serving on juries. *Doug.* 191.]

#### (H) Exaction by an Officer, what shall be.

SO, exaction by any officer, will be a great misprision. *Vide Extortion.*

If it be for taking a fee not due, or before it be due, or more than is due.

If it be by any other exaction.

And therefore, no bond or writing may be exacted from the subject, to the king or other person, to do that, which by law he is bound to do to the king; and such bond, &c. will be void, and the defendant shall plead *dures.* 3 *Inst.* 149.

By the *st. 1 Ed. 3. 2 sess. 15.* (now expired) it was prohibited, that any of the king's council, or ministers, should exact a bond of any subject, to come in arms to the king, when sent for.

And such bond is to the dishonour of the king; for every subject ought to do the king his sovereign all service due, without compulsion. 3 *Inst.* 149.

If a bishop, or other ecclesiastical judge, or minister exact a bond or oath not warranted by law, the bond is void, and it will be an offence finable. 3 *Inst.* 149.

If the clerk of the escheator seize lands purchased by *A.* till a fine paid. 12 *Co.* 127.

If the bailiff of a wapentake omit a proclamation, which ought to be made, whereby the inhabitants of a town, not having notice, are amerced for not appearing at the wapentake. *Ibid.*

If a bishop constrain an archdeacon, &c. to compound with him, not to retain causes by prevention. 3 *Inst.* 148.



## (I) Bribery, what shall be.

**I**F an officer in a judicial office takes, of any other than the king, any fee, pension, robe, livery, gift, reward, or brocage for doing his office, or *colore officii*, except meat and drink of small value, it will be bribery, and a great misprision. 3 *Inst.* 145.

By the *st.* 20 *Ed.* 3. 1. justices shall be sworn, while in office, not to take fee nor robe of any but ourself, nor to take gift or reward by themselves or other, privily nor apertly, if any that hath to do before them, except meat and drink of small value, nor shall be of counsel to great or small, where we are party, &c. on pain to be at our will, body, lands and goods, &c.

And this extends to imprisonment and fine, but not to life. 3 *Inst.* 146.

By the *st.* 11 *H.* 4. *Nu.* 28. (not in print) no chancellor, treasurer, keeper of the privy seal, king's counsellor, king's serjeant, or any other officer, judge, or minister of the king, taking fees or wages of the king, for their offices, shall take any gift or brocage of any, upon pain to answer to the king the treble, and satisfy the party, and to be punished at the king's pleasure, and discharged from his office for ever, and any one may prosecute for the king and himself, and shall have a third part of the sum recovered. *Ibid.*

Extortion may be by a judicial or ministerial officer, but bribery only by a judicial officer; ecclesiastical or temporal. 3 *Inst.* 147.

And tho' the bribe is small, the misdemeanor is great. *Ibid.*

So, bribery may be taken *colore officii*, tho' no suit be depending; as, if the chancellor, treasurer, &c. make a customer, or other officer of the king, for money given; for he ought not to take any thing. 3 *Inst.* 148.

Or, if he take a gift, &c. in any matter referred to him by the king. *Ibid.*

So, if the ordinary, having power to grant administration to the widow or son of a deceased, take money to prefer the widow, or *contra.* *Ibid.*

## (K) How an Office shall be lost.

(K 1.) By Sale within the *St.* 5 & 6 *Ed.* 6. 16.

**B**Y the *st.* 5 & 6 *Ed.* 6. 16. if any person bargain or sell any office or deputation of it, or any part of it, or take any reward or profit, directly or indirectly, or any bond, &c. for any office, &c. which concerns the administration or execution of justice, or the receipt, comptrolment, or payment of the king's treasure, &c. account, auditorship, or surveying any of the king's honors, manors, &c. or customs, or attendance in the custom-house, or the keeping of any town, castle, &c. used as a place of strength or defence, or any clerkship in any court of record, &c. he shall forfeit his right, interest, &c. in such office, deputation, or gift, or nomination to it.

And he that gives any money, reward, &c. or any bond, promise, &c. for such office, deputation, &c. shall thereupon immediately be a disabled person to have or enjoy it; and such bond, &c. shall be void.

And this statute extends to all offices, which concern the administration

stration or execution of justice; as, the office of chancellor of a bishop; for, in matrimonial and testamentary cases, his office concerns the administration of justice, and offices in the spiritual court are within the statute, as well as offices in the courts of common law. *R. 2 Cro. 269. 3 Inst. 148. 12 Co. 78.*

So, the office of register or commissary. *2 Cro. 269. 3 Lev. 289. 2 Vent. 267. [Layng v. Prim, C. P. E. 18 Geo. 2. Willes, 571.]*

Or, surrogate. *2 Ca. Ch. 42.*

So, all officers, which concern the king's revenue; as, the office of cofferer of the king's household. *Co. L. 234. a. 1 Rol. 236. 3 Inst. 154.*

The auditor of *Wales*. *R. Sal. 468.*

Surveyor of the customs. *2 And. 55.*

To be clerk of the fines to a justice in *Wales*, who has power to take fines. *Per Co. Goldsb. 180.*

So, it will be within the statute, if a man for money, &c. surrender such an office, to the intent that the king may grant it to another. *Co. L. 234. a. R. 2 And. 57. Dub. 1 Rol. 157. 236.*

So, if an officer make a deputation of the office to *A.* rendring out of it so much *per annum* to him. *R. 2 Ca. Ch. 42.*

Rendring a sum in gross, generally, without regard to the salary or profits. *R. Sal. 468. Mod. Ca. 234. R. 2 And. 57. Vide infra.*

Tho' the profits always amount to more than the sum reserved to be paid by the deputy. *Mod. Ca. 234.*

So, if the bailly of the *Savoy* demise *bona felonum*, &c. which belong to the office, to *B.* and make his deputy, rendring so much *per annum*. *Semb. 2 Lev. 151.*

[A contract with the warden of the Fleet (who held only for life under the crown), that for a sum of money he should surrender the office to the king, to the intent that he should procure from the king a grant of the office to the purchaser, is void, tho' that office has been, and may be granted to a subject in fee. *Huggins v. Bambridge, C. P. H. 14 Geo. 2. Willes, 241.*]

So, an obligation, for performance of covenants in an indenture, will be void, tho' there are other covenants besides those, which relate to the sale of the office. *R. 2 And. 57. 108.*

If an office be void by force of the statute, the nomination belongs to the king. *R. 2 Vent. 267. Vide Forfeiture (C).*

And the king cannot dispense with a person disabled by the statute to enjoy such office. *3 Inst. 154.*

But the *st. 5 & 6 Ed. 6. 16.* does not extend to an office of inheritance, or the office of keeping any park, house, manor, garden, chase or forest.

Nor, to an office in the gift or grant of the justices of *B. R.* or *C. B.* or justices of assize.

So, an office for life or years, derived out of an office of inheritance, is not within the statute. *R. 2 Lev. 151. [3 Keb. 552. 659. 678. S. C. Huggins v. Bambridge, C. P. H. 14 G. 2. Willes, 241.]*

[This exception in the statute extends to those offices only of which subjects are seised of estates of inheritance. *Ibid.*]

Tho' the fee of the office be in the king. *Ibid.*

So, the sale of the office of bailiff of an hundred is not within the statute, for it is not an office of trust, nor concerns the administration of justice. *4 Leo. 33.*

So,



So, it will not be within the statute, if a deputy gives a bond to pay a moiety of the profits to his principal, for it amounts only to an allowance of the other moiety to the deputy for his trouble. *R. Sal. 466. [Com. 1. S. C.]*

Or, a sum in gross out of the profits; for if the profits do not amount to it, it shall not be paid. *R. Sal. 468. Mod. Ca. 234. Vide supra.*

Or, a less sum certain, where the salary is certain. *R. Sal. 468. Mod. Ca. 234.*

[A bond given by any of the officers mentioned in the statute, for securing all the profits of the office to the person appointing, is void by that statute. *Layng v. Paine, C. P. E. 18 Geo. 2. Willes, 571.*]

[So, is a bond given by such an officer to surrender whenever the person appointing chose. *Ibid.*]

So, by the *st. 5 & 6 Ed. 6. 16.* all acts, by an offender against that statute before removal from his office, shall be good.

(K 2.) By Forfeiture.

So, an office shall be lost by forfeiture: as, if he break the condition annexed to it by law, by *non-user*, or *abuser*. *11 Ed. 4. 1. b. Vide Condition, (S 1, 2.)*

As, if an officer of justice, as a recorder, &c. refuse attendance upon a summons, at the court. *R. Sal. 435.*

If the marshal of *B. R.* refuse or neglect to attend the court. *R. 39 H. 6. 34. a.*

If the serjeant at arms neglect his attendance upon the lord chancellor. *Mo. 193.*

If the clerk of the signet does not attend in his waiting month. *1 Sid. 81.*

But non-attendance will not be a forfeiture, where he had lawful licence for his absence; as, if the king gives a licence to a serjeant at arms for not attending the chancellor, tho' it was only by *parol*. *R. Mo. 193.*

So, if an officer be imprisoned for a misdemeanor in his office, non-attendance during his imprisonment is no forfeiture. *Semb. Cro. Car. 491.*

*Vide post. (K 8. 11, &c.)*

(K 3.) By Misdemeanor in his Office.

So, if he commits a misdemeanor contrary to the nature of his office: as, if a gaoler of a prison be guilty of extortion. *R. 2 Lev. 71. Vide Condition, (S 1, 2.)*

Or, suffers two voluntary escapes. *R. 3 Lev. 288. Adm. Dy. 151. b. 9 Co. 96. R. 39 H. 6. 33. b.*

So, *crassa negligentia* amounts to a voluntary escape; as, if he unlock his doors and go away. *Cro. Car. 492.*

If a searcher be absent, and has no deputy at the port, where a ship lades or unlades. *R. Cro. Car. 492.*

But a negligent escape is not a forfeiture of his office. *39 H. 6. 33. b. 2 Bul. 58.*

Nor, a single escape, tho' it be voluntary. *39 H. 6. 33. b. 1*

The book says, that an escape shall not be intended voluntary, if it be not so found by verdict, or expressly confessed by the party, and that

that a fingle escape does not forfeit the office; but it does not say, that a fingle escape is not a forfeiture, if it was voluntary. 39 H. 6. 33, 4.

So, *non-user*, or *abuser*, of an office, by him or his deputy, forfeits the whole office. *Pal.* 80.

And the default of the deputy shall be charged upon the principal officer. *Dy.* 238. *b.* *Semb.* 3 *Mod.* 146.

So, if a master directs his servant, or deputy, to do an unlawful act, and he exceeds his authority, the master shall answer for him. *Mo.* 777.

But a tortious act of a servant, or deputy, does not affect his master, who gives authority for a lawful act only. *Semb. Mo.* 777. *R. Mo.* 787.

[The court are empowered by *stat.* 27 *Geo.* 2. *c.* 17. to remove a person from the offices of clerk of the papers, and clerk of the day rules in the King's Bench prison, on account of his non-residence within the prison. In the matter of *Bryant*, *T.* 32 *Geo.* 3. 4 *T. R.* 716. *H.* 34 *Geo.* 3. 5 *T. R.* 509.]

(K 4.) By Non-attendance upon the King in his Wars.

So, by the *st.* 11 *H.* 7. 18. if any within the realm, having office or fee by the king's grant, attend not on him in person, when the king goes to his wars in person, he shall forfeit his office, &c. unless by the king's special licence or sickness, or other let, by which he could not come, duly proved, he be prevented.

And this act is perpetual, and did not determine by the death of *H.* 7. *Dy.* 211. *a.*

And the licence, as well as sickness, or other impediment, ought to be duly proved. *Dy.* 211. *b.*

But, by a proviso in the same statute, it does not extend to a spiritual person, the master of the rolls, or other officer or clerk of *Chancery*, justices of either bench, barons of *Exchequer*, or officers or clerks of those places, nor to the king's attorney, solicitor or serjeants, nor to the clerk of the council, or any in the king's service in *Berwick* or *Carlisle*.

So, it does not extend to an officer, who had not his office by a grant of the same king, but of his predecessor. *R. Dy.* 211. *a.*

(K 5.) By Acceptance of another Office incompatible.

(K 5.) *What shall be such.*] So, a man shall lose his office, if he accepts another office incompatible: as, if the one office be under the control of the other: as, if the remembrancer of the *Exchequer* be made a baron of the *Exchequer*. *Dy.* 197. *b.* *Vide ante*, (B 6.)

If a town-clerk be made mayor, or justice of peace, or alderman of the same borough. *Vide Franchises*, (F 27.)

(K 6.) By Destruction of the Thing for which the Office was granted.

So, an office may be lost by destruction of the thing to which the office belongs: as, if one grants the office of parker, and afterwards destroys his park; the office, with all casual fees, is gone. *R. Cro. Car.* 60. *Hut.* 86.

If



If a grant be to *A.* to be steward of a manor, and afterwards the manor is dissolved. *Cro. Car.* 60. *Hut.* 87.

If a corporation be dissolved or surrender, the office of recorder, town-clerk, &c. is gone. *Hut.* 87.

But if the king, or another, grant to an officer a *collateral* fee, as 20 *l.* *per annum* for his life for the exercise of his office; that does not determine by destruction of the thing to which the office belonged. *Cro. Car.* 60. *Hut.* 87.

(K 7.) By Neglect of Oaths and Sacrament.

So, by the *st.* 25 *Car.* 2. 2. all admitted into office, civil or military, or who shall receive a salary, fee, &c. by reason of a patent from the king, or have a place of trust under him, or by his authority, or by authority derived from him, in *England, Wales*; or the navy, or *Jersey* or *Guernsey*, or admitted into service in his majesty's or royal highness's family, shall take the oaths of allegiance and supremacy the next term (the time enlarged to six calendar months after admission, or return from abroad, by 9 *Geo.* 2. 26.) after admittance in *Chancery* or *B. R.* or at the next quarter sessions of the place where he resides, between nine and twelve in the forenoon. *Vide Allegiance*, (B 1, &c.)

And shall receive the sacrament, &c. in three months after such admittance, in some public church, on the Lord's Day, &c.

And in the court where he takes the said oaths, shall deliver a certificate of receiving the sacrament under the hands of the minister and churchwarden, and make proof thereof by two witnesses on oath: and at the same time shall make and subscribe the declaration against transubstantiation.

And a person, who neglects so to do, shall be *ipso facto* incapable of the office, &c. and if, after such neglect, &c. he execute the said office, being convicted on information or indictment, he shall be disabled to sue in law or equity, to be guardian, executor, or administrator, to take a legacy or deed of gift, to bear office in *England* or *Wales*, and shall forfeit 500 *l.* to be recovered by him that shall sue in action of debt, information, &c. in any courts of *Westminster*.

On tender of any person to take the oaths, the court is enjoined to administer them, and the names of the persons taking them shall be inrolled in rolls to be kept for that purpose, &c.

By the *st.* 13 & 14 *W.* 3. 6. and 1 *Ann.* 22. all such persons, and all ecclesiastical persons, members of the university of the foundation, being of the age of eighteen, tutors, schoolmasters and ushers, preachers in separate congregations, serjeants, barristers, advocates, &c. shall take the oath of abjuration at the times and under the penalties aforesaid. And this was confirmed by the *st.* 1 *Geo.* 13. [And extended to high constables.]

And they may take the oaths, make certificate of receiving the sacrament, &c. in *C. B.* or *Exchequer*, as well as *Chancery*, *B. R.* or quarter sessions.

And by the *st.* 1 *Ann.* 22. may do it at the next term or quarter sessions, tho' above three months after admission to the office.

An information lies for refusing to qualify himself for an office, tho' he be a dissenter. *R. per two J. Eyre cont. Skin.* 514.

But by the *st.* 25 *Car.* 2. 2. it is provided, that the act shall not extend to an high or petty constable, overseer, churchwarden, surveyor,

or like inferior civil officer, nor to the office of a forester, park-keeper, bailiff of a manor, or the like private office.

And therefore, not to a censor in the college of physicians. *Dub. Carth. 478.*

[The common freemen of a borough are not obliged to take the test. *Borough of Christchurch, H. 2 G. 2. Str. 828.*]

(K 8.) Who shall take Advantage of a Forfeiture.

If an office be forfeited, the king, generally, shall have the advantage of the forfeiture: and therefore, where a statute makes an office void for any cause, the king shall have the forfeiture. 3 *Lev. 290. Vide post. (K 11, &c.)*

So, where the *st. 5 & 6 Ed. 6. 16.* says, if any bargain and sell, &c. any office, &c. he shall forfeit his right, &c. if any archdeacon of the patronage of a bishop, sell, &c. whereby the office is forfeited, the king shall grant it, and not the bishop or archdeacon. 3 *Lev. 289.*

But generally, a forfeiture by an officer for life or years, derived out of an estate of inheritance of the same office, shall be lost only as to himself; and he who has the inheritance shall take the advantage. 2 *Lev. 71. R. 3 Lev. 288. 39 H. 6. 34. a.*

As, if a parker in fee grant the office to B. in tail for life, &c. who breaks the condition annexed in deed or by law, he who has the fee shall have the office. *R. Mo. 707.*

(K 9.) So, an Office may become void by Surrender.

So, an office may become void by surrender: as, if an officer surrender his patent in *Chancery. 11 Ed. 4. 1. b. Vide Patent (G).*

So, if he surrender, in person in court, the office of comptroller of the pipe to the chancellor of the *Exchequer*, present in court, who grants it to another in court, all will be good without any writing, except an entry in court. *Hard. 476.*

But if the patent itself be not surrendered to be cancelled, nor a *vacatur* entered of the enrolment, nor an entry made of the surrender in the life of the master of the rolls; tho' there be an entry upon record, that it was surrendered before the master of the rolls, it is not a good surrender. *R. Dy. 195. a.*

So, if an officer says before a master in *Chancery*, that he surrenders his office, who accepts it, and makes an entry, *quod tali die A. venit coram me et sursum reddidit officium, &c.* into my hands to the use of the king; it is not sufficient, without delivery of the letters patent to be cancelled. *Semb. Dy. 176.*

(K 10.) By the Death of the King.

So, by the common law, all patents of justices of *B. R., C. B., Exchequer*, sheriffs, escheators, commissioners of *oyer and terminer*, gaol-delivery of the peace, attorney-general, determined by the death of the king.

So, since the *st. 1 Ed. 6. 7. R. per all the J. 1 Eliz. 1 And. 44. Bend. 79.*

But by the *st. 7 & 8 W. 3. 27. s. 21.* no commission, civil or military, shall determine by the death of the king, his heirs or successors;



fors; but shall continue six months after such death, unless sooner superseded, or determined by the next successor.

So, by the *st. 1 Ann. 8.* no patent, or grant of any office or employment, civil or military, &c.

And by the *same statute*, justices of assise, *oyer and terminer*, gaol-delivery, *nisi prius*, and justices of peace may proceed, as if the late king were living, but as her majesty's justices, and in her name.

So, by *that statute*, no commission of delegacy, or review, in causes ecclesiastical, testamentary or maritime, or any process thereon, shall be discontinued by the death of any king or queen, but may be proceeded on as if such king or queen were living.

So, by the *st. 4 Ann. 8. s. 8.* the privy council of the queen and her successors shall not be determined by death, &c. but shall continue to act as such six months, unless sooner determined by the next successor. [*Vide 1 Geo. 2. st. 2. c. 23.*]

So, the lord chancellor, or keeper, lord treasurer, lord president, lord privy seal, lord high admiral, and great officers of the household, and every other person in office, place, or employment, civil or military, in *England, Ireland, Wales, Jersey, Guernsey, Alderney, Sark*, or the plantations, unless sooner removed, &c.

So, by the *st. 6 Ann. 7. s. 8.* this is extended to the privy council, lord chancellor, and other officers, after the union.

[By the *st. 1 Geo. 3. 23.* the commissions of judges are continued, notwithstanding the demise of the king.]

(K 11.) By what Means Advantage shall be taken of a Forfeiture.

(K 11.) *By scire facias.*] If an office be forfeited, the king may have a *scire facias* to repeal his patent. *R. Dy. 198. Vide Patent, (F 3.) Vide ante, (K 2, 8.) Vide Patent, (F 1, &c.)*

And, regularly, there must be a *scire facias* to remove the party, where he has the office by matter of record; for he cannot be removed without matter of record. *Dy. 198. a. R. Dy. 211. a. 39 H. 6. 33.*

And the cause of forfeiture should be mentioned in the writ. *Dy. 198. b. Vide Patent, (F 7.)*

And a *scire facias* lies before inquisition, or office found of the forfeiture. *Dy. 211. a.*

If the *scire facias* is brought in *Chancery*, where the patent of the office appears upon record; otherwise the forfeiture must be found by office, or otherwise. *R. 3 Lev. 223. Vide Patent, (F 7.)*

So, there must be a *scire facias*, tho' the forfeiture incurred by the *st. 11 H. 7. 18.* for he may have an excuse for his non-attendance. *R. Dy. 211. b.*

So, there must be a *scire facias*, if it be an office for life. *Sal. 466.*

If a *scire facias* be brought to repeal a patent, the king cannot seize till the forfeiture be tried. *R. 3 Lev. 223.*

(K 12.) *By inquisition or office.*] So, an inquisition may be found, upon a commission out of *Chancery*, under the great seal and returnable there, of the grant of the office and the causes of forfeiture. *9 Co. 95. Bro. R. 375.*

And upon such inquisition returned, the king may seize the office, without a *scire facias*. *R. 9 Co. 95 96.*

If it be not an office for life. *Sal.* 466. *Vide post.* (K 14.)

And the award of seizure shall be in *Chancery*, tho' he be an officer of another court. 9 *Co.* 98. *a.*

By office and award of seizure, the king shall be in possession of the office forfeited, without writ or commission for that purpose. *Ibid.*

But to such office, or inquisition, the party shall have his traverse, or *monstrans de droit*, as the case requires. 9 *Co.* 98. *a.* *Bro. R.* 378. *Vide Prerogative*, (D 81, &c.)

And if the cause of forfeiture be traversed, the attorney-general may join issue upon it, which shall be tried in *B. R.* 9 *Co.* 99. *a.*

And after a verdict, judgment for the king. 9 *Co.* 100.

Or, for the officer, *quod restitatur*. 9 *Co.* 103. *b.*

So, such office or inquisition must find every thing requisite to shew a title in the king to the office, otherwise it shall be quashed. 3 *Lev.* 288. 3 *Mod.* 335.

As, if the inquisition finds, that the warden of the Fleet permitted voluntary escapes, &c. without saying what estate he had in the office; for, if he had it for life, the forfeiture shall not be to the king but to him who has the inheritance. *R.* 3 *Lev.* 288. 3 *Mod.* 336. *Sal.* 469.

So, an inquisition is to entitle the king, and vest the office in him, or for information only. *Sal.* 469.

If it be to entitle, it must be certain. *Ibid.*

And cannot be supplied by a *melius inquirendum*; for that goes only where all that is necessary is not found; not where the finding is defective. *Ibid.*

But in an inquisition for information only there needs not so much certainty: as, if an inquisition be of the forfeiture of an officer in *B. R.*, for such inquisition is only for information; for *B. R.* shall determine of all forfeitures by their officers. *Ibid.* 2 *Bul.* 58.

(K 13.) *By information.*] So, upon an offence committed by an officer, which amounts to a forfeiture, an information may be exhibited against him. 2 *Lev.* 71. *Vide Information* (B).

Or, upon an indictment found for such an offence, the attorney-general may exhibit an information against him. *Dy.* 151. *b.*

But, upon a single instance of neglect, the court does not usually grant an information. *Sal.* 467.

To an information, the defendant may plead *not guilty*.

If the defendant be convicted by confession or verdict, the office may be seized into the hands of the king, without a *scire facias*, or other process against him. *Dy.* 151. *b.*

(K 14.) *When, without office, or scire facias.*] So, where no freehold or interest is to be divested out of the party, or vested in the king, the king may take advantage of the forfeiture, and make a grant of the office, without inquisition, or *scire facias*: as, where an archdeacon sells the office of register, contrary to the *st.* 5 & 6 *Ed.* 6. whereby his right is forfeited, and the grantee disabled to take, the king may grant the office of register to another, without office found, or *scire facias*; for the place of register was void, and the archdeacon himself disabled to supply it. *R.* 3 *Lev.* 290.



## OFFICER.

(K 15.) *By action.*] So, if any intrude into the office of another, and disturb him, who has a right to it, in the exercise of the office, there may be an assise for the *disseisin*, if he who is disturbed have the freehold. *Vide Assise*, (B 2.)

If he have not the freehold, he may have an action upon the case. *Vide Action upon the Case for Disturbance*, (A 5.)

So, an action upon the case lies for disturbing him, who has a fee or freehold; for he may have an assise, or an action upon the case, at his election. *Vide Action*, (M 1.)

*Vide more concerning Officer, in Abatement*, (D 6.)—*Action upon the Case for a Deceit*, (A 6.)—*Action upon the Case for Misfeasance*, (A 1.)—*Action upon the Case for Negligence*, (A 2.)—*Chafe*, (Q 1, &c.)—*Courts*, (E 3.—P 16.)—*Imprisonment*, (H 8, 9.)—*Justices*, (M 12, 13.)—*Justices of Peace*, (A 4.—B 75. 101.)—*Leet*, (M 1, &c.)—*Pleader*, (3 M 22.)—*Privilege*, (C 1.)—*Sewers* (F).—*Viscount*, (E 2.)

## OLERON.

Laws of Oleron.

*Vide Admiralty*, (E 12.)

## OPPOSER.

Foreign Opposer.

*Vide Courts*, (D 15.)

## ORDERS.

Order of Bastardy.

*Vide Bastard*, (G 1, &c.)

Order of Removal of a Poor Person.

*Vide Justices of Peace*, (B 73.)

Interlocutory Order.

*Vide Chancery* (V).

Decretal Order.

*Vide Chancery*, (Y 1, &c.)—*Sewers*, (H 1, 2.)

Holy Orders.

*Vide Parson*, (B 1.)

## ORDINARY.

*Vide Administration*.—*Administrator*.—*Ecclesiastical Persons*.—*Esglise*.—*Heresy*, (B 2, 3.)—*Visitor*, (A 6, &c.)

## ORDINATION.

*Vide Parson*, (B 2.)

## ORIGINAL.

## Original Bill.

*Vide* Chancery, (E 1, 2.—Y 6.—2 N 1.)

## Original Writ.

*Vide* Action upon the Case, (C 1.)—Action upon the Case upon Assumpsit, (H 1.)—Action upon the Case for a Deceit, (F 1.)—Amendment, (D 1, &c.)—Assise, (B 8.)—Attaint, (C 1.)—Fine, (E 1.)—Pleader, (C 11, &c.—3 I 2.—3 M 1. 6.)—Prerogative, (D 51.)

## ORPHAN.

*Vide* Guardian, (G 1, &c.)—Uses, (N 5.)

## OTHER REMEDY.

*Vide* Abatement, (H 50.)—Action, (K 1, &c.—M 1, &c.)—Action, upon the Case, (B 8.)—Action upon the Case upon Assumpsit (C).—Action upon the Case for a Deceit, (E 5.)

## OVERSEERS OF THE POOR.

*Vide* Justices of Peace, (B 64, &c.)

## OUSTER.

*Vide* Estates, (H 9.)

## OUSTER LES MAINS.

*Vide* Prerogative, (D 90.)

## OUTLAWRY.

*Vide* Utlagary.

## OWELTY OF PARTITION.

*Vide* Parceners, (C 8.)

## OWNERS OF SHIPS.

*Vide* Navigation, (I 3.)

## OXFORD.

*Vide* University (C).

## OYER.

*Vide* Abatement, (I 22.)—Pleader, (P 1, 2.—2 V 4.)

## OYER AND TERMINER.

*Vide* Justices, (G 1, &c.)



## PACKAGE.

*Vide London, (K 1.)*

## PAIN FORT ET DURE.

*Vide Justices, (X 2.)*

## PALATINE.

*Vide Abatement, (D 2.)—Franchises, (D 1, &c.)*

## PALL.

*Vide Popery, (A 1.)*

## PANEL.

*Vide Amendment (F).—Enquest, (C 1, &c.)*

## PANNAGE or PAWNAGE.

*Vide Chase, (O 2.)—Grant, (E 8.)*

## PAPIST.

*Vide Justices of Peace, (B 14, &c.)—Popery.*

## PARAPHERNALIA.

*Vide Baron and Feme, (F 3.)*

## PARCEL.

*Vide Abatement, (H 51.)—Grant, (E 10.)*

## PARCENER.

## (A) Parceners by Common Law.

(A 1.) Who are.

**P**ARCENERS are by common law, or by custom. *Lit. f. 241.*

Parceners by common law are, where tenant in fee, or tail, dies, having several daughters, and no son; or several sisters, and no issue or brother; or several aunts, &c. the lands descend among all the daughters, sisters, aunts, &c. who make but one heir. *Lit. f. 241, 242.*

So, if one parcener dies, the son or other heir of the deceased shall be parcener with the survivor. *Vide Co. L. 164.*

If one after issue dies, by which her husband is tenant by the curtesy; the other shall be parcener with the husband, and shall have a writ of partition against him, tho' the husband is not a parcener. *Lit. f. 264.*

If:

If one parcener disseises the other, after recovery they are parceners again. *Co. L. 167. b.*

So, if one recovers against the other in a *nuper obiit*, or *rationabili parte*. *Ibid.*

If two parceners alien, reserving a rent to them in fee; they are parceners of the rent, and not joint-tenants: for it follows the nature of the land. *Co. L. 169. b.*

So, if a parcener grants a rent to her sisters for equality of partition. *Ibid.*

But parceners cannot be otherwise than by descent: for, if several daughters, sisters, &c. purchase lands together, they are joint-tenants, and not parceners. *Lit. f. 254.*

(A 2.) What Inheritances they take, and what not.

All lands and tenements, of which partition may be made, shall descend in parcenary.

As, a rent-charge, tho' it is entire. *Co. L. 164. b.*

A corody certain. *Ibid.*

A castle for habitation. *Co. L. 165. a.*

The lands or possessions annexed to a dignity. *Ibid.*

Tho' they be entire inheritances, which cannot be divided: as, a villein; for one may have his service for a day, or a month, &c. and afterwards the other for another day, month, &c. *Co. L. 164. b.*

So, an advowson; for they may present by turns. *Ibid.*

So, a mill; for one shall have it for so long a time, or one toll-dish, the other for a like time afterwards, or the second toll-dish. *Co. L. 165. a.*

But, where the public good requires that one shall have the whole, the inheritance does not go in parcenary: as, the crown descends only to the eldest daughter, sister, &c. for *regnum non est divisibile*. *Ibid.*

So, a castle for the defence of the realm. *Ibid.*

So, an office of honour, as, to be high constable of *England*, &c. shall be executed by the husband of the eldest daughter. *Ibid.*

And, before marriage it shall be executed by deputy. *Ibid.*

So, homage and fealty shall be done to the eldest. *Co. L. 67. b. 164. b. (Semb.)*

So, a dignity, or title of honour, shall not descend in parcenary; but the king may confer it on which daughter he pleases. *Co. L. 165. a. 12 Co. 111.*

So, where the division of an inheritance would be a prejudice to another, it goes to the eldest only, and she shall make contribution to the others; as, reasonable *estovers* appendant to a tenement; for, if all the daughters should have them, the charge would be increased. *Co. L. 164. b.*

So, a corody uncertain. *Co. L. 164. b. 165. a.*

A piscary, or common *sans nombre*. *Ibid.*

[Yet, if the eldest cannot make contribution, there shall be an allotment made to the one for so long time, and afterwards to the other. *Co. L. 165. a.*

(A 3.) Incidents to Parcenary.

(A 3.) *They make but one heir.*] If there are several parceners, all make but one heir to their ancestor. *Lit. f. 241.*



And therefore, if a remainder be limited to the heirs of *B.*, and he dies having two daughters, they both take.

If one daughter be attainted for felony the remainder shall be void for the whole: for whoever takes by purchase, as right heir to another, ought to be complete heir, and one alone is not so; for they both make but one heir. *Semb. Co. L. 163. b.*

If *B.* leases, rendering 2*s.* rent, and if he dies, his heir within age, then 20*s.* If he dies having two daughters, the one within age, the other of full age, the 20*s.* rent is not due; for his heir was not within age, both daughters being but one heir, and one being of full age. *Co. L. 164. a.*

If one parcener enters into the whole land, generally, and takes the profits, it shall be the entry of both, and does not divest the moiety of her sister. *Co. L. 243. b. 373. b.*

Or, if both enter, and afterwards one takes all the profits; this does not divest the moiety of her sister, without an actual ouster and disseisin. *Co. L. 373. b.*

But if one enters after the death of her ancestor, claiming the whole, and takes the profits of the whole; this divests the purparty of her sister. *Co. L. 243. b. 373. b.*

So, if one enters, and makes a feoffment; this subsequent act explains the preceding entry, and shews that she was seised of the whole: yet it is not properly a disseisin, for the other never was seised; nor an abatement, for both make but one heir. *Co. L. 374. a. (Vide Co. L. 243. b.)*

(A 4.) *They have an entire freehold. When they shall be joined in a suit.* So, parceners, till partition made between them, have but one entire freehold: and therefore, if land descends to several daughters, one *præcipe* lies against them all. *Co. L. 164. a. Vide Abatement, (F 4.)*

(A 5.) *When they shall join in an action.* So, in all actions real ancestral, where the right descends to them from the same ancestor, all the parceners ought to join. *Co. L. 164. a. Vide Abatement, (E 8.)*

So, if two parceners are disseised, they shall join in an assize. *Co. L. 164. a.*

But where they sue in several rights, they ought to have several actions: as, if two parceners be disseised, and die, their heirs ought to sue severally; tho' after recovery they are parceners again; for each has a several right. *Ibid.*

(A 6.) *In what respect each parcener has a moiety.* So, each parcener has a moiety, or several interest, in the land descended to her. *Co. L. 163. b.*

And therefore, if one dies, her purparty does not survive, but descends to her heir. *Co. L. 164. a.*

So, one may enfeoff, and make livery of her part to the other. *Ibid.*

(A 7.) *How the descent shall be to parceners.* A descent to parceners shall be *in capita*, not *in stirpes*: and therefore, if *A.* hath two daughters, and one dies, and leaves three daughters, and then *A.* dies; the three

three daughters take with the aunt by descent, but the aunt shall have as much as all the daughters of her sister. *Co. L. 164. a.*

So, if one daughter of *A.* dies, leaving a son and several daughters, the son shall have all the purparty of his mother, as heir with the aunt. *Ibid.*

(B) Parceners by Custom.

Parceners by custom are, where all the sons take the lands and tenements equally between them by descent: as, by the custom of *Gavelkind* in *Kent*, and elsewhere. *Lit. f. 265. Vide Gavelkind.*

(C) Partition.

(C 1.) In Law.

Parceners are so called because partition lies between them. *Lit. f. 241.*

Partition may be made by an act in law, or in deed. *Co. L. 165. b.*

As, if one parcener makes a feoffment of her part, this part is thereby severed, and the feoffee does not hold in parcenary, but in common. *Co. L. 167. b.*

If two parceners take husbands, and after issue die, by which the husbands are tenants by the curtesy; they do not hold in parcenary; but a partition is made between them by act in law. *Ibid.*

So, if one parcener disseises the other, till re-entry or recovery by the disseisee, the other does not hold in parcenary. *Ibid.*

If the parceners are *mesne*, and one of them purchases the tenancy *paravail*, this makes a partition of the *mesnalty*: for her part shall be thereby extinguished. *Ibid.*

(C 2.) Partition in Deed.

(C 2.) *By consent.*] Partition in deed shall be by consent, or by compulsion. *Co. L. 165. b.*

Partition by consent may be made in divers manners: as, if the parceners themselves, by agreement, divide their tenements into so many parts, as there are parceners, each part by itself in severalty, and of equal value. *Lit. f. 243.*

Or, if they choose friends to make partition of the tenements between them. *Lit. f. 244.*

Or, write the several parts in several billets, which are rolled within balls of wax, and shaken by an indifferent person, and then each takes a ball for her part. *Lit. f. 246.*

Or, if they determine by lot, who shall take the first ball.

So, they may make partition by consent, that one parcener shall have the lands for so long a time; and then the other for so long. *Co. L. 167. a. 180. a.*

That one shall have such a manor, or land, for a year, and the other such an one, and then that they change, and so *alternis vicibus*, to them and their heirs for ever. *Co. L. 167. b.*

That one shall have such an house, &c. the other such an house and a rent for owelty of partition. *Lit. f. 251. Vide post. (C 8.)*

That one shall put her land in *hotchpot*, and then shall make partition of the whole. *Lit. f. 266, &c. Vide post. (C 4.)*



And therefore, if a remainder be limited to the heirs of *B.*, and he dies having two daughters, they both take.

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That one shall have such an house, &c. the other such an house and a rent for owelty of partition. *Lit. f. 251. Vide post. (C 8.)*

That one shall put her land in *hotchpot*, and then shall make partition of the whole. *Lit. f. 266, &c. Vide post. (C 4.)*



So, several parceners may agree, that one shall have her part in severalty, tho' the others hold, without making partition. *Lit. f. 276.*

(C 3.) *When the eldest shall have the preference.*] If a division be made of tenements into several parts without a special agreement who shall choose; the eldest shall make her election first, and afterwards according to their seniority. *Lit. f. 244.*

So, in all cases, where no agreement is made, the eldest parcener shall be preferred: as, if an advowson descends to several daughters, the eldest daughter shall have the first turn. *Co. L. 166. b.*

And if the privilege is given to the eldest by the law, without the act of the party, it goes to her issue: as, if an advowson descend to parceners, and the eldest dies; her heir shall present in the first turn. *Ibid.*

So, if she marries, or aliens, the husband or assignee shall have the same privilege. *Ibid.*

But, if an agreement be to the contrary, the eldest shall not have the preference. *Lit. f. 244.*

Or, if by assent, the eldest makes a division of the tenements into several parts. *Lit. f. 245.*

So, where the privilege is consequent to the act of the parties, the issue or assignee shall not have it; for it is personal: as, if partition is made by assent, or by the appointment of friends, and the eldest dies; her heir shall not choose in the first place, but the next sister. *Co. L. 166. b.*

So, if partition be made by the sheriff; the eldest shall not have her choice. *Lit. f. 249.*

(C 4.) *When a daughter shall put her part into hotchpot.*] If one daughter has received land with her husband in *frank-marriage* in the life of her father, she shall not have any part of that which descends upon the death of her father, if she does not put the land given in *frank-marriage* into *hotchpot* with that which remains for her other sisters. *Lit. f. 266, 267.*

And in such case, the whole residue of the lands of the father descends to the daughters not married, till the advanced daughter puts her lands into *hotchpot*. *Co. L. 176. b.*

If the advanced daughter puts her land in *frank-marriage* into *hotchpot*, then partition shall be made; and the advanced daughter shall have all the land given in *frank-marriage*, and so much more as will make her part equal with the part of any to whom the residue descended. *Co. L. 177.*

So, if the donees die before the father, or before his land be put into *hotchpot*; the issue shall have the same advantage; and if he puts the land given in *frank-marriage* into *hotchpot*, shall have a moiety of the whole. *Lit. f. 270.*

But if land descends to a sister not advanced, from any other ancestor, except the donor in *frank-marriage*, the advanced sister shall be parcener with her without putting her land into *hotchpot*. *Lit. f. 272.*

So, if land descends in tail; for all the sisters are entitled to land in tail, *per formam doni*. *Lit. f. 274. (Vide Co. L. 179. b.)*

So, if any daughter has land by feoffment of her father, or any other means, except by a gift in *frank-marriage*, she shall be parcener with

with her sisters in all lands which descend, without putting the land into *botchpot*, which she had from her father in his lifetime. *Lit. f. 275. (Vide Co. L. 179. b.)*

If a daughter advanced in the life of her father, will put her land into *botchpot*, with her sister not advanced, she cannot refuse to do it.

And if she refuses it, the advanced daughter and her husband may enter into the lands descended, and hold with her in parcenary. *Co. L. 176. b.*

(C 5.) *The agreement may be by parol.*] Partition by agreement between parceners may be by *parol*, as well as by deed. *Lit. f. 250.*

Tho' it be made of things which lie in grant; as, an advowson, rent, common, &c. *Co. L. 169. a.*

If they are in several counties, as well as in the same county. *Ibid.*

So, a rent for owelty of partition may be granted without deed. *Co. L. 169. a. Lit. f. 252. Vide post. (C 8.)*

So, tenants in common may make partition by *parol*, if they execute it in fealty by livery. *Co. L. 169. a.*

But joint-tenants, by the common law, if they had made partition by agreement, could not do it by *parol* without deed. *Ibid.*

Neither could they after the *st. 31 H. 8. 1.* and *32 H. 8. 32.* for these statutes only enable them to make partition by writ. *Ibid.*

Nor tenants in common, if it be not executed by livery. *Ibid.*

[No partition of land can now be made without deed. *Johnson v. Wilson, C. P. T. 14 & 15 Geo. 2. Willes, 248.*]

(C 6.) *By writ of partition. Between whom it lies.*] By the common law, one or more parceners might have a writ of partition against the others. *Lit. f. 247.*

So, if one after issue dies, by which her husband is tenant by the curtesy, the other parcener may have a writ of partition against the husband. *Lit. f. 264. Vide ante, (A 1.)*

So, if one aliens her part in fee, the other shall have partition against the alienee. *Co. L. 175. a.*

So, if one takes husband, who purchases of a second, the husband and wife shall have a writ of partition against the third parcener; because he has one part in right of his wife, tho' he has the other part as a stranger. *Ibid.*

So, tho' one parcener has demised for years, yet partition lies; for the freehold continues in parcenary. *Co. L. 167. a.*

So, now, by the *st. 31 H. 8. 1.* joint-tenants, or tenants in common, of an estate of inheritance, in their own, or wives' right, may be compelled to make partition by writ *de partitione faciendâ.*

And by the *st. 32 H. 8. 32.* joint-tenants, or tenants in common, where one, or all, have but an estate for life or years.

By the equity of these statutes, the alienee of a parcener shall have a writ of partition; for he is tenant in common with the other. *Co. L. 175. b.*

So, may a husband, who is tenant by the curtesy to a parcener. *Co. L. 175. a.*

So, if a devise be to *A.* of lands held by knight's service, which by the *st. 34 & 35 H. 8. 5.* is void for a third part, the devisee shall have partition against the heir of the devisor, who claims such third part. *R. Bend. 50.*



But by the common law, joint-tenants or tenants in common, could not have a writ of partition. (*Vide Co. L. 175. a.*)

Nor, the tenant by curtesy, or alienee of a parcener. *Ibid.*

So, partition does not lie between parceners, if they have not the freehold in parcenary; for if one makes a lease for life a writ of partition cannot be sued; for the writ says, *quod infimal & pro indiviso tenent.* *Co. L. 167. a.*

So, if one disseises the other, partition does not lie during the *disseisin.* *Ibid.*

So, a purchaser from one parcener shall not join with another, in partition, against the third parcener. *Co. L. 175. b. R. Dy. 128. a. Bend. pl. 76. 210.*

So, partition lies only against the tenant of the freehold. *Co. L. 167. a. Vide Pleader, (3 F 1, &c.)*

Except where partition is brought by tenant in common, for a term of years. *Co. Ent. 419. a.*

(C 7.) *How the partition shall be made.*] After judgment in a writ of partition, the sheriff, by the oath of a jury, shall make a division into equal parts, and render to each parcener a part. *Vide Pleader, (3 F 4.)*

The sheriff may render first to the eldest or youngest, or to which he pleases. (*Vide Lit. f. 249.*)

But if there be land in fee, and other land in tail, he ought to render to each a part of the land in tail. *Co. L. 173. a.*

[By commission out of Chancery. *Vide Chancery (4 E).—Vide post. (C 10.)*]

(C 8.) *Rent for owelty of partition. How granted.*] So, if tenements, which descend to parceners, are the one of less value than the other, they may make partition between them, that one shall have the one tenement, and the other the other, and that she who has the tenement of the greater value, shall grant a rent out of it to the other and her heirs for owelty of partition. *Lit. f. 251.*

And such rent is not a rent-service, but a rent-charge. *Lit. f. 253.*

And may be granted by *parol*, without a deed. *Lit. f. 252. Vide ante, (C 5.)*

But if it was granted out of other land, it ought to be by deed. *Co. L. 169. b.*

If a rent be granted for equality of partition, without saying, out of what land, it shall be issuing out of the purparty of the parcener who granted it. *Ibid.*

If a rent be reserved, it amounts to a grant. *Co. L. 170. a.*

If husband and wife grant a rent for equality of partition out of the purparty of the wife, it binds for ever, if the partition was equal. *Co. L. 169. b.*

If a rent be granted for equality of partition, the grantee and his heirs may distrain for it of common right, into whatsoever hands the tenements out of which, &c. shall come. *Lit. f. 252.*

(C 9.) Partition, when indefeasible,

(C 9.) *If made by writ of partition.*] If a partition be made by writ *de partitione faciendâ* after the appearance of the tenant, the judgment

is, *quod firma & stabilis imperpetuum teneatur*, and therefore, it shall not be defeated. *Co. L. 168. b. 171. a.*

Tho' made against a *feme-covert*. *Co. L. 171. a.*

And tho' it be not equal. *Ibid.*

So, it shall not be defeated tho' it is not equal, and any one of the parties is an infant. *Co. L. 171. a. b.*

So, by the *st. 8 & 9 W. 3. 31.* if made without the appearance of the tenant, if she does not appear within fifteen days after the return of the attachment, where an *affidavit* was made of notice to the tenant forty days before the return of the writ, and a copy of it left with the occupier of the land.

But by the *same statute*, if judgment be in a writ of partition, without the appearance of the defendant, upon motion shewing a probable bar, or that the demandant hath not title to so much, within a year after judgment, or (if the party was an infant, *covert*, non-sane, or out of the realm) after the inability is removed, the court may order the defendant to plead, &c.

Or, if the demandant's title be admitted, but the partition appears unequal, the court may award a new partition.

[This statute applies only to cases where the tenant does not appear. *Dyer v. Bullock*, *C. P. M. 39 Geo. 3. 1 Bos. & Pull. 344.* See *Halton v. Thanet*, *C. P. E. 17 Geo. 3. 2 Bl. 1134. 1159.*]

(C 10.) *If made by commission.*] So, a partition by commission out of *Chancery* binds all of full age, if part of the land *in capite* be allotted to each; for there is a *proviso* in the writ to such intent. *Co. L. 171. a.*

So, if it be equal, tho' some be within age. *Ibid.*

But an unequal partition by commission does not bind any within age; for it is made, *salvo jure si*, &c. *Ibid.*

*Vide Chancery (4 E).*

(C 11.) *If made by consent.*] So, a partition of lands in fee-simple by persons of full age, sound memory, and not *covert*, by agreement between them, never shall be defeated. *Co. L. 166. a.*

Tho' the part of one be not equal in yearly value to the part of the other. *Lit. f. 255. Co. L. 166. a.*

So, by persons within age, if it be equal. *Co. L. 171. a.*

So, if a *bastard eigne* and *mulier puisne* make partition between them, the *mulier* shall be bound by it for ever. *Co. L. 170. b.*

So, if husbands and their wives parceners make partition, which was equal at the time of the partition, it shall not be afterwards defeated. *Lit. f. 257.*

Neither by the wives after the coverture determined, or by their heirs. *Co. L. 171. a.*

Tho' by surrounding or neglect, the parts afterwards become unequal. *Ibid.*

So, if a partition be made between husbands and their wives, not equal at the time of the partition, it shall not be defeated during the coverture. *Co. L. 166. a.*

Or, if such partition be between parceners, where any one is non-sane, it shall be good during the life of the person non-sane. *Ibid.*

So, if parceners make partition within age, and agree to it at full age, by taking all the profits of their parts, &c. it shall be good for ever. *Lit. f. 258.*

So,



So, if parceners make a partition of lands in tail, which is equal, it shall not be defeated by them, or their issues. *Co. L. 173. b.*

So, if each part is not equal in value, it shall not be defeated during the lives of the tenants in tail. *Lit. f. 255.*

So, if land in fee is allotted upon a partition to one parcener and land in tail to another, it shall be good as long as both estates continue without alteration; for it is not necessary that the estates of the land are equal. *Lit. f. 260.*

(C 12.) When it may be defeated.

(C 12.) *If it be not equal.*] But if a partition be of lands in tail, and one part is not equal in value to the other; after the death of one, her issue may disagree to the partition. *Lit. f. 255. Co. L. 166. a.*

So, if a partition not equal be of lands in fee, or tail, where any parcener is within age, if she does not agree to it at her full age; she may avoid it at any time during her nonage, or afterwards. *Lit. f. 258. Co. L. 166. a.*

So, if such partition is made between husbands and their wives; after the coverture determine, the wife or her heir may defeat it. *Co. L. 166. a. Lit. f. 256.*

(C 13.) *If one purparty be evicted.*] So, if the purparty of one parcener be evicted by a title *paramount*, the partition shall be defeated; for the partition imports a warranty and condition in law, that the one shall enter upon the other and enjoy her part in parcenary, if she be evicted, as long as the privity between them continues. *Lit. f. 262. (Vide Co. L. 173. b.)*

Tho' the eviction be only of part of the purparty. *Co. L. 173. b.*

Or, only of an estate of freehold; as, for life, or in tail, &c. *Co. L. 174. a.*

So, if all the land in fee be allotted to one, and the land in tail to another parcener, and she who has the land in fee aliens her part; her heir may enter into the land in tail to have a recompence out of it for so much as belongs to her. *Lit. f. 260.*

So, if she who has the land in fee makes an estate-tail only; for the reversion after the tail ended, is not of any account. *Co. L. 173. a.*

So, if she aliens only part of the land in fee, her heir may waive the residue, and enter upon the land in tail. *Ibid.*

Tho' it was not known that any part of the land was entailed; for every one shall be intended to be content of her title. *Co. L. 173. b.*

But if the privity between the parceners be destroyed before eviction, then the parcener who was evicted shall not enter into the part of the other; as, if after partition between *A.* and *B.* the one aliens in fee, and then the alienee is evicted; the alienor shall not enter upon the other: for by her alienation she has dismissed herself to have any of the tenements as parcener. *Lit. f. 262.*

So, she shall not take advantage of a warranty in law. *Co. L. 174. a.*

So, if land in tail be allotted to *A.* and land in fee to *B.* who aliens, and afterwards her heir enters into the part of *A.*, she cannot enter into the land in fee which was aliened; for by the alienation the privity was destroyed. *Co. L. 172. b.*

Yet

Yet if the who had the land in fee aliens only for life, or years; her heir shall not enter into the land in tail. *Co. L. 173. a.*

So, if the who had the land in tail, discontinues in fee, her issue shall not enter into the part of the other; for he has remedy by a *formedon* for the land in tail. *Ibid.*

(C 14.) How it shall be defeated.

When a partition by a commission out of *Chancery* is avoidable, it may be defeated by a *scire facias*. (*Vide Co. L. 171. a.*)

Or, by a writ of partition. *Ibid.*

So, if a partition be voidable for want of equality, she who would defeat it may waive assenting to her part, and enter into the part of the other. *Co. L. 174. a.*

And by such entry she defeats the whole partition. *Ibid.*

But if a parcener be evicted after partition, and would take advantage of the warranty in law annexed to the partition; she does not defeat the whole partition, but shall have a recompence for that which she has lost. *Ibid.*

And she shall have a recompence for her moiety only, by which the loss will be equal. *Ibid.*

(C 15.) The Effect of a Partition.

Upon partition made, the occupation and descent, which before were in common, shall be several and distinct. *Sav. 113.*

But a coparcener, after partition, continues in the same privity of estate as before; for it does not convey, or make any alteration of the estate. *Ibid.*

And therefore, parcners shall have aid, and vouch, &c. (which are founded in privity,) after partition, as well as before. *Ibid.*

So, parcners shall be in from the common ancestor, as before: for the partition does not make any degree. *Ibid.*

So, a partition of the demesnes of a manor does not sever them from the manor, as long as the manor continues in parcnary. *Ibid.*

P A R C O F R A C T O.

*Vide Distress, (D 2.)*

P A R D O N.

(A) By the King; in what Cases granted.

**T**HE king, by his prerogative, may grant his pardon to all offenders attainted or convicted of a crime, where he has hope of their amendment. *St. P. C. 99. a. 3 Inst. 233. Vide Parliament, (L 46.) Vide Prerogative, (D 8.)*

And therefore, in high, or petit treason, a pardon may be granted by the king alone. *3 Inst. 233.*

So, in murder. *R. 4 Mod. 61. Sho. 284. (Vide Sal. 499.)*

In all felonies. *3 Inst. 233.*

So,



So, if a man be convicted for manslaughter, the king may pardon the burning in the hand. 3 *Inst.* 237.

So, tho' he be convicted in an appeal. *H. P. C.* 252. (*Vide* 3 *Inst.* 237.)

So, if convicted for heresy, or other ecclesiastical offence. 3 *Inst.* 238. *Vide post.* (E 1.)

So, the king may pardon piracy. 3 *Inst.* 238.

So, the king may pardon any crime or offence before attainder, or conviction. 3 *Inst.* 233.

The judgment against a petty jury in an attainr; for tho' it be the suit of the party, this judgment does not give satisfaction to the party. 3 *Inst.* 237.

The imprisonment for two years in a judgment upon the *ft. W.* 2. 35. *Ibid.*

So, all that is forfeited to the king by attainder, he may restore by his charter. 3 *Inst.* 233.

### (B) In what, not.

**B**UT by the *ft. 2 Ed. 3. 2. conf.* by 4 *Ed. 3. 13.* a charter of pardon shall not be granted but in cases where a man kills another *per infortunium*, or *se defendendo*.

And by the *stat. 14 Ed. 3. 15.* no charter shall be henceforward granted of the death of a man, or other felony, except in case where the king may do it, saving his oath of his crown; and a charter to the contrary shall be held for none.

Yet these statutes do not restrain the king's prerogative; but they are a caution for his using it well. *Semb. cont. St. P. C. 101, &c. Acc. 4 Mod. 63. Sal. 499. (Vide Sho. 284.)*

And therefore, a pardon with a *non obstante* of the statute is usual. *St. P. C. 101. a. Mo. 752. Kelg, 24.*

So, the king cannot, by his pardon, discharge the appeal of the party. *H. P. C. 251. 3 Inst. 237.*

Or, a thing in which a subject has a property, or interest. *Vide post.* (F).

So, the king by his pardon cannot make restitution of blood, where the blood is corrupted by attainder; for it must be done by act of parliament. 3 *Inst.* 233.

### (C) How expounded.

**A** General pardon shall be expounded most strongly against the king, and for the benefit of the subject. 5 *Co. 48. 50. a.*

And therefore, where the king pardons *all his subjects*; an alien, residing as a friend in the kingdom, shall be pardoned; for he is a subject, tho' not a natural subject. *Semb. Hob. 271.*

But a pardon to *A. of all debts*, shall not be extended to a debt by *A. and B.* 3 *Inst.* 239. [So as to discharge *B.*]

A pardon of *all trespasses*, does not extend to the cutting of wood in a forest, which amounts to waste. *R. Jon. 279.*

[The recognizance of a person indicted for beating a custom-house officer, *in diminut. reventionum dom. regis*, was discharged on an act of grace, 7 *G.* tho' such offences are excepted. *Rex v. Spencer, in Sc. M. 1721, Bunb. 88.*]

## (D) By what Words it shall be.

**I**F the king pardons treason, murder, rape, &c. it shall not be allowed, if the crime be not specified in the charter. 3 *Inst.* 236.

So, a commission, or grant of an office, does not amount to a pardon for high treason; for a pardon by express words is necessary. R. 2 *Rol.* 50.

So, if the king pardons *all felonies*; this extends to petit treason, as well as murder, manslaughter, arson, burglary, robbery, rape, &c. Co. L. 391. a.

So, chance-medley, *se defendendo*, and petit larceny. *Ibid.*

So, a pardon of *all felonies*, in which treason is excepted, will be a plea to an indictment for felony against him who has committed treason. *Per Coke, Poph. cont.* 2 *Leo.* 28.

So, a pardon is sufficient, tho' the words are not positive; as, a pardon of outlawry, *if any be*, discharges him who is outlawed. 3 *Inst.* 238.

So, a pardon of the alienation of lands which are holden *in capite*, *ut dicitur*. 3 *Inst.* 239.

## (E) What Offences a Pardon discharges.

## (E 1.) Spiritual Offences, &amp;c.

**I**F a suit be between party and party in the spiritual court *pro salute animæ*, or *reformatione morum*, the king's pardon, before or after the suit begins, discharges it; for the suit is for the king. R. 5 Co. 51. a. R. 2 *Cro.* 335. 2 *Bul.* 182. *Cont. Cro. El.* 684.

If a suit be in the *Star-chamber*, for a misdemeanor. 5 Co. 51. a. 3 *Inst.* 238.

So, where the suit is in the spiritual court, *ex officio*. R. 5 Co. 51. b. R. *Cro. El.* 684.

So, if a pardon be after sentence in the *Star-chamber*, or spiritual court, it discharges the sentence, and consequent disabilities. R. *Cro. Car.* 55. *Adm.* 2 *Cro.* 335.

If a suit be in the spiritual court for simony, a pardon discharges the penalty; tho' it does not enable to retain the benefice. R. *Cro. El.* 686. *Mo.* 916.

If a man be convicted for heresy, the king by pardon may discharge it. 3 *Inst.* 238.

So, if a penalty be given by statute to him who will sue for it; the king, before suit, may pardon the whole penalty. *Ibid.*

And the moiety, or king's part, after the suit commenced. *Ibid.*

## (E 2.) A Pardon of the Foundation discharges all dependent.

So, if the king pardons the foundation, all dependent upon it shall be pardoned: as, if a pardon be of an offence after a suit for it in the spiritual court; no costs shall be afterwards given. R. 5 Co. 51. b. 2 *Rol.* 299. l. 2. R. *Latch*, 190. *Vide post.* (F).

If a pardon be after an action commenced, and before judgment, the amercement shall be pardoned, tho' it was not due before judgment; for the delay, for which it was given, was pardoned. Co. L. 126. b. R. 5 Co. 49.



If there be a pardon of a trespass, before outlawry for it, the king's fine is pardoned. 2 *Rol.* (179.) l. 10.

If the contempt be pardoned, excommunication for it is discharged. 2 *Rol.* (178.) l. 45. *Jon.* 227. *Cro. Car.* 199.

If a bill in the *Star-chamber*, before pardon, be exhibited for matter within the jurisdiction of the court as to one defendant, and for a matter scandalous as to another, and after a pardon of *all contempts* the bill is dismissed as to the scandal with costs; the costs are discharged by the pardon. *R. Hut.* 79. *R. Cro. Car.* 68.

Tho' a bill depending was excepted out of the pardon: for this relates only to matter against the other defendant. *R. Hut.* 79.

After an indictment for a forcible entry, and restitution upon it; if the king pardons the force, the defendant cannot afterwards proceed upon a traverse to the indictment to obtain restitution. *R. Yel.* 99. 2 *Cro.* 149.

After trespass for a battery, and before judgment, if the king pardons the force, there shall be no *capiatur*. *Cro. Car.* 32.

If a stroke be the 1 *Apr.* upon which death ensues 10 *Apr.* and the king pardons *all offences* till 4 *Apr.* by which the stroke was pardoned; by consequence the murder shall be discharged. *R. Pl. Com.* 401.

If an obligation be *ad parend. mandat. ecclesie*, a pardon of *the offence and excommunication*, discharges the obligation. *Mod. Ca.* 71. 2 *Lev.* 36.

If the king, after verdict upon an obligation and *non est factum* pleaded, pardons *all debts*, and judgment be afterwards entred; yet it shall be discharged by the pardon, and the defendant may plead it. 3 *Inst.* 235.

A pardon of a *debt* discharges all suits for it; or *vice versa*. 3 *Inst.* 239.

[If the felony has its commencement before the pardon takes place, but not its completion, the pardon shall operate in favour of the prisoner, as it would have done had the felony been complete before the pardon. This is the true sense of the doctrine in *Cole's case*. *Plowd.* 401. *supra*. *Quod nota. Nicholas's Case*, 1748, *Fost.* 64.]

### (F) What not.

**B**UT a pardon of *all felonies*, where the party is attainted, does not discharge the attainder, or execution upon it. *St. P. C.* 102. *b.* *H. P. C.* 251. 3 *Inst.* 238.

So, a pardon of the *attainder*, or *execution*, without mention of the felony, does not pardon the felony. *St. P. C.* 102. *b.* *H. P. C.* 251.

Nor, shall a pardon of the felony only, when a man is abjured, discharge him without mentioning the abjuration. *St. P. C.* 102. *b.*

So, a pardon of a *felony of which he stands indicted* is not good, if he be not indicted. *H. P. C.* 251. 3 *Inst.* 238.

A pardon of *felony*, without mention of bigamy, is not good, where the felon had prayed his clergy, and it was objected that he was *bigamus*, and a writ issued to certify whether, &c. *St. P. C.* 102. *b.*

So, a pardon of several *jointly of all felonies by them committed* is not good; for felony is several. *Ibid.*

So,

So, if it says, *by them, or any of them, committed.* St. P. C. 102. b.

So, a pardon of a felonious killing does not pardon murder. Ray. 13. R. Cont. 3 Mod. 37.

So, a pardon *to be acquitted of the escape of prisoners* discharges him of a negligent, not of a voluntary escape. St. P. C. 102. b.

So, a pardon of a felony for which he was attainted, *et omnia quæ ad dominum regem pro felonâ prædictâ pertinent*, without words of restitution, does not entitle him to a debt due upon an obligation: for that was vested in the king by the attainder, without office. R. 2 Rol. (178.) l. 10.

So, a pardon of an outlawry for felony, does not restore his goods or lands forfeited by the outlawry, without words of restitution. 2 Rol. (179.) l. 15. Vide infra.

So, a pardon of felony does not restore a disability by corruption of blood. Pl. Com. 557, 8.

Nor, enable him to be tenant by the curtesy, if he has not issue after, tho' he had before the attainder. 13 H. 7. 17. a.

[If a man gives a stroke, or poison, (which till death ensues upon it is only a misdemeanor,) and a pardon is granted of all misdemeanors, &c. but not of murder or poisoning, and afterwards the party dies, the felony is not pardoned. Nicholas's Case, 1748, Fost. 64.]

A pardon to a parson of a church of *all contempts, &c.* after acceptance of a plurality, does not restore him to the former church. R. Jon. 339.

So, a pardon does not discharge a thing in which the subject has a property, or interest; as, if a suit be in the spiritual court for tithes, a legacy, contract or matrimony, &c. R. 5 Co. 51. a.

Or, for dilapidations. R. 3 Mod. 56.

If an incumbent, &c. accepts a plurality, the interest of the patron or king, to present, shall not be discharged by a general pardon. R. Cro. Car. 357, 8.

So, trespass lies upon the *st. de malefactoribus in parcis*, for the amends and recompence to the owner, tho' the king has pardoned the offence. R. Dal. 60.

So, a penalty upon a conviction for deer-stealing, is not discharged by a pardon; for it is a forfeiture to the party grieved. Semb. 1 Sal. 383, 4.

So, after an indictment for a nuisance, and a fine upon it, if there be a pardon of *all offences*; the nuisance may be afterwards removed; for it is annoyance to the subject. R. Sal. 458.

So, if the king pardons the judgment given against the petit jury in an attain, the party shall have restitution; for the right of the party is not discharged by the pardon. 3 Inst. 237.

So, the king cannot by his pardon discharge a nuisance, on an indictment for it: for the suit is given to the king, for the reformation of the nuisance. Ibid.

Nor, a recognizance or obligation to the king, for surety of the peace; before the condition broken. 3 Inst. 238.

Nor, an action commenced *qui tam, &c.* upon a penal statute, except for the king's moiety or part. Ibid.

Nor, a penalty given to the party grieved. Ibid.

[Nor, penalties given between the informer and the poor of the parish. Howel v. James, T. 21 G. 2. Str. 1272.]

Nor,



Nor, a penalty for securing a duty, given in recompence of a duty taken away: as, where the *ft. 6 Ann. 16.* gives 40*s. per ann.* for admission of every broker, and that any not admitted, &c. acting as a broker, shall forfeit 25 *l.* The penalty shall not be discharged by an act of pardon of *all offences the king may pardon.* *R. 2 Mod. Ca. 103, 4.*

[Nor, by an act of grace. *Ludlam v. Lopez, M. 9 G. Str. 529.*]

So, a pardon does not discharge a thing consequent, in which the subject has an interest vested in him: as, if costs are taxed in the spiritual court, a pardon of *the offence* does not discharge the costs. *R. 5 Co. 51. b. R. 2 Cro. 159. Cro. Car. 199.*

Tho' the party appeals after costs taxed, by which the sentence is suspended. *R. 5 Co. 51. b.*

Tho' costs are awarded, and not taxed; for by the award the party has an interest in them. *Cro. Car. 9. Cent. 2 Rol. 304. l. 40.*

So, if the party appeals after costs taxed, and then the pardon comes, and upon the appeal the former sentence is annulled, and costs given to the appellant; these costs are not discharged by the pardon: for the costs being taxed in the original suit, the party had a right of appeal, which was not taken away by the pardon; and by consequence has a right to the costs. *R. Cro. Car. 47.*

So, a pardon after judgment and costs taxed in the *Star-chamber*, does not discharge the costs and damages given. *3 Inst. 238.*

So, a pardon of an offence does not discharge a collateral thing subsequent to it.

So, if the king pardons an *intrusion and entry*, this does not discharge the profits; for he shall have account for them against the intruder, or debt against his lessee, if these actions are not pardoned. *2 Rol. (178.) R.*

[So the crown's share only of a forfeiture is pardoned by an act of general pardon, but not the informers on an information filed previously. *Weddel v. Thurlow, T. 10 Ann. Parker, 280.*]

[So, *9 G. 3. c. 37.* which discharges persons who have incurred penalties, if they pay the duty before, &c. bars only future actions, but discharges not defendant against whom verdict was obtained before. *Couch v. Jefferies, T. 9 G. 3. 4 B. M. 2460.*]

If the king pardons an *outlawry*, the fine to the king is not discharged. *2 Rol. (179.) l. 10.*

If a man, bound in a recognizance to the peace, commits a felony; a pardon of the *felony* does not discharge the breach of the recognizance. *2 Rol. (179.) l. 17.*

If a man be outlawed, a pardon of the *outlawry* does not give the goods, without words of restitution. *3 Inst. 238.*

### (P) Pardon, how granted.

[A Pardon ought to be under the great seal. *1 Bl. 480.*]

[The method of pardoning, on the circuit, and at the *Old Bailey*, is this; a sign manual issues, signifying the king's intention of either an absolute or conditional pardon, and directing the justices of gaol-delivery to bail the prisoner, in order to appear and plead the next general pardon that shall come out, which they do accordingly; taking his recognizance to perform the conditions of the pardon, if any. *1 Bl. 479.*]

If

If a man be found guilty of homicide *se defendendo*, he shall have a pardon of right. *H. P. C.* 250.

For, by the *ft. Glo. 9. les justices assavoier au roy, et le roy luy en fra sa grace, ft luy pleist.*

And therefore the justices, upon his request, let him to mainprize, and give a writ to the chancellor containing the whole record of his acquittal, upon which certificate the chancellor shall make his pardon, without speaking to the king. *St. P. C.* 15. (2 *Inst.* 316.)

But he shall not be discharged without a charter of pardon. *St. P. C.* 15. a.

By the *ft. 27 Ed. 2. ft. 1. 2.* in every charter of pardon, the suggestion, and the name of him who makes it, shall be comprized; and if the justices find the suggestion false, the charter shall be disallowed.

And by the *ft. 5 H. 4. 2.* the name of him who makes the suggestion shall be specified in the pardon; and if a felon becomes a thief afterwards, he forfeits 100 *l.* to the king.

But the effect of these statutes is evaded by a *non-obstante*. *St. P. C.* 102. a.

So, by the *ft. 13 R. 2. ft. 2. 1.* in a pardon of treason, murder, or rape, if the offence be not specified, the charter shall be disallowed. *Conf.* by the *ft. 16 R. 2. 6.*

But a small or immaterial mistake, in a pardon, does not vitiate the charter; as, if it says, in consideration of service by his family *versus* the crown, where it ought to be *erga* the crown. 1 *Rol.* 297, 8.

If the indictment be, *A. B. of C. in com. D.*, and the pardon omits *in com. D.*; for *constat. de persona*. *R. 1 Rol.* 297, 8.

If the indictment be, *A. B. of C. knight*, and the pardon be of *A. B. baronet*. *Per three J. Holt. cont. Comb.* 184.

#### (H) How the Party shall take the Benefit of a Pardon.

**I**F a pardon be by an act of parliament, in which there is no exception, the defendant shall take advantage of the pardon, without pleading. *St. P. C.* 103. a. 3 *Inst.* 234. *Pl. Com.* 83, 4. *Vide Parliament*, (L 46.)

And the court shall give him the benefit of the act, tho' he waives, or refuses it. *St. P. C.* 103. a.

So, he shall have the advantage without pleading, where the act says, that he shall take advantage without pleading; tho' there are exceptions in the statute. *St. P. C.* 103. a. *Semb. Lane*, 71.

Where the exception goes only to particular persons by name. 2 *Leo.* 28.

But, generally, when there are exceptions, the party ought to plead, and shew that he is not a person excepted. *St. P. C.* 103. a. *H. P. C.* 252. *Cro. Car.* 449. *Pl. Com.* 103. a. 2 *Leo.* 28. 3 *Inst.* 234.

So, a special pardon shall not be intended, if it be not pleaded: as, if an entry of a judgment, where the plea was after a general pardon, be, *nil de fine quia pardonatur*; for the pardon not being pleaded, shall not be intended. *R. 1 Leo.* 300. *Cro. El.* 153.

So, if a *capiatur*, or in *misericordia* be entred, where the plea was after a general pardon, it is well; for perhaps there was an exception. *R. Cro. El.* 768. 778.

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And



And if there be a general pardon, in which there are exceptions, the court need not take notice of it, if it be not pleaded. *Lane*, 71.

So, if a man has a charter of pardon from the king, he ought to plead it in bar of the indictment. 1 *Rol.* 297.

So, he ought to plead it, shewing his charter *sub pede sigilli*. *St. P. C.* 103. a. *H. P. C.* 252.

And if he pleads *not guilty*, he waives his pardon. *R. Kelz*, 25.

Yet, if a pardon be of murder and manslaughter, and he pleads *not guilty* to the indictment for murder, and is found guilty of manslaughter, he shall afterwards have the benefit of the pardon. *Dub. Kelz*, 25.

[On an indictment for returning from transportation, the king's sign manual may be given in evidence; and if not revoked, and the condition be literally, though not substantially, complied with, the prisoner shall be discharged. 2 *Bl.* 797.]

[Defendant in an information for maihem shall have the benefit of an act of grace, tho' he did not insist on it at his trial; but shall pay prosecutor full costs. *Rex v. Haines*, *P.* 21 *G.* 2. 1 *Wilf.* 214.]

So, if there be a variance in the addition, &c. between the charter and the indictment, he ought to aver that he is the same person. *H. P. C.* 253.

And if the pardon be between the verdict and the judgment, he may plead it, tho' he has not a day in court, for necessity; for he cannot have an *audita querela*, or *scire facias*, against the king. 3 *Inst.* 235.

So, by the *st.* 10 *Ed.* 3. 3. a man pardoned ought to find six sufficient mainperners, before the sheriff and coroners of the county where the felony was done; and the mainprises shall be sealed with their seal, and returned into *Chancery*; otherwise the charter shall be holden for none. But this statute is now repealed by the *st.* 5 & 6 *W. & M.* 13.

And therefore, when he pleads his pardon, he ought to have a writ of allowance, testifying that he has found sureties according to the statute. 4 *Mod.* 62. *Ray.* 13. *Per Holt*, *Sho.* 283. *Sal.* 499. 3 *Inst.* 235.

Or, he may plead the pardon, with an averment that he has found sureties, *prout patet per recordum*. 3 *Inst.* 235.

So, by the *st.* 5 & 6 *W. & M.* 13. which repeals the *st.* 10 *Ed.* 3. the justices, before whom a pardon of felony is pleaded, may at discretion remand the party to prison, till he enter into recognizance with two sureties, or if an infant, or *covert*, till they find two sureties for good behaviour for seven years.

[There has been no instance, since this statute of the court's requiring recognizance for the good behaviour of a person pardoned for murder. *Rex v. Chetwynd*, *H.* 17 *G.* 2. *Str.* 1203.]

But there needs no writ of allowance, if there be a special *non-obstante*. *H. P. C.* 250. *Cro. Car.* 596, 7.

So, if he has no writ of allowance, he shall not be hanged. *H. P. C.* 253.

So, it is not necessary for treason. *R. Cro. El.* 814.

So, by the *st.* 10 *Ed.* 3. 3. if he finds surety for his good behaviour, and after mainprize does contrary to the peace, the charter shall be held for none.—(Repealed by the *st.* 5 & 6 *W. & M.* 13.)

And

And therefore, upon the peace broken, a *scire facias* lies to repeal the patent; and he shall be hanged for his first offence. *H. P. C.* 252.

So, if it appears by an indictment confessed in the same court where he pleads his pardon, that he has broken the peace: the charter shall be disallowed. *St. P. C.* 104. *a.*

But where there is a special *non-obstante* of the statute in the charter, it shall be good, tho' the peace be broken. *H. P. C.* 252.

So, if a man be outlawed in an appeal, and has a pardon, he ought to sue a *scire facias* against the appellant, before allowance of the pardon. *St. P. C.* 104. *b.*

[On a pardon for a misdemeanor, the defendant shall not be put to the bar, nor plead it on his knees. *Rex v. Hales, M. 2 G. 2. Str.* 816.]

### (I) Exception in a Pardon.

**I**F an offence be excepted, a corporal or pecuniary penalty, consequent to it, is also excepted. *R. 5 Co.* 47. *a.*

If an offence and fraud, in not collecting or paying the revenue, or other money to the king, be excepted; a penalty for importing prohibited goods will be excepted. *Dub. 3 Mod.* 241.

If accounts are excepted in an act of pardon, a sum due upon an account stated is excepted. *R. 3 Lev.* 135.

So, a debt for rent to the king, shall be excepted, tho' by negligence of the clerk it was not in charge in the *Exchequer*. *R. Cro. Car.* 349.

If a bond to pay a debt, &c. be excepted, a recognizance to pay it shall be within the exception. *R. Hard.* 369.

If burglary be excepted, a man attainted for burglary is within the exception. *3 Inst.* 234.

But where an exception goes only to the penalty, or forfeiture, nothing is excepted but what is necessary for recovery of the penalty; as, the prosecution: for the imprisonment and all corporal punishment are pardoned. *R. 5 Co.* 47. *a.*

If all offences in taking away, or purloining the king's goods, money, &c. are excepted, felony in purloining them will be pardoned. *Hard.* 367. (*Cro. Car.* 249.)

An exception of murder does not extend to a *felo de se*. *R. 1 Lev.* 8.

## P A R I S H.

### (A) Parish, when taken for a Diocese.

**P**AROECIA signified antiently the precinct or diocese of the bishop. *Seld. de Dec.* 80. [*Edit.* 1726. 3 vol. 1120. 2 *Will.* 182.]

### (B) Parish.

#### (B 1.) What shall be.

**I**N the time of *Honorius*, archbishop of *Canterbury*, England was divided into parishes. *Camb. Brit. in the Introduction. Cont. Seld. H. of T.* 3 vol. 1208.



Every precinct which belongs to the same parochial church is one parish. *Nom. verb. Parish.*

A parish was a precinct within a diocese, which comprehended one or more vills, or a lesser territory. *Seld. de Dec. c. 6. f. 3. p. 80. 3 vol. 1120.*

For several vills may be contained in the same parish.

And therefore, *parochia* is said to be *locus in quo populus alicujus ecclesie degit.* 5 Co. 67. a.

So, *plures hainletti potuerunt pertinere ad unam parochiam.* Fl. 4. c. 15. f. 9.

So, *plures parochia potuerunt pertinere ad unam villam.* Fl. 4. c. 15. f. 9.

(B 2.) What not.

But if a place has not a church, churchwardens, and *sacramentalia*, it is not properly a parish.

So, it shall not be a parish by reputation within the *§. 43 El. 2.* if it had not a parochial chapel, chapel-wardens, and *sacramentalia*, at the time of the statute. *R. Sal. 501.*

Tho' it had a distinct overseer, and maintained its own poor. *Sal. 501.*

Tho' it had also a chapel-warden, by whom rates are collected there, and paid to another parish. *Ibid.*

So, land shall not be within any parish, unless by prescription, or act of parliament. *Sti. 137.*

So, a place, &c. may be extra-parochial.

Yet an extra-parochial place is within a county. *Per Holt, Skin. 685.*

(C) Vill.

(C 1.) What shall be.

*VILLA est ex pluribus mansionibus vicinata.* Co. L. 115. b.

[A vill must consist of ten families, or have a constable, or at least the reputation of a vill. *Rex v. Denham, P. 8 G. 2. B. S. C. No. 11. Str. 1004. Rex v. Grafton, P. 10 G. 2. B. S. C. No. 31. Str. 1071.*]

And a vill is the *genus*, which comprehends several species. Co. L. 115. b.

For every borough is a vill; but not *è converso.* *Ibid.*

So, every parish shall be intended to be but one vill, if it does not appear to the contrary. Co. L. 125. b.

So, every place shall be intended a vill *primâ facie*, if it does not appear to the contrary. Co. L. 125. b. R. 2 Cro. 263. R. Sal. 501.

And therefore, if a fine be levied of lands in *A.*, and the parish of *A.* comprehends several vills, *A., B., &c.* nothing passes but land in the vill of *A.*, and not land in *B.*, or other vills within the parish of *A.* R. 2 Cro. 120. *Vide Fine, (E 4.)*

But a fine of land in the parish of *A.* passes land in all the vills of the same parish. R. 1 Vent. 170.

So, a fine in *A.* which has a superintendency and constablewick, which extend over several vills, passes land in those vills. 1 Vent. 170.

If

If all the houses in a borough are decayed, yet it continues a vill.  
*Co. L. 115. b.*

(C 2.) What not.

But it shall not be accounted a vill where there is not, and never was a parochial church. *Co. L. 115. b.*

So, one vill cannot be within another vill: and therefore if in *replevin*, the taking is supposed in a warren in *A.*, and the defendant avows for rent out of a manor, which extends to *A.* and *B.*, and the plaintiff alleges an assignment of dower out of *B.*; and avers that the warren in *B.* was within *A.* This is bad; for *B.*, which ought to be intended a vill, cannot be within *A.*, which ought also to be intended a vill. *R. 1 Sid. 10.*

[An extra-parochial place, consisting of two houses, &c. 300 acres of land worth 300*l.* per annum, belonging to and in the occupation of several persons, are not sufficient to constitute a vill. *Rex v. Denham, P. 8 G. 2. B. S. C. No. 11. Str. 1004.*]

[Nor, an extra-parochial place, a manor, formerly a nobleman's seat, and park, since converted into farms, and having five houses occupied by five tenants. *Rex v. Grafton, P. 10 G. 2. B. S. C. No. 31. Str. 1071.*]

[Nor, extra-parochial place, consisting of one capital messuage, two old cottages, one new one, and one tenement, part of the capital messuage, all let to one, and inhabited by him and his under-tenants. *Rex v. Showler, T. 3 G. 3. B. M. 1391.*]

## P A R K.

*Vide Chase (C).*

## P A R L I A M E N T.

(A) Its Name.

**T**HE parliament is the highest and most honourable and absolute court of justice within the realm, composed of the king and lords and commons of the realm. *Co. L. 109. b. Dy. 60. a.*

And is known by several names. *4 Inst. 2.*

(B) Its Antiquity.

**T**HE parliament, *si antiquitatem spectes est antiquissima, si dignitatem est honoratissima, si jurisdictionem est capacissima.* *9 Co. Pref.*

*Tempore Ine & aliorum regum Saxonum fuerat conventus sapientum spiritualium & temporalium.* *9 Co. Pref.*

(C) When it shall be summoned.

**B**Y the *stat. 4 Ed. 3. 14.* confirmed by *36 Ed. 3. 10.* a parliament shall be holden every year once, or more often, if need be.

By the *stat. 16 Car. 1. 1.* a parliament was to be held every third year.—But this was repealed by the *stat. 16 Car. 2. 1.*



And by the same *st.* 16 *Car.* 2. 1. it was enacted, that parliaments shall not be intermitted, or discontinued above three years at most: but within three years after the determination of any parliament, or if occasion oftner, the king shall issue writs for a new parliament.

So, by the *st.* 1 *W. & M.* *st.* 2. 2. it was declared, as the right of the subject, that parliaments ought to be held frequently.

And, by the *st.* 6 *W. & M.* 2. a parliament shall be holden once in three years at least: and after the determination of every parliament legal writs under the great seal shall be issued for calling a new parliament.

[But now, by *st.* 1 *G.* 1. *st.* 2. 38. parliaments shall and may have continuance for seven years, and no longer, to be accounted from the day on which by the writ of summons the parliament shall be appointed to meet, unless sooner dissolved by his majesty.]

A writ of summons issues from *Chancery*, by advice of the king's council, for summoning the parliament to assemble at the return of the writ. 4 *Inst.* 4. *Vide post.* (D 8.—E 1.)

But by the *st.* 12 *Car.* 2. 1. it was enacted, that the houses then sitting should be the houses of parliament, notwithstanding any want of a writ of summons or defect therein, or other defect.

So, by the *st.* 1 *W. & M.* 1.

By the *st.* 7 & 8 *W.* 3. 15. no parliament shall be dissolved by the demise of the king, but shall immediately meet and sit for six months, unless sooner prorogued, or dissolved by the successor.

If no parliament be then in being, the last preceding parliament shall immediately convene and sit as aforesaid.

#### (D) What Persons compose it.

THE parliament consists of the king, lords, and commons. *Co. L.* 109. b. *Sal.* 510.

Of the king and three estates of the realm, viz. the lords spiritual and temporal, and the commons. 4 *Inst.* 1. *Ha. Parl.* 1.

Of the king and two estates. By the King at a Parliament, 18 *Jac. Russ.* 21.

But it is not necessary that the lords spiritual or temporal should always assent to every act; for if all the lords spiritual are absent, an act by assent of the king, the other lords and commons, will be good. *Vide post.* (G 10.—R 3.)

So, if all the lords temporal are absent. *Vide post.* (R 3.)

So, if the lords spiritual are present, and all dissent. *Ibid.*

The lords and commons antiently sat together. 4 *Inst.* 2. 2 *Bul.* 173. *Cout. Praef. Cot. Abr.* 5. *Vide post.* (E 2.)

All the lords ought to be summoned. 4 *Inst.* 1. 4.

And all the knights for shires, citizens and burghesses ought to be elected, which are 493. 4 *Inst.* 1.

And by the *st.* 5 *Ann.* 8. at the union, 16 peers and 45 commoners are added for Scotland.

#### (D 1.) The King.

The king is *caput parliamenti*. 4 *Inst.* 3. *Ha. Parl.* 1. in marg.

#### (D 2.) The Lords Spiritual.

The lords spiritual, viz. the archbishops and bishops sit in parliament by reason

reason of their baronies; for they hold their bishoprics *per baroniam*.  
4 *Inst.* 1. 45.

And they ought to be summoned *ex debito iustitie*. 4 *Inst.* 1.

The summons to the lords spiritual names them by their christian name, and their name of dignity. 4 *Inst.* 5.

But an addition of the surname does not vitiate the writ. *Ibid.*

A bishop elect may be summoned as a lord of parliament. 4 *Inst.* 47.

A summons to an abbot or prior named him by his dignity only. 4 *Inst.* 5.

An abbot, &c. tho' summoned, needed not to have come to parliament, unless he held *per baroniam*; for he was dead in law. 4 *Inst.* 44, 5.

So, tho' he had often served in parliament. 4 *Inst.* 45.

And where the king granted to such an one to be a lord spiritual of parliament, it was void. *Ibid.*

(D 3.) The Lords Temporal.

Every duke, marquis, earl, viscount, and baron of *England*, by creation or descent, ought to be summoned to parliament *ex debito iustitie*. 4 *Inst.* 1.

If he be of full age. *Ibid.*

A summons to a temporal baron mentions his christian name, and his dignity. 4 *Inst.* 5.

If he be a knight, that is frequently added. *Ibid.*

And if his surname be added it does not vitiate the writ. *Ibid.*

If a knight or esquire be summoned by writ to parliament, he cannot refuse. 4 *Inst.* 44.

(D 4.) The Commons.

The commons make the third estate of parliament, and consist of knights of shires, citizens, and burgeses. 4 *Inst.* 1.

And all ought to be elected by writ *ex debito iustitie*. *Ibid.*

And they represent all the commons of the realm. *Ibid.*

The beginning of the commons' attendance in parliament seems to have been since the 40th year of H. 3. *Cot. Abr. Praef.* 11, 12.

The first writ for the election of knights, citizens, and burgeses, seems to have been in the 49 H. 3. *Cot. Abr. Praef.* 13. b.

(D 5.) *Knights of shires.*] A writ goes to the sheriff of every county in *England* and *Wales*, commanding, *quod duos milites gladiis cinctos magis idoneos & discretos comitatus tui, &c. eligi fac., &c.* Co. L. 109. b. 4 *Inst.* 6.

Anno 49 H. 3. a writ of summons was directed to the sheriff of every county, *quod venire fac. duos de legalioribus & discretior. militibus singulorum comitatum.* *Dug. Sum. Parl.* 3 *Cot. Abr. Praef.* 13. b.

And from that time, the counties of *Bedford, Berks, Bucks, Cambridge, Kent, Cornwall, Cumberland, Derby, Devon, Dorset, York, Essex, Gloucester, Hereford, Hertford, Huntingdon, Lancaster, Leicester, Lincoln, Middlesex, Norfolk, Northampton, Northumberland, Nottingham, Oxford, Rutland, Salop, Somerset, Southampton, Stafford, Suffolk, Surry, Sussex, Warwick, Westmorland, Wilts, and Worcester*, have sent each of them two knights.



By the *st.* 27 *H.* 8. 26. *f.* 29. every county in *Wales* shall send one knight to parliament.

By the *st.* 34 & 35 *H.* 8. 13. the county palatine of *Chester* henceforth shall have two knights, to be elected by process from the chancellor of *England*, to the chamberlain of *Chester*, his lieutenant or deputy.

By the *st.* 25 *Car.* 2. 9. the county palatine of *Durham* shall have two knights in parliament, to be chosen on a writ from the chancellor, &c. to the bishop of *Durham*, or his temporal chancellor.

(D 6.) *Citizens.*] A writ to the sheriff of every county commands, *quod de qualibet civitate comitatûs tui duos cives*, &c. 4 *Inst.* 6. *Co. L.* 109. *b.*

Anno 49 *H.* 3. a writ of summons was directed to the citizens of *York*, and required them to send to parliament 2 *de discretioribus, legalioribus, & prioribus civibus*, &c. *Dug. Sum. Parl.* 3.

Citizens and burgeses were not afterwards summoned with the knights of shires to parliament, till 23 *Ed.* 1. but the king sent them commissioners, who assessed or levied upon them the same, or a greater tax than was granted by the knights of shires. *Bra. Treat. de Burg.* 25 — 32. *Dugdale mentions the second summons*, 22 *Ed.* 1. *Dug. Sum. Parl.* 7.

(D 7.) *Burgeses.*] A writ to the sheriff of every county commands, *quod de quolibet burgo duos burgenfes de discretioribus & magis sufficientibus*, &c. 1 *Inst.* 110.

So, it was done anno 49 *H.* 3. *Dug. Sum. Parl.* 3. A writ was directed to the burgeses of every borough.

Burgeses were not afterwards summoned to parliament till 22 or 23 *Ed.* 1. *Bra. Treat. de Burg.* 25, &c. *Dug. Sum. Parl.* 7.

By the *st.* 27 *H.* 8. 26. *f.* 29. the counties of *Brecknock*, *Denbigh*, and every shire in *Wales* shall send to parliament one knight, and every shire town (except *Merioneth*) one burges.

(D 8.) *Election. Writ of Election.*] The writ for summons, or election, shall have no material alteration, or addition, without act of parliament. 4 *Inst.* 10.

By the *st.* 7 & 8 *W.* 3. 25. there shall be forty days between the *issue* and return of the writ of summons.

And the lord chancellor, &c. shall issue writs for the election with as much expedition as may be.

And as well on calling a new, as on a vacancy in parliament, the writs shall be delivered to the proper officer, to whom the execution of them belongs, and no other.

Before the writ of summons issues, the king gives a warrant to the chancellor, by bill signed, for issuing the writs. *Vide D'Erwes*, 2.

The form of the warrant. *Ibid.*

If the person elected dies, or makes election for another place, the speaker issues a warrant to the clerk of the crown, upon motion, to make a writ for another election at the vacant place. 29 *Nov.* 1710.

So, if the person elected accepts an office, he made a peer, &c. *Ibid.*

Tho' there be a petition depending for the election at the same place, if it be not against him who dies, &c. 30 *Nov.* 1710. Or,

Or, there was not any candidate, but the persons who are returned.

30 Nov. 1710.

The writ of summons shall be, *teste* the king.

Or, *teste* the chief justice, or guardian of the realm. 4 *Inst.* 6.

[By *stat.* 10 G. 3. c. 41. the speaker, during recess of parliament, may issue his warrant to the clerk of the crown, to make out a writ for electing a member in the room of one dead during recess, on the death being certified under the hands of two members. He must give notice in the *Gazette*, and not issue warrant till fourteen days after; nor unless the return of the deceased member was brought in fifteen days before the end of the session preceding his death.]

[But the speaker is not to issue his warrant for a new election, unless the death was certified, so that notice may be given fourteen days before the meeting of parliament, nor where a petition was depending at the last prorogation or adjournment. *St.* 15 G. 3. c. 37. *f.* 1.]

[He may issue his warrant on a member's becoming a peer, in the same manner as if he were dead. *f.* 2.]

(D 9.) *Who cannot be elected, and who may.*] A man, attainted for treason or felony, cannot be elected; for the writ says, *magis idoneos & discretos eligi fac.* &c. 4 *Inst.* 47, 8.

So, *temp.* H. 7. persons outlawed for treason could not come into parliament, till their attainders were reversed. *R. Bac.* H. 7. 13.

Nor, persons outlawed after judgment, or before, in a civil action. *R. per all the J.* 1 *And.* 293.

Nor, persons taken in execution upon a judgment. *Mo.* 57.

An alien cannot be elected to parliament, or, if he be elected, shall not sit. 4 *Inst.* 47.

Nor, a denizen. *Ibid.*

But a man, when naturalized, may. *Ibid.*

A clergyman cannot be elected; for he is represented in convocation. 4 *Inst.* 47. *Mo.* 783.

Tho' he be of the inferior order. 4 *Inst.* 47.

By the *st.* 46 Ed. 3. No. 13. a man of the law, following business in the king's court, and sheriffs, shall not be elected for counties. *Cot. Abr. Pref.* 7. *Vide infra.*

A judge of B. R. or C. B., or a baron of the *Exchequer*, cannot be elected; for they are assistants to the peers. 4 *Inst.* 47. *Tamen Thorp*, a baron of the *Exchequer*, was Speaker to the Commons. 31 H. 6.

By the *st.* 5 & 6 W. & M. 7. *sess.* 2. no member of the House of Commons shall be, directly or indirectly, concerned in farming, collecting, or managing of duties given by lottery, or other act, except commissioners of the treasury, officers of the customs or excise, and commissioners of the land-tax.

But he may be a member of the corporation erected by the *st.* 5 & 6 W. & M. 14. *sess.* 2.

He may have a judicial place in the duchy court, or other court, ecclesiastical or civil. 4 *Inst.* 47.

By the *st.* 12 & 13 W. 3. 2 after limitation in the House of Hanover, no person in an office or place of profit under the king, or who receives a pension from the crown, shall be capable of serving as a member



a member of the House of Commons.—But by the *st.* 4 & 5. *Ann.* 8. this was repealed.

By the *st.* 4 & 5 *Ann.* 8. no person, who, in his own name, or in trust, hath any new office or place of profit under the crown, then after created, no commissioner, sub-commissioner, secretary, or receiver of the prizes, comptroller of the accounts of the army, commissioner of transports, sick and wounded, for wine licences, nor agent for any regiment, nor governor, or deputy governor of the plantations, nor commissioner of the navy for the out-ports, nor any having a pension from the crown during pleasure, shall be capable of being elected a member of the House of Commons. [The election is declared void, and he shall not sit or vote, on pain of 500*l.*]

Nor, by the *st.* 6 *Ann.* 7. after the union.

And by *that statute*, all disabled to sit in the parliament of *England* shall be disabled in the parliament of *Great Britain*.

Nor, by the *st.* 1 *Geo.* 56. any person, having a pension from the crown for a term of years in his own name, or in trust.

[No judge of session, justiciary or Exchequer in *Scotland*, is capable of being chosen a member of the House of Commons. 7 *G.* 2. *c.* 16.]

By *stat.* 15 *G.* 2. *c.* 22. commissioners of revenue in *Ireland*, of the navy, clerks in the following offices: treasury, auditors, tellers, or chancellor of exchequer's offices, admiralty, paymaster of army or navy, secretaries of state, salt, stamps, appeals, wine-licence, hackney-coaches, hawkers, and pedlars, or having office in *Minorca* or *Gibraltar*, (except commission-officers in regiments,) are excluded from being members of the House of Commons.

[By 22 *G.* 3. *c.* 45. every person who shall directly or indirectly, by himself or by any other to his use, hold any contract made with the commissioners of the treasury, navy or victualling office, or the master-general or board of ordnance, or any other person, for or on account of the public service; or shall in pursuance of any such contract, furnish any money to be remitted abroad, or any wares, or merchandize to be used in the service of the public, shall be incapable of being elected or sitting or voting in the House of Commons, during the time that he shall hold such contract.]

By the *st.* 9 *Ann.* 5. no person shall be capable, &c. who shall not have a freehold or copyhold for his own life, or a greater estate in law or equity, and for his own use, of the annual value of 600*l.* if a knight; 300*l.* if a burgess, &c. in *England*, [*Wales* or *Berwick*,] above reprises and all incumbrances that may affect the same. [Provided, not to extend to the eldest son of a peer, or of a person qualified to serve as knight of a shire.]

An infant within the age of 21 years cannot be elected. 4 *Inst.* 47.—And by the *st.* 7 & 8 *W.* 3. 25. the election of an infant is void, and if being returned he sit, he shall incur the penalty, as if he sat without being returned.

By the *st.* 4 & 5 *Ann.* 8. confirmed after the union by the *st.* 6 *Ann.* 7. if any accept any office of profit from the crown, while a member, his election shall be void, but he may be capable of being again elected.

By the *st.* 1 *H.* 5. 1. knights, &c. shall not be chosen, unless resident within the shire the day of the date of the writ of summons.—  
By the *st.* 8 *H.* 6. 7. unless dwelling and resident. And

And by the *st.* 1 *H.* 5. 1. citizens and burgesſes choſen ſhall be reſiant, dwelling, and free in the city or borough, and no other.

By the *st.* 23 *H.* 6. 14. knights of ſhires ſhall be notable knights of the ſame county, or ſuch notable eſquires and gentlemen born of the ſame county, as ſhall be able to be knights, and not any of the degree of yeoman.

By the *st.* 5 *El.* 1. none ſhall enter into the Parliament Houſe till he hath taken the oath of ſupremacy, 1 *El.* before the lord ſteward or deputy.

Nor, by the *st.* 30 *Car.* 2. 1 *ſeſſ.* 2. after the ſpeaker choſen, till he take the oaths of allegiance and ſupremacy, and ſubſcribe and repeat the declaration againſt popery, between nine in the morning and four in the afternoon, at the table in the middle of the Houſe in a full Houſe, in ſuch order as the Houſe is called over, on pain of 500*l.*, and being a popiſh recusant convict, and incapable of office, &c. *Vide poſt.* (E. 4.)

Nor, by the *st.* 7 & 8 *W. & M.* 27. till at the time he takes the oaths, and ſubſcribes the declaration in the *st.* 1 *W. & M.* 8. he alſo ſubſcribe the aſſociation.

But by the *st.* 1 *Ann.* *ſeſſ.* 1. 22. the aſſociation is taken away.

Nor, by the *st.* 13 & 14 *W.* 3. 6. and 1 *Ann.* *ſeſſ.* 1. 22. till he take and ſubſcribe the abjuration oath.

By the *st.* 7 *W.* 3. 4. any perſon, who after the *teſte*, or the ordering of any writ, or after the vacancy, by himſelf or others, or by any means, before his election, gives to any voter, or to any county, city, town, &c. in general, any money, meat, drink, or preſent, &c. is diſabled to ſerve upon ſuch election.

Treating a corporation on the day of election, is a breach of this ſtatute. *R. in the caſe of Sloan at Thetford, 26 Jan. 1699.*

But all others, under the degree of a peer of the realm, may be elected. 4 *Inſt.* 47.

As, a banneret. *Ibid.*

The heir apparent of a peer. *Vide ſupra.*

So, he who is judge in the duchy or other court. 4 *Inſt.* 47.

And the attorney or ſolicitor general. 4 *Inſt.* 48. *cont.*

Every one profeſſing or practiſing the common law, tho' there was an ordinance of the peers in Parliament. 46 *Ed.* 3. *cont.* 4 *Inſt.* 38. *Vide ſupra.*

A mayor or bailiff of a corporation. *Cont. Ero.* 38 *H.* 8. *Tit. Parl.* 7 *Acc.* 4 *Inſt.* 48.

A ſheriff of one county may be elected in another; as, 1 *Car.* the ſheriff of Buckinghamſhire was elected in Norfolk. 4 *Inſt.* 48.

And the king by his charter cannot exempt a man from being elected; for ſuch charter of exemption is void. 4 *Inſt.* 49.

[By *ſtat.* 33 *G.* 2. c. 20. members, before they vote or ſit in parliament, ſhall deliver in a ſchedule of their qualifications according to 9 *Ann.* and ſwear to it; except eldeſt ſons of peers, or of perſons qualified to be knights of a ſhire, members for univerſities, or Scotch members.]

[*Stat.* 14 *G.* 3. c. 58. repeals *ſtat.* 1 *H.* 5. and ſo much of the 8th, 10th, and 23d *H.* 6. as relates to the reſidence of electors or elected.]

(D 10.) *Who ſhall be electors, who not.*] By the *st.* 1 *H.* 5. 1. chooſers



choosers of knights, &c. shall be resident within the shire the day of the date of the writ of summons.

By the *st.* 8 *H.* 6. 7. shall be dwelling and resident, &c.

By the *st.* 8 *H.* 6. 7. every one of the electors shall have lands or tenements of the value of 40 *s.* *per ann.* at least above charges: and the sheriff shall have power to examine on the evangelists, how much he may expend by the year.

By the *st.* 10 *H.* 6. 2. he shall have 40 *s.* *per ann.* freehold in the same county.

By the *st.* 7 & 8 *W.* 3. 25. before he polls, if required by any candidate, he shall swear he hath in that county freehold lands or hereditaments of 40 *s.* *per ann.* and hath not polled before: and, for perjury or subornation, be subject to the penalties of the *st.* 5 *El.* [*Vide* in the *st.* 18 *Geo.* 2. 18. the oath altered and enlarged.]

By the *st.* 7 & 8 *W.* 3. 34. a quaker, instead of an oath in the usual form, shall be permitted to make affirmation in all courts and places, &c.—But the preamble speaks of cases, where process issues for contempt.—*Vide the st.* 10 *Ann.* 23. [By which the affirmation is to be admitted upon elections.]

If a man has a freehold in *antient demesne*, he may elect. *Semb. cont.* 4 *Inst.* 4, 5.

By the *st.* 7 & 8 *W.* 3. 25. none shall vote by reason of any trust or mortgage, unless in the actual possession or receipt of the profits; but a mortgagor, or *cestui que trust* in possession, shall vote.

By the *same statute*, conveyances of any messuage, lands, &c. in any county, borough, &c. to multiply votes, are void; and but one single voice shall be admitted for one house or tenement.

By the *st.* 10 *Ann.* 23. such a conveyance, on condition, &c. shall be absolute; and he who executes, or, being privy to such purpose, prepares it, or votes by virtue of it for a knight of the shire, forfeits 40 *l.*

[By 13 *G.* 2. *c.* 20. the *stat.* 10 *Ann.* *c.* 23. and 12 *Ann.* *stat.* 1. *c.* 5. for preventing fraudulent conveyances, and persons voting who have not been in possession of 40 *s.* are extended to freeholders in towns that are counties of themselves.]

By the *st.* 7 & 8 *W.* 3. 25. none under the age of twenty-one shall be admitted to give a vote, &c.

By the *st.* 5 & 6 *W.* & *M.* 20. *f.* 48. no officer in the excise shall persuade or dissuade any to vote, &c. on pain of 100 *l.*, a moiety to the poor, a moiety to the informer, and of incapacity to enjoy any office of excise or trust.

No peer hath a right to vote at elections. *R. nem. con.* 14 *Dec.* 1699. *R. nem. con.* 13 *Feb.* 1700. *R.* 24 *Oct.* 1702.

If a peer, or lord lieutenant of a county, concerns himself in elections, it is an infringement of the liberties of the commons. *R. nem. con.* 15 *Feb.* 1700. *R.* 24 *Oct.* 1702.

By the *st.* 7 & 8 *W.* 3. 27. none refusing the oaths in the *stat.* 1 *W.* & *M.* 8. or, being a quaker, the declaration of fidelity in the *st.* 1 *W.* & *M.* 18. which the sheriff or chief officer, &c. at the request of any candidate, may administer, shall vote, &c.

Nor, by the *st.* 6 *Ann.* 23. refusing the oath of abjuration, or, if a quaker, to declare the effect thereof.

If a man, who has a right to vote for two, gives a single vote, he cannot

cannot afterwards give a second vote for another. *R. in a committee: but the consideration of it postponed by the house. 21 Dec. 1699.*

By the *st. 23 H. 6. 15.* citizens and burgesses have always been chosen by citizens and burgesses, and no other.

And, by the same statute, the precept to cities and boroughs shall be, to choose by citizens of the same city citizens, and if a borough, by burgesses of the same.

And, by common right, in all boroughs the election ought to be by all the burgesses, where there is no prescription, or constant usage time out of mind, &c. to the contrary. *R. 8 May, 1626. Vide Brady Tr. 60.*

And therefore, if the king grant to a borough by charter, that a select number shall elect, &c. this does not take away the right of the other burgesses. *4 Inst. 48.*

So, a bye-law by the corporation itself, that a select number shall elect, does not avail. *Ibid.*

In a borough which has no charter, or burgesses, nor any custom for it, the election shall be by all the householders, and not by freeholders only. *R. 21 May, 22 Jac. Vide Brady, 60, &c.*

But, by an original grant, or custom, an election may be by a select number. *R. 4 Inst. 49.*

So, by custom or prescription, it may be by burgage tenants. *Vide post. (D 12.)*

[By *stat. 18 G. 2. c. 18.* every collector, if required, shall swear that he has a freehold of 40 s. per annum, and what and where, and has had it a year, or come to it by descent, marriage, marriage-settlement, devise, or promotion; that it was not granted on purpose to qualify; his place of abode; that he is twenty-one, and has not polled before.]

[By *st. 3 & 4.* elector must have been assessed to the land-tax within twelve months before, (except for chambers, &c. not usually assessed,) and duplicates of assessment shall be kept among the records of quarter-sessions.]

[By *st. 5.* person not qualified voting, or voting more than once, forfeits 40 l.]

[By *st. 6.* taxes and rates are not to be deemed charges within the meaning of this act.]

[Bribery at elections for members of parliament was punishable at common law, and is still so punishable. *1 Bl. 383.*]

[By *2 G. 2. c. 24.* every freeholder, &c. claiming to have a right to vote or be polled at an election, shall, if required by either of the candidates, or any two of the electors, make an oath or affirmation, that he has not by himself, or any person in trust for him, received, directly or indirectly, any sum or sums of money, office, place, or employment, gift or reward, or any promise or security, &c. in order to give his vote at the election.]

[Bribery by loan is but colour, and is really bribery by gift. *1 Bl. 317.*]

[By *st. 7.* persons taking money or reward for their vote shall forfeit 500 l. and be disabled to vote at any future election; provided, *st. 11.*, the prosecution be commenced within two years.]

[Since this statute *B. R.* will be cautious of granting informations at common law, till the time of limitation be expired; yet still they will



will on circumstances grant such an information, to prevent collusion with a common informer, and that the offence may be prosecuted at the suit of the king for the public benefit. 1 *Bl.* 384.]

[In an action on 2 *G.* 2. for bribery, it is not necessary to prove that the party bribed had a right to vote; if defendant gave the money, saw him vote, and his vote was not controverted, it is sufficient. *Rigg v. Curgenven*, *H.* 9 *G.* 3. 2 *Wils.* 395.]

[The action need not state *all* the parties for whom the bribe was given, nor is it necessary to prove that those parties were candidates. 1 *Bl.* 523. *Andr.* 248.]

[Neither is it necessary that the person bribed should give his vote according to the bribe. *Id.* 317.]

[By *f.* 8. offenders, who within 12 months after the election, shall discover others so that they be convicted, shall be discharged from all penalties, if they themselves have not been before convicted.]

[On this clause, making an affidavit is a sufficient affidavit to indemnify the discoverer: but a conviction must follow; and a naked verdict only, without a judgment, is not a sufficient conviction. 1 *Bl.* 665, 6.]

[And it will be good, tho' the discoverer himself be found guilty of bribery between the discovery and conviction. *Ibid.*]

[But whether the discoverer may be relieved, after verdict against him, by motion, or must be driven to his *audita querela*, will depend on the discretion of the court, according to the circumstances of his case. *Ibid.* et 3 *Wils.* 35.]

[*St.* 19 *G.* 2. *c.* 28. regulates the elections of cities and towns, which are counties in themselves.]

[By *f.* 31 *G.* 2. *c.* 14. persons holding their estates by copy of court-roll, are not thereby entitled to vote for counties; if they vote, they forfeit 50 *l.* to any candidate for whom they did not vote.]

[By *f.* 3 *G.* 3. *c.* 15. a freeman shall not vote, unless admitted twelve months before first day of election, except entitled to freedom by birth, marriage, or servitude.]

[The mayor and common council of the borough of *Carmarthen* have power to admit to the freedom of the borough such of the inhabitants paying scot and lot, who for three years previously have rented lands within the borough, for which they paid 10 *l.* a-year: the defendant, an inhabitant of that description, was nominated a *burgess* accordingly (by which title the corporators are called); and it was holden, that a *burgess* so appointed is within the prohibition of this act against occasional *freemen* voting at elections; and that the defendant having voted within the twelve months after he was sworn in, was liable to the penalty of 100 *l.* imposed by the act, although he had been nominated to be a *burgess* for more than six years before. *Williams v. Evans*, *B. R. E.* 39 *Geo.* 3. 8 *T. R.* 246.]

[*Stat.* 3 *G.* 3. *c.* 24. requires annuities to be registred with the clerk of the peace, twelve months before the first day of election.]

As to the determination of the right of elections, *vide post.* (E 15.—F 3.)

(D 11.) *The manner of election. In a county.*] By the *f.* 7 *H.* 4. 15. at the next county-court after delivery of the writ, proclamation shall be

be made in full county of the day and place of parliament, and all present duly summoned, or others, shall then in full county proceed to election, freely and indifferently. *Vide ante*, (D 10.)

By the *st.* 23 *H.* 6. 15. the election shall be made in full county between eight and eleven in the forenoon.

But it is sufficient, if the election be begun within those hours. 4 *Inst.* 48.

By the *st.* 7 & 8 *W.* 3. 25. the sheriff shall proceed to an election, at the next county-court after the receipt of the writ, unless it be held on the day of such receipt, or in six days after: for then he may adjourn the court to some convenient day, giving ten days notice of the time and place.

And by the *same statute*, the sheriff shall hold the county-court for an election at the most public place, where it hath been most usually for forty years past. *Vide infra.*

And the county-court for the county of *York*, formerly held on a *Monday*, shall be held on a *Wednesday*.

But the sheriff of *Southampton*, at the request of any candidate, may adjourn from *Winchester*, after all are polled, to the isle of *Wight*.

It may be judged, who are elected, by hearing of the voices, or view of the hands held up. *Pl. Com.* 123. 126. *a.*

But if the freeholders demand a poll, the sheriff ought not to refuse it; for, upon view, he cannot judge who have freeholds. 4 *Inst.* 48.

And he ought not to refuse it, tho' the party waives it. *Ibid.*

So, if the party demand a poll, he ought not to refuse it. *Ibid.*

And now, by the *st.* 7 & 8 *W.* 3. 25. if the election be not determined upon view, with consent of the freeholders, but a poll is demanded, the sheriff, with others deputed by him, shall forthwith proceed to take the poll, in some open place by the sheriff appointed.

And the sheriff, or his deputies, shall appoint such a number of clerks as he thinks meet, for taking of it, who shall take the same in the presence of the sheriff, &c. and shall be first sworn by the sheriff, &c. to take the same truly and indifferently, and to set down the name of each freeholder, and the place of his freehold, and for whom he polls, and to poll none, unless sworn, if any of the candidates require it.

And the sheriff, &c. shall appoint such one person as each candidate shall name, to inspect the clerk appointed for the taking the poll.

And the sheriff, &c. shall proceed to poll all the freeholders, and not adjourn the court without consent of the candidates to any other place, nor, by unnecessary adjournments in the same place, protract or delay the election, but proceed in taking the poll from day to day, and time to time, without other adjournment, unless by consent of the candidates, till all the freeholders present be polled, and no longer.

And the sheriff, mayor, &c. shall deliver to any who desires it a copy of the poll, paying only for the charge of writing it; and shall forfeit 500*l.* to the party grieved for every wilful offence against this act.

[By 10 *Ann.* c. 23. the sheriff must deliver the check-books, as well as the original poll-book to the clerk of the peace. *Rex v. Davis*, T. 9 G. 2. Str. 1048.]

[By *stat.* 18 G. 2. c. 18. *st.* 7, 8, 9. booths for taking the poll not exceeding fifteen, to be erected at candidates' expence, with the names of



of the hundreds on them. Clerks to be appointed. A list of the towns for which each booth is appointed shall be made, and, on request, delivered to each candidate; and no person to vote there, but whose estate lies in one of these towns, unless they do not lie in any place mentioned in any of the lists. And a check-book to be allowed for each candidate.]

[By *§. 10 & 11.* the sheriff shall not adjourn the next county-court after receiving the writ for more than sixteen days, and it may be adjourned to a *Monday, Friday, or Saturday*, notwithstanding *stat. 6 Geo. 2. c. 23.*]

(D 12.) *In a city or borough.*] By the *§. 23 H. 6. 15.* the sheriff, after delivery of the writ, shall deliver, without fraud, a sufficient precept under his seal to the mayor or bailiffs of cities and boroughs within his county, reciting such writ, and commanding them, if a city, to choose citizens, if a borough, burgesses for the parliament. *Vide ante, (D 10.)*

And a sheriff doing contrary to this or other statutes about elections, shall forfeit the penalty of the *§. 8 H. 6. 7. viz. 100 l.* to the king, and a year's imprisonment without bail; and shall forfeit 100 l. to every knight, citizen, or burgess chosen in his county, and not duly returned.

By the *§. 7 & 8 W. 3. 25.* the officer forthwith, on receipt of the writ, shall make out the precept to each borough, &c. and in three days after receipt, by himself or proper agent, deliver it to the proper officer, &c. to whom the execution of it belongs, and no other.

[The precept for a borough must be directed to the returning officer; if other words are added, they are surplusage, and may be struck out; and parol evidence shall not be received to shew they had been there, and so to make variance from the declaration and the record erroneous. *Dickson v. Fisher, M. 9 G. 3. 4 B. M. 2267.*]

And by the *same statute*, such officer shall indorse on the precept the day of his receipt in the presence of him who delivers it, and forthwith give public notice of the time and place of election, and proceed to election thereupon within eight days after receipt of the precept, giving four days notice of the day of election.

[The indorsement of the returning officer of the time of his receiving the precept is immaterial, and need not be proved on an action for bribery against a third person. *Gray v. Smithyes, H. 9 G. 3. 4 B. M. 2273.*]

A citizen is the most worthy, but his election agrees in all respects with the election of a burgess. *Per Holt, Mod. Ca. 51.*

The election in a borough is by persons, who hold by burgage tenure, or by the burgesses of a corporation. *Ibid.*

The right of a vote for electing burgesses to parliament is incident to every burgage tenure. *Ibid.*

The election by the burgesses of a corporation is a personal privilege given by prescription or charter, and is a right, vested in the whole corporation, to be exercised by every member of the same corporation. *Per Holt, Mod. Ca. 52.*

By the *§. 1 W. & M. 2 sess. 2.* and the *§. 2 W. & M. 7.* it is declared, that elections to parliament ought to be free.

(D 13.)

(D 13.) *The return of the elected.*] By the *st.* 7 *H.* 4. 15. after the election, the names of the persons chosen (whether present or absent) shall be written in an indenture under the seals of the choosers, and tacked to the writ; which indenture, so sealed and tacked, shall be holden for the sheriff's return to the said writ for the knights of the shires; and this clause shall be added to the writ, *et electionem tuam in plena comitatu tuo factam distincte & aperte sub sigillo tuo & sigillis eorum qui electioni illi interfuerunt nobis in cancellaria ad diem & locum in brevi contentum certifies indilate.*

By the *st.* 23 *H.* 6. 15. the mayor or bailiffs, &c. shall return to the sheriff the precept they received by indenture between the sheriff and them of the elections, and the names of the citizens and burghesses by them chosen. And the sheriff shall make rightful return of his writ, and of every return to him made by any mayor or bailiffs.

And if the sheriff do contrary to this, or any other statute for elections, &c. he shall incur the pain inflicted by the *st.* 8 *H.* 6. 7. *viz.* 100*l.* to the king, and imprisonment for one year, without bail or mainprize, and forfeit 100*l.* to every knight, citizen, or burghess chosen in his county, and not duly returned.

By the *st.* 5 *R.* 2. *sess.* 2. *c.* 4. if a sheriff be negligent in making his return, or leave out of his return any city or borough, bound or of old wont to come to parliament, he shall be amerced, or otherwise punished as was accustomed in times past.

If any sheriff refuses the return of the proper officer, and accepts a return by an improper officer of the corporation, it shall be amended by the clerk of the crown, by order of the house to file the proper return, and take the other off the file. 20 *Dec.* 1710.

If he makes a double return, and one is waived and appears improper, it shall be amended by taking it off the file. 8 *Dec.* 1710.

*Vide post.* (D 14.)

(D 14.) *At what time it shall be.*] By the *st.* 5 *R.* 2. 4. if a sheriff be negligent in making his return, he shall be amerced or punished as was accustomed in times past.

By the *st.* 7 *H.* 4. 15. and the clause afterwards inserted, the sheriff is commanded, *quod electionem, &c. ad diem et locum in brevi contentum nobis in cancellaria certifies.*

And where a sheriff did not make a return in due time he was taken into custody by order of the House, as for a breach of privilege. 23 *Oct.* 1702.

By the *st.* 10 & 11 *W.* 3. 7. if a sheriff make not a return on or before the parliament is to meet, or in convenient time, not exceeding fourteen days after election on a new writ, he shall forfeit 500*l.*, a moiety to the king, a moiety to the informer.

(D 15.) *False return.*] By the *st.* 11 *H.* 4. 1. justices of assize may inquire of returns made to writs of parliament, and if found by inquest, that the return is contrary to the *st.* 7 *H.* 4. 15. the sheriff shall incur 100*l.* to the king, and the knight unduly returned, shall lose his wages.

And the sheriff also, by the *st.* 8 *H.* 6. 7. shall have a year's imprisonment without bail.



But by the *ſt.* 6 *H.* 6. 4. the ſheriff or knight, &c. may traverse ſuch inqueſt of office, before the juſtices of aſſiſe.

By the *ſt.* 23 *H.* 6. 15. if any ſheriff make a return contrary to that, or other ſtatute for elections, &c. he ſhall incur the penalty of the *ſt.* 8 *H.* 6. 7. *ante* (D 12.), and alſo pay to every perſon choſen and not duly returned 100 *l.* to be recovered with coſts in debt againſt the ſheriff, his executors or adminiſtrators, by the party grieved, if he ſue in three months after the beginning of the parliament, or, in his default, by any that will ſue.

And if any mayor or bailiffs return to the ſheriff any not duly choſen, he ſhall forfeit 40 *l.* to the king, and 40 *l.* to every perſon choſen and not returned, to be recovered *ut ſupra*.

And if any returned be put out, and another put in his place, he that is put in his place, if he take upon himſelf to be knight, citizen, or burgeſſes, forfeits 100 *l.* to the king, and 100 *l.* to him put out to be recovered, &c.

By the *ſt.* 7 & 8 *W.* 3. 7. continued by the *ſt.* 12 & 13 *W.* 3. 5. and afterwards by the *ſt.* 12 *Ann. ſeſſ.* 1. c. 15. made perpetual, a falſe return is againſt law, and any, making or procuring it, may be ſued by the party grieved, who ſhall recover double damages with coſts.

All contracts, ſecurities, bonds, &c. to procure a return are void, and he who makes them forfeits 300 *l.*, a third to the king, a third to the poor, and a third to the informer; and a return, contrary to the laſt determination in the Houſe of Commons of the right of election for the ſame place, is a falſe return.

By the *ſame ſtatute*, the clerk of the crown ſhall enter the return in a book, (which, or a copy of it, ſhall be evidence as much as a record,) and the not entring it in ſix days, or if he alter it, but by order of the Houſe of Commons, or give a certificate of any not returned, or wilfully neglect his duty, he ſhall forfeit 500 *l.* and his office, and be for ever incapable of it.

By the *ſame ſtatute*, any officer who wilfully, maliciously, and falſely returns more perſons than he ought, forfeits double damages, with coſts of ſuit to the party grieved, who may ſue the officer, or him who procures ſuch return, at his election. *Vide infra*.

The Houſe expects the ſheriff to make a return according to law, and will not give him directions in caſe of difficulty; tho' the mayor to whom the precept was directed dies, and yet the burgeſſes go to election, and part return one by one indenture, and the other part return another by another indenture. 9 *Jan.* 1699.

If a ſheriff makes a falſe return, debt lies for the 100 *l.* upon the *ſt.* 23 *H.* 6. 15. *R. Pl. Com.* 118. 130. *Aſſ. Ent.* 72. 91.

So, an action upon the caſe lies for a falſe return, after a determination for him in parliament. *Semb. Lut.* 89. *Sal.* 502. *Semb. cont. Sal.* 505.

Or, after the determination there becomes impoſſible; as, if the parliament be diſſolved. *Semb. per Holt, Sal.* 503.

So, an action lies upon the *ſt.* 7 & 8 *W.* 3. 7. for a falſe return. *Lut.* 185.

If the plaintiff makes his caſe purſuant to the ſtatute. *Sal.* 504.

But an action does not lie for a falſe return, if it be not founded upon ſome ſtatute; for it is a matter only cognizable in parliament. *Semb. Sal.* 505. *Vide Action upon the Caſe, (B 8.)* And

And therefore, an action upon the case does not lie before the determination in parliament. *R. Lut. 89. Per Holt, Sal. 503.*

Nor, after a determination, by him against whom the determination there was. *R. Lut. 89. Sal. 503.*

Nor, since the *st. 7 & 8 W. 3. 7.* where the return was conformable to the last determination of the House of Commons. *Semb. Lut. 189.*

So, it does not lie by the common law for a double return. *Cont. per three J. in B. R., but the judgment was reversed in the Exchequer, and the reversal affirmed in Parl. R. 2 Vent. 37. 2 Lev. 114. Pol. 470. R. 3 Lev. 29. Per Holt, Sal. 503.*

[Double damages may be recovered for any false return, tho' there is no resolution of the House of Commons relating to the right of election to that place. *In Excheq. Chamb. Williams Wynne v. Middleton, H. 19 G. 2. 1 Wils. 125. Willes, 597. S. C.*]

[Action at common law will lie for a false or for a double return; for there is *damnum cum injuria* in both cases. *D. per Willes C. J. Ibid.*]

[The courts of *Westminster-hall* are not bound by resolutions of the House of Commons relating to actions at common law for such returns; and the party may proceed there, notwithstanding the order of the House. *D. per Willes C. J. Ibid.*]

[The *stat. of William* is a remedial act, and the *venire facias* may be *de corpore comitatus*. *Ibid.*]

By the *st. 7 & 8 W. 3. 25.* no sheriff or under-sheriff in a county or city, or mayor or other officer in a borough, &c. shall give or take any fee or gratuity, for making out receipt, delivery, return, or execution of any writ or precept for elections.

(D 16.) *The wages.*] A knight for a shire had *4s. per diem* for his expences *veniendo ad parlamentum, ibidem morando, & exinde redeundo.* *4 Inst. 46.*

A citizen and burghers *2s. per diem.* *Ibid.*

If nothing is done, but by the death of the king the parliament is dissolved, *qu. whether wages are due?* *Ibid.*

And by the *st. 23 H. 6. 10.* at the next county court after the delivery of the writ, the sheriff shall make proclamation, that the coroners, every chief constable, and the bailiffs of every hundred, shall be at the next county court to assess the wages of the knights, and all else that will come may, but the sheriff, coroners and bailiffs not coming, forfeit *40s.* each; and then the sheriff or under-sheriff, in full county, shall assess a certain sum on every hundred assessable, so as the sum on all the hundreds exceed not the sum due to such knights, and shall assess a certain sum on every village assessable in each hundred, so as the sum on all the villis in each hundred exceed not the sum on such hundred. And if the sheriff levy more on any place than assessed, or assess otherwise, he shall forfeit *20 l.* to the king, and *10 l.* to him that will sue by *scire facias* against the sheriff on this statute, to be paid, if on such *scire facias* he make default, or be convict, with treble damages.

By the *st. 12 R. 2. 12.* lords, or spiritual persons, purchasing lands contributory to the wages of knights, they shall continue contributory, as they were wont.

By the *st. 23 H. 6. 10.* the expences of knights shall not be levied of any villages, whereof it was not levied heretofore.



Tenants in *antient demesne* were not contributory to those expences.  
*Cot. Ab.* 1.

Nor, clerks of *Chancery*, having benefices. *Ibid.*

Nor, tenants of the bishop of *London*. *Ibid.*

(D 17.) *Privilege.*] A member of parliament shall have privilege for himself, his servants and goods. 4 *Inst.* 24. *D'Ew.* 43. 66. *Dy.* 60. a. in marg. *Vide Privilege.*

And therefore, he shall not be arrested or sued. *D'Ew.* 43.

So, his attendants shall not be arrested. *D'Ew.* 83, 84, 85. 629.

Nor, shall be served with a *subpœna*, citation, or other process, tho' he be not restrained. 4 *Inst.* 24. *D'Ew.* 655. *H. Parl.* 29.

A *superfedeas* goes for every action in particular, and not for all actions generally. *Latch*, 150. *Dy.* 60. a. in marg. *Seld.* 3 vol. 2 P. 1524.

And a *superfedeas* goes to justices of assise, *quod superfedeant captioni assissarum*, &c. *ubi comites, et alii summoniti ad parlamentum sunt partes quamdiu parlamentum duraverit.* 4 *Inst.* 24.

He shall not be assaulted; for the assailant was taken into custody. 21 *Dec.* 1699.

Nor, his servant. *D'Ew.* 656. 658.

By the *st.* 5 *H.* 4. 6. and 11 *H.* 6. 11. if any assault, or affray be made to a lord, knight, citizen, or burghers come to parliament, or other council of the king, by his command, proclamation shall be made three days that he yield himself in *B. R.* within a quarter of a year after, or the first day of the term after such quarter, and if not, that he be attaint, and pay double damages to the party, to be assessed by inquest, or by the justices of *B. R.*, and pay a fine and ransom; and if he do, and be found guilty by inquest, the same penalty.

The privilege of freedom from arrest for their persons, goods, and attendants, is demanded by the speaker, when he is confirmed by the king. 21 *Jac. Russ.* 119.

And if a member be arrested, he may have a writ of privilege for his discharge. *Dy.* 60. a.

But a letter from the speaker, for allowance of privilege, is not to be regarded. *R. Latch*, 48. 150. *Dy.* 60. in marg.

It is no breach of privilege to file an original against him. *Sal.* 512.

[A member of parliament may be sued in *C. B.* by bill. *Dawkins v. Burridge*, *M.* 13 *G.* *Str.* 734. *Ld. Raym.* 1442.]

[If a person having privilege be in the *King's Bench* prison, a declaration may be filed against him as being in the custody of the marshal, and no summons need be issued against him. *Jackson v. Mackreth*, *T.* 33 *G.* 3. 5 *T. R.* 361.]

If a servant of a member be arrested, he need not have a writ of privilege, but shall be discharged by the serjeant. *D'Ew.* 249, 250.

But if a servant procure himself to be arrested, he shall be punished for the contempt. *D'Ew.* 254. 258.

And if he procure himself to be a servant to avoid his debts, he shall have no privilege. *D'Ew.* 373.

So, if he be not a menial servant he shall have no privilege. *D'Ew.* 315. 655.

[An attorney, tho' a menial servant of a peer, has no privilege of parliament. *Wickham v. Hobart*, *M.* 10 *G.* 2. *Str.* 1065.]

[Whether

[Whether a gamekeeper is entitled to privilege? *qu.* But if he is, it is necessary to have affidavit what and where the manor is, that the lord is in possession, and that the defendant is gamekeeper. *Chester v. Upsdale*, T. 24 G. 2. 1 *Wils.* 278.]

[Order of lords, 28th June 1715, does not extend to all their servants, only such as are necessarily and properly employed about their estates or their persons. *Ibid.*]

[So, C. B. declared that privilege extended to *infamous and seditious libels tending to inflame the minds and alienate the affections of the people from his Majesty, and to excite them to traiterous insurrections against the government.* *Rex v. Wilkes*, P. 3 G. 3. 2 *Wils.* 151.]

[But by resolution of House of Lords 29th November 1763, and of House of Commons, 24th November 1763, writing and publishing seditious libels is not entitled to privilege.]

And a servant may be sued, if he be not arrested. *Semb.* 1 *Mod.* 146.

Privilege shall be allowed in all cases, except treason, felony, or the peace. 4 *Inst.* 25. *Cott. Abr.* Pref. 8. b.

So, a peer shall have privilege, if cited in the ecclesiastical court. *Seld.* 3 vol. 2 P. 1478.

So, a peer shall have privilege, tho' he be not committed in time of parliament, except for treason, felony, or refusing surety of the peace. *R.* 2 *Car. Russ.* 365. *H. Parl.* 30.

Nor, shall he be taken by attachment out of *Chancery*. *D'Ew.* 203.

[The court of B. R. will not grant an attachment against a peer for not paying a sum of money awarded, tho' the defendant consent on condition that the attachment shall lie in the office for a certain time. *Walker v. Earl of Grosvenor*, H. 37 Geo. 3. 7 T. R. 172.]

[Nor, against a member of parliament. *Catmur v. Knatchbull*, B. R. M. 38 Geo. 3. 7 T. R. 448.]

[A *Scotch* peer (not one of sixteen) arrested, shall be discharged on motion. It does not appear whether the suit was also discharged. *Ld. Mornington's Case*. *Fort.* 165.]

So, privilege shall be allowed in an action by the king. *H. Parl.* 16.

Or, an information. *H. Parl.* 30.

The privilege of a peer commences from the *teste* of the summons, and continues for twenty days after the session, and so for twenty days before and twenty days after every session, upon prorogation. *R.* by the Lords 28 May 1624, and 27 Jan. 1628. 2 *Lev.* 72. 1 *Kebl.* 329.

But the Commons claim forty days before and after every session. 2 *Lev.* 72.

[On the dissolution of parliament, the members have privilege *redeundo* for a reasonable time. *Pitt's Case*, T. 7 & 8 G. 2. *Fort.* 159. *Str.* 985. B. R. H. 28.]

[If a member is arrested within that reasonable time, it is breach of privilege. *Ibid.*]

[A member so arrested may be discharged without a writ of privilege, on motion. *Ibid.* and *Fort.* 342.]

[But it is on filing common bail; for it is a discharge to his person, not to the suit. *Ibid.*]

But no member shall have privilege, when he is only a trustee. *R.* 13 Feb. 1700. 16 Nov. 1699. *R.* 24 Oct. 1702.



Nor, shall he have privilege unless for his person, when the house does not actually sit for dispatch of business. *Declared as a standing order nem. con. 13 Fei. 1700.*

Nor, shall he have privilege when he is a public officer, for a thing done in the execution of his office. *R. 28 Nov. 1699.*

Nor, shall he have privilege, if taken in execution. *Vide post. (D 20.)*

Nor, if taken after his election, and before the session begins.

Or, if taken before his election, he shall not have it afterwards. *R. in Parl. 12 Mar. 1592. Mo. 340.*

And by the *st. 12 & 13 W. 3. 3.* all persons may sue, or proceed in any suit in the courts at *Westminster*, admiralty, court of arches, prerogative court of *Canterbury* and *York*, and delegates in causes matrimonial and testamentary, and all courts of appeal, against any peer, or member, or their servants, immediately from the dissolution, prorogation, or adjournment for more than fourteen days till the time of meeting or re-assembling, so as they arrest not the person privileged, but proceed by summons and distress infinite, or by original bill, summons, and distress infinite, till common bail filed, &c.

So, by the *st. 11 Geo. 2. 24.* in any court of record, *Wales*, or county palatine.

And by the *st. 12 & 13 W. 3. 3.* none stayed by privilege, shall be barred by the statute of limitation.

And by the *same statute*, no original debtor or accountant to the king shall have privilege but from arrest.

Nor, shall a member have his privilege, when he has once waived it. *20 Nov. 1702.*

[Waiver of privilege must be in writing. *Holliday v. Pitt, T. 7 G. 2. B. R. H. 37.*]

[It is never as to the person, only to give a power of suing. *Ibid.*]

Or, if he begins at law, he shall not have privilege, upon a bill in equity to be aided against such suit. *1 Ver. 329.*

[If a peer, plaintiff, gives rule to examine witnesses, it is not breach of privilege in defendant to examine. *Earl of Derby v. Duke of Athol, T. 1751, 2 Vesey, 298.*]

[If peer brings action at law, it is not breach of privilege in defendant to bring bill for injunction. *Ibid.*]

[Peers may be sued in *B. R.* by original bill. *Say v. Lord Byron, B. R. M. 26 Geo. 2. Say. 63. Gosling v. Lord Weymouth, B. R. T. 18 Geo. 3. Cowp. 844. Earl Lonsdale v. Littledale, Exch. Cham. M. 34 Geo. 3. 2 H. Bl. 267.—Quare. Lonsdale v. Littledale, House of Lords, E. 34 Geo. 3. 2 H. Bl. 299.*]

The privileges, liberties, and jurisdiction of parliament are the right and inheritance of the subject. *By the Commons 19 Jac. Russ. 53.*

But none shall be imprisoned by the serjeant for breach of privilege till the matter be examined by a committee, and reported to the house. *R. 13 Feb. 1700.*

The lords have privilege from arrest, &c. as well as the commons. *Seld. 3 vol. 2 P. 1478.*

[No peer has privilege of peerage or of parliament against being compelled by process of courts of *Westminster-hall* to pay obedience to *habeas corpus* directed to him. *Order, 7th February 1757, 8th June 1757.*]

They

They shall not answer to a complaint against them in the House of Commons. *Seld. 3 vol. 2 P. 1478.*

[*Stat. 4 G. 3. c. 24.* regulates franking letters; and this is amended by *stat. 2 G. 3. c. 25.*]

[By *stat. 4 G. 3. c. 33.* the creditor of a member, a merchant, may on affidavit sue out writ and serve him, and if he does not make satisfaction in two months, he shall be bankrupt from the time of service.]

[Merchant committing act of bankruptcy, creditors may sue out commission, and commissioners proceed, notwithstanding privilege.]

[But the person shall not be arrested or imprisoned except for cases made felony by the bankrupt acts.]

[By *stat. 10 G. 3. c. 50.* peers and members may be sued at any time, and the suit shall not be impeached or stayed by privilege; but the person not to be imprisoned.]

[The court may order the issues from time to time to be sold, and plaintiff's costs to be paid, and the residue retained till the purpose of the writ answered, and then the issues or money returned.]

[Rule of court of *B. R.*, *C. B.*, or Exchequer, may be enforced by distress infinite.]

[If member is illegally taken, and detained by process of *B. R.*, and is brought by *habeas corpus* to be charged in execution in *C. B.*, they will remand him, that he may be discharged by *B. R.* *Barnes, 199.*]

(D 18.) Assistants in Parliament.

All the judges of the realm, and barons of the *Exchequer* of the coif shall be attendant and assistant *in domo superiori parliamenti.* 4 *Inst.* 4. 50.

So, the masters of *Chancery.* 4 *Inst.* 4.

So, the attorney and solicitor general.

And the king's council. 4 *Inst.* 4.

But the presence of the judges, &c. is only for their advice, not for their consent. *Seld. 3 vol. 2 P. 1650.* 4 *Inst.* 4.

(D 19.) Proxies.

A commoner cannot have any proxy. 4 *Inst.* 12. for he himself is elected. *Ha. Parl.* 11.

But a lord in parliament may have his proxy. 4 *Inst.* 12.

And such proxy shall be a lord of parliament. *Ibid.*

And this is the constant course since 1 *H. 8.* *Seld. 3 vol. 2 P. 1477.*

Yet, antiently, a bishop made a proctor of the clergy his proxy. 4 *Inst.* 12.

And others not barons. *Seld. 3 vol. 2 P. 1477.*

And the usual course is, for a temporal lord to make a temporal lord his proxy, and for a lord spiritual to make a spiritual lord. *Ibid.*

A lord may name two or three for his proxies; as, 1 *El.* 4 *Inst.* 12. *Vide infra*, the order 2 *Car.*

So, two or three *conjunctim & divisim.* 4 *Inst.* 12. *Seld. 3 vol. 2 P. 1477.*

And in such case, all present ought to assent or dissent; for if one be content and the two others not content, it is no vote. *R. 4 Inst.*

13. *Ha. Parl.* 11.



But he shall not have above two proxies. *By order 2 Car. Russb. 269.*

The proxy is appointed by the lord upon leave for his absence.

And it has usage for it *a tempore Ed. 1. Seld. 3 vol. 2 P. 1476.*

But he may be summoned with a clause, that he do not make a proxy. *Seld. 3 vol. 2 P. 1476.*

If a lord appears in parliament, tho' he speaks or argues nothing, his proxy is thereby revoked. *R. 1 El. 4 Inst. 13. Ha. Parl. 11.*

(D 20.) Absents.

By the *st. 5 R. 2. 4.* if any summoned to parliament, viz. lord, knight, citizen, or burghers, absent himself without cause, he shall be amerced and otherwise punished as hath been antiently used; that is to say, a lord by the peers, a knight, citizen, or burghers by the commons. *4 Inst. 43.*

By the *st. 6 H. 8. 16.* none shall depart from the House of Commons without licence of the speaker and commons, entred in the book of the clerk, before the end of the parliament, on pain to lose his wages.

And he who departs may be fined by the commons. *4 Inst. 44. D'Ew. 309.*

So, a lord may be fined by the lords. *4 Inst. 44.*

So, an information lies for a contempt. *Semb. H. Parl. 17, 18.*

But, a burghers being ill, cannot be discharged for it. *Cont. Bro. Parl. 7. 4 Inst. 8. acc. R. acc. D'Ew. 244. 281. 307.*

Nor, a member detained in execution. *D'Ew. 244. 2 Ed. 4. 8. a. Per Dy. Mo. 57.* and if he be, by the *st. 1 Jac. 13.* he may be taken in execution again.

Or, absent upon an embassy. *D'Ew. 244.*

Yet, if a member, absent for illness, request his discharge, or his distemper be incurable, he may be discharged, and another elected in his stead. *D'Ew. 307. 429.*

(E 1.) Parliament summoned, and the Beginning of it.

THE writ of summons to parliament issues at least forty days before the beginning of a parliament, *4 Inst. 4. Vide ante, (C. —D 8.)*

The parliament cannot begin without the presence of the king, either in person or by representation. *4 Inst. 6.*

The king is often present in person.

Or, if the king be out of the realm, there may be a special commission to the *capitalis iudiciarius* of the realm, to hold and proceed in the parliament. *4 Inst. 6. Vide Roy, (H 1, 2.)*

And if the *custos* of the realm be engaged, &c. there may be a commission to hold it in the name of the king, or himself. *Cott. Ab. 19.*

So, if the king be infirm, a commission shall issue to certain lords of parliament to hold, &c. the parliament. *4 Inst. 6.*

So, it was *19 Jac. Russb. 39. Ha. Parl. 3.*

So, if a parliament begins by the king in person, it may, after prorogation by the king, be summoned before commissioners. *4 Inst. 7.*

If the king pleases that the parliament shall not begin at the day of the return of the writ summons, a writ patent under the great seal tested before the day of the return, and directed *prælati, magnatibus, proceribus hujus regni, ac militibus, civibus, & burghensibus, &c.* shall be read at the day of the return in the upper house before the lords, and other commons there assembled, whereby the parliament shall be prorogued to another day. 4 *Inst.* 7.

So, it was 1 & 5 *El.* *Vide post.* (M).

And in such case the parliament does not begin till the day to which it is prorogued. 4 *Inst.* 7.

[The courts are bound to take notice of the commencements, prorogations, and sessions of parliament. 1 *Lev.* 296. cited *Doug.* 97. n.

And that even when the proceedings are on a private statute. *Ibid.*

(E 2.) In what Place assembled.

Antiently both houses of parliament sat together. 4 *Inst.* 2. 2 *Inst.* 267.

But it appears *cont. per Prynn* in his *pref.* *Cot. Ab.* 5.

As, in 4 *Ed.* 1. 2 *Inst.* 267.

Anno 50 *Ed.* 3. the House of Commons assembled in the chapter-house of the abbot of *Westminster.* *Cot. Abr. Pref.* 13. b. 4 *Inst.* 2.

The place was antiently *St. Stephen's chapel.*

Every day before the House of Commons assembles, prayers are said in the house by the speaker's chaplain.

So, upon solemn days, as 130 *Jan.* 29 *May,* 5 *Nov.* &c. some divine is desired to preach a sermon before the House. 3 *Jan.* 1710.

But none shall be recommended to preach before the House unless he be of the dignity of a dean, or of a doctor in divinity. *R.* 31 *Jan.* 1699.

(E 3.) Things done at the Beginning of a Parliament.

(E 3.) *In the House of Lords.*] At the first day of the parliament, the king sets forth the causes of summoning the parliament. 4 *Inst.* 7.

Or, the chancellor or keeper for him. *Ibid.*

Or another, tho' the chancellor be present; as, the chief justice. 4 *Inst.* 8.

The king's chamberlain, &c. 4 *Inst.* 8. and *marg. imb.*

When the commons go to choose their speaker, the lords appoint four justices, and two masters in *Chancery*, to be receivers of petitions for *England, Ireland, Wales, and Scotland,* which shall be delivered within six days ensuing. 4 *Inst.* 11.

And three justices and two masters are appointed receivers of petitions for *Gascoign, Guen, Poitiers, Normandy, Anjou, &c.* which shall be delivered within six days ensuing. *Ibid.*

Then six of the temporal and two of the spiritual nobility are appointed triers of the petitions of *England, Ireland, Wales, and Scotland;* who, or four of whom, assisted by the king's counsel, sit in the treasury chamber, and try whether the petitions are reasonable to be proposed to the lords. *Ibid.*

As many are appointed triers of the petition of *Gascoign, &c.* *Ibid.*

And this course still continues, tho' *Gascoign, &c.* are lost. *Ibid.*



(E 4.) *In the House of Commons.*] By the *st.* 5 *El.* 1. every knight, citizen, burghers, and baron of the *Cinque Ports*, before he enters into the parliament-house, or has a voice there, shall take the oath of supremacy (and by the *st.* 7 *Jac.* 6. the oath of allegiance) before the lord steward or his deputy, or suffer the penalties, as if he had sat without election, return, or authority.

By the *st.* 30 *Car.* 2. 1. *sess.* 2. no peer, or member of the House of Commons, shall vote or sit during any debate, after the speaker is chosen, till he takes the oaths of allegiance and supremacy, and repeat and subscribe the declaration against transubstantiation and invocation of saints, &c. betwixt nine and four of the clock, at the table, in a full House, in such order as the House is called over, on pain to suffer as a popish recusant convict, &c. and a writ shall issue to elect a new member, &c.

By the *st.* 1 *W. & M.* 8. every person required by any act to take the oath of supremacy made 1 *El.* 1. or the oath of allegiance made 3 *Jac.* 4. which are hereby abrogated, or either of them, shall instead thereof take and subscribe the oaths of allegiance and supremacy here prescribed.

By the *st.* 7 & 8 *W.* 3. 27. every member of the House of Commons was obliged to subscribe the association. But by the *st.* 1 *Ann.* 22. this part of the said act is declared to be void.

By the *st.* 13 & 14 *W.* 3. 6. no peer, or member of the House of Commons, shall vote or sit during any debate, after the speaker is chosen, till he take and subscribe the oath of abjuration, (and by the *st.* 1 *Ann.* 22. it shall be taken as there altered,) at the time, place, and on the pain *ut supra* by the *st.* 30 *Car.* 2. 2.

If there be not any lord steward, the treasurer or comptroller of the household by common usage is his deputy to all intents. *D'Ew.* 122.

If there be a lord steward, he may appoint others to be his deputies to take the oaths. *D'Ew.* 40.

And other lords may be appointed.

Or, any of the members, after they are sworn, may be his deputies, for giving the oaths to others. *D'Ew.* 40.

(E 5.) *Choice of a speaker*] Antiently there was no constant speaker. 4 *Inst.* 2.

But there was a speaker 44 *H.* 3. *Semb.* *D'Ew.* 40.

And the first prolocutor named upon record was 51 *Ed.* 3. *viz.* Sir Thomas Hungerford. *D'Ew.* 40. *Cot. Abr. Pref.* 13. b.

But in the parliament, rolls, *temp.* R. 2. and from that time, the speaker is frequently mentioned. *D'Ew.* 41.

None can be speaker without election of the commons. 4 *Inst.* 8.

And their election is free. *D'Ew.* 41.

But the king may recommend. 4 *Inst.* 8. *Cot. Abr. Pref.* 14. b.

Or, refuse him. *Ibid.*

Yet, antiently, there was no command for the election of a speaker. *D'Ew.* 41.

The first command for it was 2 *H.* 4. *Ibid.*

And it was afterwards omitted, 7 & 8 *H.* 4. *Ibid.*

But it is now usual, and by long usage necessary at this day. *Ibid.*

The speaker elect disables himself. 4 *Inst.* 8.

Then

Then he is presented to the king in the House of Lords, and there excuses himself. 4 *Inst.* 8. *Rush.* 480.

And from the 6th year of *H. 6.* they have usually made an excuse. *D'Ew.* 42.

But sometimes he does not make any excuse; as, Mr. *Harley* did not, 13 *W.* 3.; and, antiently, it was not made except for cause; as, 5 *R.* 2. was the first excuse, and not allowed: 1 *H.* 4. 6 *H.* 4. *H.* 5. 28 *H.* 6. 29 *H.* 6. it was not made. *D'Ew.* 42. *Harley did make his excuse. 1 Wood. don 59. n. 2.*

And before confirmation by the king, he was called speaker, when the commons were summoned to attend the king. 16 *Nov.* 1699. *See Wooddon at supra.*

So, 21 *Oct.* 1702. But usually he is not so called.

If the speaker be approved by the king, he prays; 1. Freedom of speech, and all their antient privileges; 2. Pardon for mistakes, and that he may resort to the commons for a declaration of their intent; 3. Access to the king. 4 *Inst.* 8. 21 *Jac.* *Rush.* 119. *Ha. Parl.* 4.

Freedom from arrest, of speech, and access to the king, and candid construction of their proceedings. 3 *Car.* *Rush.* 484.

So, per Mr. *Harley*, 1702.

The House of Commons cannot assemble without their speaker. 4 *Inst.* 8.

And therefore, if he cannot attend for sickness, he shall be discharged; as, *John Cheyne*, 1 *H.* 4. *Wm. Sturton*, 1 *H.* 5. *Sir John Tirrel*, 15 *H.* 6. *Ibid.*

After the speaker chosen, and the oaths, according to the *st.* 30 *Car.* 2. and 13 *W.* 3. taken, a bill is read, and from thence the session begins. So, 23 *Oct.* 1702.

And after a bill read, the House is summoned to attend the king in the House of Peers, to hear the king's speech.

Sometimes the House is summoned to attend the king before a bill is read: so it was, 16 *Nov.* 1699; so it is usually done. So, it was 1702, 1710.

And the king's speech was reported to the House by the speaker, before a bill was read, 16 *Nov.* 1699; but the speaker said, that he could not do it till the oaths were taken, according to the statutes, 21 *Oct.* 1702.

And it was not reported, till after a bill read, and committees appointed, and other orders made, 23 *Oct.* 1702.

After a bill read, and before committees appointed, &c. 29 *Nov.* 1710.

After the king's speech is reported, the House usually returns thanks for it. So, 23 *Oct.* 1703. 29 *Nov.* 1710.

And appoints a day for the consideration of it. 16 *Nov.* 1699. So, 23 *Oct.* 1702.

Then a day is appointed, in which the House will resolve itself into a committee for the consideration of it. 24 *Nov.* 1699.

And the House appoints a committee, for an address upon their vote of thanks.

Or, to be drawn upon their vote, and the debate in the House, 29 *Nov.* 1710.

When the address is reported from the committee, it may be agreed to, or amended by the house. 30 *Nov.* 1710.

After the House agrees, it shall be presented to the king by the whole House usually. 30 *Nov.* 1710.



And the members of the privy council are appointed to inquire the time when the king pleases to be attended by the House. 30 Nov. 1710.

The summons to attend the king is made by the usher of the black rod.

Or, by his deputy-usher. 16 Nov. 1699.

When the speaker reports the king's speech, he prays a copy of it, and reads the copy. 16 Nov. 1699. 29 Nov. 1710.

So, the speaker ought to be conformable to the command or order of the House; and therefore, if he be required by the majority to propose the question, it will be a breach of privilege if he disobeys, tho' it be by the king's command. R. 16 Car. 3. Rusb. 1137.

(E 6.) *Committees appointed.*] The commons in parliament are the general inquisitors for the realm. 4 Inst. 11.

And at the beginning of the sessions, it is their principal care to appoint committees for grievances, &c. *Ibid.*

The general committees appointed after the reading of the first bill, are, a committee for religion, for grievances, for justice, for trade, for privileges, and elections. 13 Feb. 1700. 16 Nov. 1699. So, 23 Oct. 1702.

A committee is general, i. e. of the whole House; *de quo vide post.* (E 13.) or a private committee.

(E 7.) *Chairman.*] The committee appoints one of them for chairman. 4 Inst. 12.

The chairman reports the resolution of the committee to the House. *Ibid.*

Or, another whom the committee appoints for this purpose. *Semb. ibid.*

(E 8.) *Committee for a private bill.*] In a committee for a private bill, the chairman shall not sit without a week's public notice set up in the lobby. *Declared for a standing order, 15 Feb. 1700.*

And upon the report of a private bill, he shall inform the House, whether the allegations of the bill are examined, and the parties concerned have consented, to the satisfaction of the committee. *Declared for a standing order, 15 Feb. 1700. So, 24 Nov. 1699.*

Before a private bill be considered by a committee of the lords, a copy of it shall be delivered to every one concerned in it. *Declared for a standing order, 16 Nov. 1705.*

And if an infant be concerned, a copy shall be delivered to his guardian, or next relation of full age, not concerned in interest, nor in the passing of the bill. *Declared for a standing order, 16 Nov. 1705.*

By a standing order of the lords 23 Apr. 1698, a committee shall take no notice of the consent of any person to any private bill, unless he appear before them, or there be an *affidavit* of two persons made, that he is not able to attend, and doth consent to the bill.

If a bill be for a sale of land in such a place, and a purchase in another, the committee shall see that the values are fully proved, and that there be an agreement for the purchase, and that the bill provides for the effectual purchase and settlement of the lands, as it is desired. *Ordered 16 & 19 Feb. 1705.* And

And if trustees are appointed by the bill, they ought to appear personally before the committee, and accept the trust under their hands. *Declared for a standing order, 16 & 19 Feb. 1705.*

The lord, who makes the report of the committee, shall report that all orders were observed by the committee. *Order, 16 Feb. 1705.*

(E 9.) *Committee for other purposes.*] So, a committee is frequently appointed for other purposes; as, for inspection of the journals of another session. 27 Nov. 1699.

For inspection of the journals of the peers.

But it was not usual till later times to appoint committees to determine any particular thing, without a report to the House. *Cot. Ab. Pref. 14. b.*

(E 10.) *Instruction to a committee.*] After a committee is appointed, the House may give any particular instruction to it. So, 27 Nov. 1699.

So, a matter referred to one committee may be afterwards transferred to another. 11 Jan. 1699.

(E 11.) *Witness attending the House, or a committee.*] If a witness refuse to attend the House, or a committee, he shall be summoned by order of the speaker, or chairman, to attend. *Vide post. (E 15.)*

But no witness pays any thing for being summoned to the House, or a committee. *Declared 29 Jan. 1699.*

Nor, shall he be arrested upon his coming to or departure from the committee; and if he be, the House upon motion will discharge him. *R. 15 Feb. 1699.*

An officer may be summoned to attend with the public books of a corporation, &c.

If any one directly or indirectly attempts to prevent a witness from appearing, or giving testimony, or tampers with a witness, in respect of the evidence to be given to the House, or to a committee; this is a misdemeanor, and the House will proceed against him with severity. *R. 24 Oct. 1702. 29 Nov. 1710.*

So, if a witness gives false testimony to the House, or a committee. *R. 24 Oct. 1702. 29 Nov. 1710.*

(E 12.) *When committees are to sit.*] A committee cannot continue sitting after the House is assembled.

And if committees are adjourned, a committee cannot sit till committees be again revived. *Declared for a standing order, 23 Jan. 1699.*

(E 13.) *Committee of the whole House; when necessary.*] The House will not proceed upon a petition, motion, or bill for granting money to the king, charging the subject, or compounding or releasing a debt due to the king, except in a committee of the whole House. *Declared for a standing order, 29 Nov. 1710. Vide post. (H 17.)*

(E 14.) *Committee for justice.*] A committee for justice may summon any judges, and examine them in person, upon complaint of any misdemeanor in their office. 1 Sid. 338.

(E 15.)



(E 15.) *Committee of elections.*] The committee of privileges and elections usually meets in the speaker's chamber, and then adjourns in to the House.

There ought to be to the number of five, who are named of the committee before adjournment.

And there ought to be at least eight of them continuing in the House, otherwise the committee does not proceed.

But it is usually ordered, that all the members present have votes. So, *Journal*, 13 Feb. 1700. So, 23 Oct. 1702. But, antiently, it was otherwise.

A petition which concerns an undue election or return, &c. is usually referred to the committee of privileges and elections.

And the committee usually appoints the day for hearing.

Or, the House may direct the hearing upon a particular day. 14 Dec. 1710.

But it may be heard at the bar of the House. 1 Dec. 1710.

And, antiently, it was referred to the determination of the king and the lords. *Semb. Cot. Ab. Pref.* 14. b.

So, if, upon a double return ordered to be shewn to the House, it appears that there were equal votes for all the candidates, it may be declared void, and a writ ordered for a new election, without a reference to the committee. 1 Dec. 1710.

So, if one of the parties returned waives his return, it may be amended by the House. 2 Dec. 1710.

This committee considers all matters concerning the return, election, and privileges of the members. *Journal*, 13 Feb. 1700. 16 Nov. 1699. 23 Oct. 1702.

Double returns are usually determined in the first place; for the House is not full before the determination of them. *Journal*, 15 Feb. 1700. 16 Nov. 1699. 23 Oct. 1702.

It is usually ordered, that all returns be questioned within fourteen days. *Journal*, 13 Feb. 1700. 16 Nov. 1699.

So, within fourteen days after another return made. *Journal*, 13 Feb. 1700. 23 Oct. 1702.

That any person, returned for two places, shall elect for which he will serve within three weeks, if there be not any question of the return for such place. *Journal*, 13 Feb. 1700. 23 Oct. 1702.

That all persons, returned upon a double return, withdraw till their return be determined. *Ibid.*

And every member ought to withdraw when his return, election, or privilege is debated. *Ibid.*

And only two counsel of a side shall be admitted. *Journal*, 13 Feb. 1700.

As to a petition concerning an election, or privilege, *vide post.* (F 3.)

The serjeant shall give order to the door-keepers and messengers to attend the committee of privileges and elections, and provide that none crowd the stairs below, or above in the gallery. *Declared for a standing order*, 16 Dec. 1699.

The witnesses at the committee shall be examined separately, and then withdraw; and the passage shall be free for this purpose. *Declared for a standing order*, 16 Dec. 1699.

If the House judges a petition concerning election, frivolous or vexatious,

veracious, it will order satisfaction to the party grieved. *R. nem. con. 13 Feb. 1700. R. 24 Oct. 1702.*

If it appears, that any person procured himself to be elected or returned, by bribery or corruption, the House will proceed with severity against him. *R. nem. con. 13 Feb. 1700. R. 24 Oct. 1702. Vide post. (G 5.)*

[By *stat. 10 G. 3. c. 16. and 11 G. 3. c. 42.* after day appointed to consider petition, the first time there are one hundred members present, the names of forty-nine present are to be drawn out of the names of the whole House; each party names one not drawn; each party strikes out alternately one of the forty-nine, till they are reduced to thirteen; these fifteen make a committee to determine the election; thirteen must be present. None can vote who have not been present every sitting. They have power to send for persons, papers, &c. and to examine on oath. Notice is to be given to all parties. If there are more than two parties interested, the thirteen ballotted members nominate the two nominees. Made perpetual by *stat. 14 G. 3. c. 15.*]

### (F) Petitions.

(F 1.) By the Lords, or Commons, to the King.

Petitions in parliament are, some of grace, some of right.  
*4 Inst. 11.*

Some by the lords temporal, some by the lords spiritual, some by the commons, some by all of them. *Ibid.*

The parliament shall not be ended, till all petitions are answered. *Ibid.*

Petitions ought to be certain, to which a certain answer may be given. *Ibid.*

The commons ought to petition the king, and acquaint him with their grievances. *18 Jac. By the king to the parliament. Rusb. 22.*

A petition against recusants presented to the king by the lords and commons, *1 Car.* and the king's answer. *Rusb. 181. The like, 4 Car. Rusb. 516.*

(F 2.) By other Subjects to the King.

So, any subjects may of right make a petition to the king for redress of grievances. *R. 27 Oct. 1680.*

And if any traduce the right of such petition, it is unlawful. *R. 27 Oct. 1680.*

But if subjects framed petitions to the king in a public cause, and collected a multitude of hands to it, it was a misdemeanor and fineable. *R. 2 Cro. 37. R. Mo. 755.*

So, by the *stat. 13 Car. 2. 5.* no person shall solicit or procure the hands or consent of any, above the number of twenty, to any petition, remonstrance, or address to the king, or both or either house of parliament, for the alteration of matters established by law in church or state, unless first consented to and ordered by three justices of peace, or the major part of the grand jury, at the assizes or quarter sessions, or if in *London*, by the mayor, aldermen, and common council. And none shall present to the king, both or either house of parliament, any petition,



petition, remonstrance, or address, accompanied with excessive numbers of people, more than ten at once, on pain of a sum not exceeding 100*l.* and three months imprisonment, without bail, for every offence, to be prosecuted in *B. R.* the assises, or quarter-sessions in six months after, and proved by two witnesses.

[This statute is not virtually repealed by the bill of rights, 1 *W. & M. sess.* 2. c. 2. s. 1. art. 5. *Rex v. Gordon*, *H.* 21 *Geo.* 3. *Dougl.* 592.]

(F 3.) Petition to the Commons.

So, a petition may be to the house of commons: as, for a false election, or return of any to serve in parliament.

But such petition shall be within fourteen days after the committee for privileges and elections is appointed, or within fourteen days after a subsequent return made. 16 *Nov.* 1699.

And if a petition in another session, for a matter not heard upon the petition in the former session, varies from the first petition, it shall be rejected: as, if the first petition be against two, and the second against one member only. 28 *Nov.* 1699.

And it may be referred to the committee to examine, whether the second petition be of the same nature in substance with the first. 29 *Nov.* 1699.

And if it be not the same in substance, it will be ordered that the committee do not proceed upon it.

If the petition be not signed, it shall not be received.

So, if it be against no person in certain, it shall be rejected. 30 *Oct.* 1702.

So, every petition ought to contain such certainty and particularity, that a direct answer may be given. *Ha. Parl.* 9. (*Vide* 4 *Inst.* 11.)

(F 4.) *The proceeding upon petitions.*] When a petition is presented to the House of Commons, sometimes upon disclosure of the substance of the petition, it will be rejected. 18 *Dec.* 1699.

Sometimes it shall be referred to a committee to examine the matter of the petition, and report it, with their opinion, to the House. 8 *Dec.* 1699.

Sometimes the matter of the petition shall be examined at the bar of the House. *R.* 24 *Oct.* 1702.

After a petition received and read, the petitioner, by leave of the House, may withdraw it.

All petitions ought to be discussed before the conclusion of the parliament. *H. Parl.* 9.

(G 1.) The Law and Usage of Parliament.

**T**HE parliament, *suis propriis legibus et consuetudinibus subsistit.* 4 *Inst.* 15. 50.

All matters moved, concerning the peers or commons in parliament, ought to be determined according to the usage and customs of parliament, and not by the law of any inferior court. *H. Parl.* 14.

(G 2.) In preventing Annoyances.

By the antient usage of parliament, proclamation shall be made in  
*Westminster*

*Westminster* at the beginning, that none, on pain that he forfeit all that he has, shall wear a privy coat, or armour, in *London, Westminster,* or the suburbs. 4 *Inst.* 14.

So, proclamation shall be made, that no games or pastimes shall be used to the disturbance of the parliament. *Ibid.* Order 12 Dec. 1699. *Ha. Parl.* 13.

So, it was ordered that the door of the speaker's chamber be locked at the sitting of the house, and the keys laid on the table. 24 Nov. 1699. *R. for a standing order,* 24 Oct. 1702.

That the serjeant prevent footmen and others standing on the stairs in the passage to the house, to prevent annoyance by them. *Declared for a standing order,* 18 Jan. 1699.

That letters be not delivered by the postman, till the rising of the house. *R.* 24 Oct. 1702.

(G 3.) In inquiring of Misdemeanors.

The commons are the general inquisitors of the realm. 4 *Inst.* 11. 24.

And therefore, if a lord spiritual or temporal commit oppression, bribery, extortion, &c. the commons shall inquire of it; and if, by the vote of the House, the crime appears to have been committed, they transmit it with the evidence to the lords. 4 *Inst.* 24.

(G 4.) *What are good grounds for an inquiry.*] Common fame is a sufficient ground of a proceeding in the House of Commons by inquiry, or by a complaint, if need be, to the king or the lords. *R.* 1 *Car. by the Commons.* *Rush.* 217.

(G 5.) In Punishment of Offences.

(G 5.) *In the lower house. Offences done by the members. Bribery.*] One *Long* gave 4*l.* to be chosen, and was removed. 8 *El.* 4 *Inst.* 23.

The house will proceed with severity against any chosen by bribery or corruption. 29 Nov. 1710. *Vide ante,* (E 15.)—*Vide Officer* (I).

*Hill* writing a book to the dishonour of the House of Commons, of which he was a member, and for discovering the conferences of the house, after examination, was expelled, and committed to the Tower for six months, and fined 500 marks. 23 *El.* 4 *Inst.* 23.

(G 6.) *Offences by others.*] A mayor taking 4*l.* for electing a burghers, was fined and imprisoned. 8 *El.* 4 *Inst.* 23. [*Vide ante,* (D 10.)]

One committed to the Tower for striking one, returned upon record as a burghers to parliament: for he ought to take notice of the record at his peril. *Ibid.*

So, a man who misbehaved himself at elections, was ordered to be prosecuted by the attorney-general. 18 Nov. 1702.

So, where the bishop of *Worcester* was censured for a violation of the privileges of the commons, at the election of a knight for the county of *Worcester*, there was an address to the queen for his removal from the place of lord almoner. 18 Nov. 1702.

The lords addressed *contra*, but he was removed.

After the impeachment of the duke of *Buckingham*, the university



of Cambridge chose him their chancellor, by which they displeased the House of Commons. 2 *Car. Rusb.* 372.

How the lords proceed upon an impeachment, *vide post.* (L 18, &c.)

(G 7.) Things done or said in Parliament shall not be questioned elsewhere.

A thing moved or done in parliament shall not be discussed elsewhere. 4 *Inst.* 15.

And therefore, the judges shall not give any opinion of a matter of parliament. *Ibid.*

If any absents himself from parliament, if a suit or information be for it in *B. R.* he shall plead to the jurisdiction of the court, that it ought to be determined in parliament.—So, the bishop of *Winchester*, 3 *Ed.* 3. 4 *Inst.* 15. and an information against thirty-nine for the same cause, 3 & 4 *Ph. & M.* and six submitted, but nothing done to the others. 4 *Inst.* 17.

By the *st.* 4 *H.* 8. 8. all accusations of members, for any matter in parliament, shall be void. *Ha. Parl.* 7.

No member shall be molested for a thing said or done in parliament, except by the house. By the Commons, 19 *Jac. Rusb.* 53. But the king razed it out of the journal. *Ibid.* 54. *R.* 5 *Car. Rusb.* 663.

The king shall not give credit to an information of a thing done or said in parliament, till he be informed by the House itself. By the Commons, 19 *Jac. Rusb.* 53. But the king razed it out of the journal. *Ibid.* 54.

An address, that the king would shew his indignation against those who misrepresent proceedings in parliament. *R.* 28 Nov. 1699.

So, none ought to be censured by another court for the proceeding in parliament. *Per Pym.* 3 *Rusb.* 1132.

[If a libel charge a member with criminal language held in parliament, the court will grant an information against the libeller, without a denial of the charge by affidavit. *Doug.* 387.]

But for a matter out of parliament, a member of parliament may be punished elsewhere, after the end of the session, if he be not questioned for it in parliament. *R.* 5 *Car. Rusb.* 663. (2u.)

If for a thing not done in the way of parliament. *Ibid.* (2u.)

As, a conspiracy to inveigh against the judges or king's counsel in parliament, without an intent to prosecute them in a legal course, but with intent only to defame them. *R.* 5 *Car. Rusb.* 663.

#### (G 8.) Liberty of Speech.

Freedom of speech is the antient and undoubted right and inheritance of parliament. Claimed 19 *Jac. Rusb.* 46. But disallowed by the king. *Ibid.* 52. and then claimed by protestation. *Ibid.* 53. But the king razed it out of the journal. *Ibid.* 54.

By the *st.* 4 *H.* 8. 8. all suits, &c. against *R. Storde* and his accomplices, or any other hereafter, for any bill, speaking, or reasoning of any thing concerning the parliament, shall be void.

This statute was a particular law. *R.* by all the Judges, 5 *Car. Rusb.* 662. *R.* cont. in Parliament. *Cro. Car.* 604.

But all members of parliament ought to have freedom of speech upon matters debated in parliament, by the course of parliament. *R.* by all the Judges, *Rusb.* 662.

And

And none shall be put to answer elsewhere for speaking in parliament, tho' it be suggested to be with a bad intent. *R. in Parliament, 1667. Vide Cro. Car. 604.*

By the *ft. 13 Car. 2.* 1. there was a proviso, that nothing in the said act should extend to deprive either house of parliament, or the members thereof, of their just and antient privilege of debating any matters propounded in either house, or at any conference or committee, or touching the repeal or alteration of any old, or preparing any new law, or redressing any public grievance. But members shall have the same freedom of speech and privileges as before.

And by the *ft. 1 W. & M. 2. sess. 2.* it is declared, that the freedom of speech and debates, or proceedings in parliament, ought not to be impeached or questioned, in any court, or place out of parliament.

(G 9.) Debates there shall not be divulged.

So, debates in the House of Commons ought not to be divulged without the order of the House.

So, the lords ought not to take notice of any thing debated by the commons, till it be declared to them by the commons. *R. 16 Car. 3 Rusb. 1147.*

Nor, the commons, of a thing debated by the lords. *3 Rusb. 1147.*

(G 10.) *In Legem datione.*

(G 10.) *The manner of enacting a statute. There ought to be the assent of king, lords, and commons.]* Every act of parliament shall have the assent of the lords and commons, and of the king. *4 Inst. 25. 2 Inst. 157.*

If there be the consent of one or two of them, it is only an ordinance. *4 Inst. 25.*

So, if it be with the consent of the king and the lords temporal only, (without the spirituality,) and the commons. *Semb. 4 Inst. 25. Vide ante, (D 1.)—Post. (R 3.)*

Or, with the consent of the king, and the lords spiritual only, (without the temporality,) and the commons. *4 Inst. 25.*

And therefore, an ordinance by the lords, *6 Ed. 3.* that none shall refuse to serve the king as a judge, or otherwise, in Ireland, does not bind the subject. *2 Inst. 47, 8.*

So, the *46 Ed. 3.* that none of the profession of the law shall be chosen by the commons to serve in parliament. *4 Inst. 48.*

So, a bill by the king to attaint any with the assent of the lords, without mention of the commons, is not a law. *F. Parl. 3.*

(G 11.) *Bill introduced.]* A bill may be introduced by any member.

But it shall be after an order of the House, upon a motion for such a bill; and it is ordered, that such member prepare and bring in the bill. *24 Nov. 1699.*

And sometimes a committee is ordered to prepare a bill. *28 Nov. 1699.*

But a private bill shall not be brought in, without a petition which suggests the causes for it. *Ordered and declared for a standing order, 15 Feb. 1700. Ord. 24 Nov. 1699.*



Nor, in the upper house. *Declared for a standing order, 7 Dec. 1699.*

And such petition to the lords shall be signed by all concerned in the consequences of the bill. *Ord. 16 Feb. 1705.*

And it shall be referred to two judges, who ought to summon before them all who may be concerned in the bill, and make a report under their hands of the state of the case, and their opinion of it. *Declared for a standing order, 16 Feb. 1705.*

(G 12.) *Bill read.*] A bill shall be read three times before it be passed.

A private bill shall be printed.

So, in the House of Lords it shall be printed, and delivered to the clerk for the lords. *Ord. 16 Nov. 1705.*

Three days ought to intervene between every reading of a private bill. *Declared for a standing order, 15 Feb. 1700. Ord. 24 Nov. 1699.*

It shall not be read to the lords upon a day appointed for hearing of causes, before the cause heard. *Ord. 14 and 18 Jan. 1705.*

When a bill is presented upon an order of the House, it shall be received and read the first time. *23 Oct. 1702.*

Tho' it be a private bill. *12 Dec. 1699.*

Or, the first reading may be appointed upon a subsequent day. *19 Dec. 1699.*

And if, upon receipt of the bill, no time be appointed for reading it, it shall be afterwards read upon motion, or, upon motion, a day shall be appointed for reading it. *20 Dec. 1699.*

Or, the first reading may be appointed immediately after the receipt. *24 Jan. 1699.*

After the first reading, it shall be ordered that the bill be read a second time. *16 Nov. 1699.*

And sometimes, that it be read a second time at a certain day. *29 Nov. 1699.*

Tho' it be a private bill. *30 Nov. 1699.*

If a day certain be not limited for the second reading, there ought to be a motion, upon which a day shall be appointed. *11 Dec. 1699.*

Or, upon motion for the second reading, it shall be read immediately.

And sometimes the second reading is directed to be in a full House. *20 Jan. 1699.*

Sometimes after noon of such a day. *25 Jan. 1699.*

Sometimes upon such a day, and that nothing intervene. *24 Jan. 1699.*

(G 13.) *Committee.*] After the second reading, the bill shall be committed to a committee to be considered there. *Vide ante, (E 6, 7, 8.)*

Sometimes it is committed to a committee of the whole House. *Vide ante, (E 13.)*

If there be no objection to a bill, upon the second reading, nor any blank in it, it shall be ingrossed without a commitment.—So it was, *6 Feb. 1699.*

Sometimes it shall be committed upon the first reading. *D'Ew. So, 1769.*

So, bills of grace, as for a general pardon, shall be passed upon the first reading, without more. *D'Ew. 73. 464. 5.*

Sometimes the bill shall lie, without an order to be committed, or ingrossed. *D'Ew. 111.*

Yet, regularly, upon the second reading, if it be not passed or rejected, it ought to be committed or ingrossed. *D'Ew. 464.*

And it ought to be committed or ingrossed upon the day when read; though antiently it has been done upon another day. *D'Ew. 27.*

(G 14.) *The duty of the speaker upon the reading.]* After the reading of a bill, it shall be delivered, with a brief of it, to the speaker, who reads the title, and then reports the substance of the bill to the House.

So, in the House of Peers. *D'Ew. 17.*

(G 15.) *Bill opposed, or debated.]* After the bill is read, and the effect of it reported to the House, it may be opposed by any member.

And a bill may be opposed, debated, or rejected upon any of the readings.

Upon the first reading. *D'Ew. 17.*

Upon the third reading. *D'Ew. 271.*

But the usual course is upon the second reading. *D'Ew. 17.*

(G 16.) *Bill ingrossed.]* After a bill is passed the committee, and reported to the House, it shall be ordered to be ingrossed.

So, if no objection be to the bill, nor any blank, it may be ingrossed upon the second reading, without commitment. So it was done, 6 Feb. 1699.

But a bill transmitted from one House to another, is not ordered to be ingrossed; because it was ingrossed and comes in parchment from the other House. *D'Ew. 17. 20. 148.*

So, bills of grace, as for naturalization, pardon, &c. are not ordered to be ingrossed; because they come to the House ingrossed in parchment, and signed by the king. *D'Ew. 20.*

(G 17.) *Bill passed the House.]* After the third reading of a bill by the clerk, and the effect of it reported by the speaker, if nothing be spoken to it, the speaker proposes the question, whether it shall be passed? *L'Ew. 45.*

(G 18.) *Transmitted for the assent of the other House. From the commons to the lords.]* When a bill is passed by the commons, the clerk, within the bill at the top upon the right hand, writes, *soit baille aux seigneurs.* *D'Ew. 45. Fitz. Parl. 1.*

Then it shall be transmitted to the lords by some of the commons.

When a bill is presented by the commons to the other House, the chancellor and lords rise, and at the bar receive it from those who bring it from the commons. *D'Ew. 585.*

(G 19.) *From the lords to the commons.]* If a bill be passed by the lords, it shall be indorsed, *soit baille aux commons.* *Dy. 93. a.*

Then it is transmitted to the commons by two of the assistants in the House of Peers.



These being admitted into the House of Commons, after three *con-gees* at the table, inform the House that the lords have passed such a bill, and they read the title. *D'Ew. 45.*

If the messengers of the lords see the speaker, at his entry into the House of Commons; they cannot deliver the bill, but ought to deliver it in the House. *D'Ew. 688.*

And where a speaker received it at the door. and took it and delivered it to the House, it was returned to the lords. *Ibid.*

(G 20.) *Amendments to a bill by the lords.*] Tho' a bill be transmitted to the lords, yet it remains a bill of the commons. *D'Ew. 576.*

If the lords make an amendment by the omission, change, or addition of any words, it ought to be written in paper with a reference to the line where it ought to be made. *D'Ew. 20. 576.*

And then the lords subscribe the bill with these words, *a cesty bill ovesque les amendments a mesme le bill annexe les seigneurs sont assentus.* *D'Ew. 576.*

But the amendments ought not to be written in parchment. *D'Ew. 534. 576.*

When a bill, with amendments, is returned to the other House, there the bill shall not be read another time, but the amendments only. *D'Ew. 271.*

If the amendments are agreed to by the commons, the bill is amended by them. *D'Ew. 576.*

If one House does not approve the amendments of the other, it cannot reject them; but ought to reject the whole bill, or receive it with the amendments. *D'Ew. 513. 537.*

But one House may make additions to the amendments of the other. *D'Ew. 534.*

If the lords add a new clause, or proviso to a bill, it shall be ingrossed in parchment, and subscribed, *soit baille aux commons*, and then the bill with the clause annexed shall be transmitted to the commons, with this subscription, *a cesty bill ovesque le schedule ou provision a mesme bill annexe les seigneurs sont assentus.* *D'Ew. 26. 576.*

(G 21.) *Royal assent.*] The king usually gives his assent to acts passed by both Houses in person.

But he may declare his assent by letters patent, and appoint any one to notify such assent, and the clerk to indorse it, in the usual form. *D'Ew. 389. Dy. 93.*

And by the *stat. 33 H. 8. 21.* the king's royal assent by his letters patent under his great seal, and signed with his hand, and notified in his absence to the lords and commons, is and ever was of as good strength as tho' the king had been present, and assented publicly to the same, and shall hereafter be taken for effectual. *H. Parl. 40.*

When the king is ready to give the royal assent, the clerk of the crown reads the title of a public bill, and if the king allows it, the clerk of the lords says, *le roy le veult.* *D'Ew. 35. 116.*

If it be a private bill, the clerk says, *soit fait come il est desire.* *D'Ew. 35.*

After the other public and private bills are approved, or disapproved, the clerk of the crown reads the title of the act of subsidy,

to which the clerk of the lords gives the king's answer, viz. *le roy remercie ses loyal subjects, accept leur benevolence, et aussi le veult.* D'Ew.

35.

Then if there be an act of pardon, after the title read by the clerk of the crown, the clerk of the lords pronounces, *les prelates, seigneurs, et commons, en ce present parliament assemblees, au nom de tous vous autres subjects, remercient tres humblement votre majeste, et prient a Dieu vous donner en sante bone vie et longue.* Ibid.

But acts for a subsidy or a pardon sometimes have the assent, before other public or private acts. D'Ew. 76. 116.

If the king disallows the bill, the clerk pronounces, *le roy s'avisera.* D'Ew. 35.

But if letters patent for his assent are not signed by the king, but the stamp of his name put to them by another, it is not sufficient. Semb. Dy. 93.

(G 22.) *Inrolment of an act.*] After the royal assent given, the clerk of the parliament transcribes every public act into a roll, and subscribes, *le roy le veult.* D'Ew. 35.

So, he transcribes every private act, and at the beginning says, *in parlamento inchoat. et tent., &c. inter al. inactitat. ordinat. et stabilit. fuit sequens hoc statutum ad verbum ut sequitur, viz.—*Then at the end adds, *ego A. B. clericus parlamenti virtute brevis supradict. domine nostre regine de certiorand. mihi direct. et hiis annex. certifico superius hoc scriptum verum esse tenor. act. parl. supradict. in eo brevi express. In cuius rei testimonium, &c.* D'Ew. 36.

Public acts after inrolment are delivered into *Chancery*, and this is the original record. R. Hob. 109.

But private acts are not inrolled, without the suit of the party; and therefore the original bill, filed among the bills of parliament, and marked with the great seal, as the course is, is the original record of it. Ibid.

(G 23.) *Promulgation.*] Before the invention of printing, the usage was, after the conclusion of a parliament, to transcribe all the acts in parchment, and by a writ to every sheriff of the kingdom command, *quod statuta illa & omnes articulos in eisdem contentos in singulis locis in balliva sua tam infra libertates quam extra, ubi expedire viderit, publice proclamari et firmiter teneri faceret.* 4 Inst. 26. H. Parl. 36. 1 Ch. R. Arg. 51.

And this writ was sometimes in *Latin*, sometimes in *French*. 4 Inst. 26.

The sheriff thereupon proclaimed them in his county court, where a transcript was preserved, that every one might read it, or take a copy of it. Ibid.

So, by *certiorari*, the tenor of the record of every act may be removed into the *Chancery*, and delivered by the hand of the chancellor into *B. R.* 4 Inst. 43.

And by *mittimus* from *B. R.* it may be afterwards sent to *C. B.*, or the *Exchequer.* Ibid.

And the king by writ may command, that each court the act *firmi. et observari faciat.* Ibid.

But proclamation by the sheriff is not necessary; for every one



ought to take notice of every thing done in parliament. 4 *Inst.* 26. *H. Parl.* 36.

And since printing has been used, the proclamation has been disused. 1 *Ch. R. Arg.* 53.

(G 24.) *Conference with the lords.*] Upon any message from the lords, the commons may desire a conference with them upon the subject matter of the message. 15 *Feb.* 1700.

The commons send one of their members to desire such conference. 15 *Feb.* 1700.

If the lords consent to the conference, and appoint the time and place, the member reports it to the House. 17 *Feb.* 1700.

After a conference appointed and agreed, managers shall be named for it. *Ibid.*

And instructions may be given to the managers. *Ibid.*

(G 25.) *The manner of putting the question.*] After a question is proposed, a motion may be made for the previous question, viz. Whether the question proposed shall be now put. 2 *Nov.* 1702.

After the previous question proposed, the first question may be amended: *agreed.* *Ibid.*

But not after the previous question put. *Agreed.* *Ibid.*

If the previous question be moved and seconded, it shall be put first. *Ibid.*

And if it be carried in the affirmative, the main question shall be put. *Ibid.*

(G 26.) *The manner of voting in the House of Peers.*] In the House of Peers, the lords deliver their votes *seriatim*, beginning from the youngest baron. 4 *Inst.* 34.

And they say *content*, or *not content.* *Ibid.*

If the vote be delivered conditionally, as if he says, *content as far forth as it swerves not from the law of God and the church, and imports no deadly sin*, the condition shall be rejected. So it was, 6 *H.* 6. 4 *Inst.* 35.

(G 27.) *In the House of Commons. At a committee.*] At a committee, upon a division, the *noes* goes to one part of the House, the *yeas* to the other; for to the question they say, *yea*, or *no.* 4 *Inst.* 35.

Tho' it be a committee of the whole House. *Ibid.*

And then the number appears. *Ibid.*

(G 28.) *In the House.*] When the commons sit as an House, upon a division, if it cannot be determined by the sound of the voices which party is the majority, the *noes* sit, and the *yeas* go out of the House. 4 *Inst.* 35.

Then two are appointed to number the parties, one the *yeas*, the other the *noes*, and deliver the numbers to the speaker in the House. *Ibid.*

(G 29.) *Conference with the people.*] If a new thing, or aid, be demanded, the commons may answer, that they cannot consent without conference with their counties. 4 *Inst.* 14.

So, it was answered 9 *Ed.* 3. when a new sort of subsidy was demanded. 4 *Inst.* 34.

(H) The subject Matter of Laws.

(H 1.) The Parliament is absolute.

THE parliament makes statutes, &c. concerning matters ecclesiastical, civil, capital, common, criminal, martial, maritime, &c. Co. L. 110. a.

The legislative power of parliament is so absolute, that it cannot be limited to things, or persons. 4 Inst. 36. H. Parl. 46.

*Parliamentum omnia potest. Per Mont. Ch. 7.*

The arduous and urgent affairs concerning the king, the state, and defence of the kingdom and church, the maintenance and establishment of the laws, and the redress of grievances, are proper subjects for counsel and debate in parliament. R. by the commons, 19 Jac. Russ. 53. But the king razed it out of the journal. Ibid. 54.

The writ of summons says, that the parliament is summoned *pro arduis et urgent. negotiis, nos, statum et defensionem regni et ecclesie concernen.*

And therefore, not only things delivered by the king, or his chancellor, are subjects of their debate; but also all other affairs. H. 7. P. 5.

(H 2.) May give the King a Legislative Authority.

By the 28 H. 8. 17. power was given to the successor of the king to repeal by his letters patent, after his age of twenty-four years, any act which he had assented to before such age. 2 Rol. 164. l. 42.

(H 3) Dissolution of a Marriage, &c.

So, the parliament may annul a marriage. Pr. 8 & 9 W. 3. 27.

Dissolve a marriage, and make the children illegitimate. Pr. 8 & 10 W. 3. 11. H. 7. P. 47. 4 Inst. 36.

Dissolve a former, and enable another marriage. Pr. 11 & 12 W. 3. 2.

Make a separation between husband and wife, for the severity of the husband. Pr. 12 & 13 W. 3. 16.

So, it may make a bastard to be legitimate. H. P. C. 47. 4 Inst. 36. 7.

Make the issue inherit in the life of his ancestor. H. 7. P. 47. 4 Inst. 36.

(H 4.) Consultation about the King's Marriage.

So, the king advised with his parliament in relation to his marriage. Cot. Ab. 9, 10.

(H 5.) Enabling a Sale, &c. and practicable by the Rules of Law.

So, the parliament may enable a sale, or settlement of lands, not practicable by the rules of the law; as, it may enable an infant to make a sale for the discharge of debts, &c. Pr. 10 & 11 W. 3. 46.

To make a jointure during his minority. Pr. 9 & 10 W. 3. 8.

Or, a settlement of an estate upon marriage. Pr. 10 & 11 W. 3. 38.

Or leases. Vide Pr. 10 & 11 W. 3. 48.



To execute a power.

So, it may enable a lunatic to make a sale, lease, &c. *Pr. ft. 9 & 10 W. 3. 16.*

To execute a power.

So, it may enable any, by marriage-settlement or otherwise disabled, to sell lands for payment of debts.

To make a provision for wife or children.

To the intent to settle other lands to the same uses.

So, it may enable a charge to be transferred from one estate to another. *Pr. ft. 10 & 11 W. 3. 27.*

So, it may enable a sale of copyhold lands. *Pr. ft. 9 & 10 W. 3. 5.*

Or, vest them in trustees for payment of debts. *Pr. ft. 9 & 10 W. 3. 32.*

So, it may make such a will to be the last will. *Pr. ft. 12 & 13 W. 3. 27.*

It may adjudge a minor of full age. *4 Inst. 36.*

May make an alien a natural subject. *Ibid.*

#### (H 6.) Matters Criminal.

(H 6.) *Attainder.*] A bill of attainder may be against a man after his death. *4 Inst. 36. As. R. 3. was 1 H. 7. Bac. H. 7. 13.*

So, against a man not arraigned, nor put to his answer, tho' he was in custody; as, against Sir John Mortimer, 2 H. 6.—Against the earl of Essex Cromwell, 32 H. 8. But such proceeding ought to be condemned. *4 Inst. 37.*

So, an attainder may be by bill in all cases where the parliament pleases. *Cot. Abr. Pref. 10. Cot. Abr. 6.*

So, by the *ft. 1 Jac. 2.* the duke of Monmouth was attainted for high treason.

And by the *ft. 8 W. 3. 4.* Sir John Fenwick was attainted for the same offence.

And by the *ft. 13 & 14 W. 3. 3.* the pretended prince of Wales.

So, it is usual by an act of attainder to enact, that such an one shall be attainted, if he do not render himself at such a day.

So, by an act, an absent man was attainted, with a reward to him who should apprehend him, whether he were alive or dead. *Cot. Ab. 6.*

[If a man is attainted unless he render himself at a certain day, and before the day is taken into custody, he may plead it as a surrender. *John Murray of Broughton's Case, 1746. Foster, 47. N. B.* This was denied in *Lord Duffus's Case*, in parliament, 7 G. 2. *Com. 440.* So in outlawry. It was denied in *Sir Thomas Armstrong's Case, 3 State Trials, 895.* But allowed in *Roger Johnson's, M. 2 G. 2. Str. 824.*]

[A person may be attainted by an incomplete description, if it is not repugnant to truth; thus lord Forbes of Pitligo was attainted by the name of lord Pitligo. *Foster, 79.*]

[If an act enacts, that if A. does not surrender on 12th July, he shall stand attainted from the 18th April preceding, he is capable of taking lands by descent in the intermediate time; and such descent does not become divested or avoided by his not rendering himself to justice on the 12th July, so as to prevent the forfeiture in prejudice of the crown. *Lord John Drummond's Case, 1751. Foster, 88.*

(H 7.) *Exile.*] So, the parliament sometimes makes an act for the banishment of a person.

Tho' he be not before convicted for any offence. *Cot. Abr. Praef. 10.*

(F 8.) *Fine and imprisonment.*] So, the parliament, by an act, may impose a fine or imprisonment upon a person, without a trial by the law. *Cot. Abr. Praef. 10.*

(H 9.) Matter Civil.

(H 9.) *Tallages. Are granted by parliament.*] No tallage or aid shall be granted without the assent of parliament, by the common law. 2 *Inst.* 59, 60. 528. 533. *Rush.* 429. *R. in Parl.* 3 *Car. Rush.* 513. And by the petition of right. 3 *Car. Rush.* 590. *Vide Prærogative, (D 40.)*

By the *st.* 25 *Ed.* 1. 6. *conf. chart.* no manner of aids for any occasion shall be taken, but by the common assent of the whole realm, and for the common profit of it. *Vide 2 Inst.* 529.

By *st. de tallagio non concedendo*, 34 *Ed.* 1. *nullum tallagium, vel auxilium ponatur seu leveter, sine voluntate et assensu archiepiscoporum, episcoporum, comitum, baronum, militum, burgensium, et aliorum liberorum com. de regno.* *Vide 2 Inst.* 532. 2 *Rol.* 174. l. 5.

*Custuma antiqua*, viz. for every sack of wool 6 s. 8 d., for 300 wool-fells 6 s. 8 d., for one last of leather 13 s. 4 d., was granted by parliament. 2 *Inst.* 59. 4 *Inst.* 29.

And no custom can be enlarged, or imposed *de novo*, without the assent of parliament. 2 *Inst.* 60.

But such grant is void. 2 *Inst.* 61. *Vide Prærogative, (D 48.)*

So, by the *st.* 14 *Ed.* 3. *seff.* 2. 1. the prelates, earls, and commonalty shall not be grieved with any aid, or to sustain any charge, if it be not by common assent in parliament. 2 *Rol.* 172. l. 35.

By *st.* 1 *Ed.* 3. 7. *conf. by H.* 4. 13. commissions to prepare men of arms, and convey them to the king, at the charge of the shire, shall not be granted any more. 2 *Rol.* 172. l. 25. 174. l. 25. *Vide War, (B 6, 7.)*

By the *st.* 25 *Ed.* 1. 7. the king shall take such aids, &c. without common assent no more. (*Vide 2 Inst.* 530.)

By *st.* 45 *Ed.* 3. 4. no imposition shall be put upon wool, &c. without the assent of parliament. 2 *Rol.* 175. l. 2.

So, no tallage or charge can be put by the privy council, without the assent of parliament. 2 *Rol.* 174. l. 10. *Vide Roy, (E 5.)*

And tho' it was certified to the king by his judges, 12 *Car.* that when the safety of the kingdom requires, the king may by writ command all his subjects to provide, &c. ships, &c. for defence of the kingdom, and compel the doing of it in case of refusal; and tho' judgment was given against *Hampden* for such refusal, and the case afterwards refused to be argued. 2 *Rush.* 355. 480. *Cro. Car.* 524. 3 *Rush. App.* 159. Yet it was afterwards declared illegal by parliament, and judgment given against the levyers of the tax. *Cro. Car.* 601.

And by the *st.* 16 *Car.* 14. ship-money and the extrajudicial opinion of the justices and barons, and the writs, and the judgment against *Hampden*, are contrary to the laws, &c. of this realm, &c.

And



And by the *same stat.* the petition of right shall be firmly observed, &c. and the proceeding upon ship-writs, &c. be vacated, &c.

(H 10.) *And the disposal examined by parliament.*] By the *st.* 25 *Ed.* 1. 6. *conf. chart.* all aids shall be employed for the common profit of the realm, *Vide 2 Inst.* 529.

And a committee was appointed for examining how subsidies given for the recovery of the palatinates were employed. 1 *Car. Russh.* 176.

(H 11.) *Customs.*] When they began, *vide Prærogative*, (D 43, &c.) Antiently no custom was paid by native or alien, but for wool, woollfells, and pells. 4 *Inst.* 29.

The first custom, *viz.* 6*s.* 8*d.* upon every sack of wool, 6*s.* 8*d.* upon 300 woollfells, and 13*s.* 4*d.* upon a last of pells, was imposed as it seems 3 *Ed.* 1. 2 *Inst.* 59. 4 *Inst.* 29. *Dy.* 43. *b.*

By the *st.* 3 *Ed.* 1. upon merchants strangers 3*s.* 4*d.* in a noble *ultra antiquam custumam.* *Vide 2 Inst.* 59. *Forst.* 15.

But this does not extend to wool made into cloth. 4 *Inst.* 29.

The first statute which imposed a custom upon cloths, was the 21 *Ed.* 3. (*Vide 4 Inst.* 29.)

And another custom was imposed by the *st.* 27 *Ed.* 3. *st.* 2. 1. and 36 *Ed.* 3. 11. 2 *Rol.* 173. *l.* 15. (*Vide 4 Inst.* 30.)

By the equity of which, all cloths made of wool only, are now charged *pro ratâ.* *R.* 2 *Jac.* 2 *Inst.* 61, 2. 4 *Inst.* 31.

(H 12.) *Tonnage and poundage; how granted.*] Tonnage and poundage was granted for the safeguard of the sea and commerce, 4 *Inst.* 32. 2 *Rol.* 174. *l.* 20. 181. *l.* 10. *Forst.* 37.

And at first poundage only was granted; as, 2 *R.* 2. *Forst.* 38.

Afterwards tonnage and poundage.

And that 6*d.* per pound. 2 *Rol.* 175. *l.* 25. *Forst.* 38.

Afterwards 8*d.* per poundage. 2 *Rol.* 175. *l.* 45.

Afterwards 12*d.* 2 *Rol.* 176. *l.* 15.

Then 2*s.* for tonnage, and 6*d.* for poundage; as, 5 *R.* 2. *Forst.* 38.

*Anno* 21 *Ed.* 3. 2*s.* for every ton of wine, and 6*d.* per pound for all merchandize imported, being granted by order of the king and the peers, was first established by parliament. 47 *Ed.* 3. *Forst.* 38.

And it was granted at first for years. 2 *Rol.* 175. *l.* 5.

Sometimes *pro hac vice.* (*Vide 4 Inst.* 32.)

Sometimes the grant was intermitted. *Ibid.*

*Anno* 3 *H.* 5. it was granted for life; and never before. 4 *Inst.* 32. 2 *Inst.* 61. 12 *Co.* 34. *Forst.* 39.

*Anno* 31 *H.* 6. it was granted for life, but woollen cloths excepted; as, ever afterwards. 4 *Inst.* 32.

4 *Ed.* 4. and 12 *Ed.* 4. it was granted to him for life; but without a retrospect. 4 *Inst.* 32. 2 *Rol.* 175. *l.* 50.

So, 1 *H.* 7. and ever since it has been granted for life. 4 *Inst.* 32, 3. As, 1 *H.* 8. *not in print.*

So, by the *st.* 1 *Ed.* 6. 13. the *st.* 1 *Mar. sess.* 2. 18. the *st.* 1 *El.* 20. the *st.* 1 *Jac.* 33.

By the *st.* 6 *W. & M.* 1. it was granted only for five years.

By the *st.* 12 *Car.* 2. 4. it was granted to the king for his life.

So, by the *st.* 1 *Jac.* 2.

By

By the *ft. 6 Ann. 11.* a moiety of these customs inward was granted for nine-six years; and by the *ft. 1 Geo. 12.* to the king and his heirs.

By the *ft. 7 Ann. 7. f. 28.* the other moiety was granted to the queen and her heirs.

So, by the *ft. 3 Geo. 7.* the subsidy outward.

So, *34 H. 6. 6.* it was granted in *Ireland*, and was not due before. *2 Rol. 179. l. 15.*

And therefore, where the king took it without a grant by parliament, it was unlawful.

So, where the king had charged an annuity upon the subsidy of tonnage and poundage, it was avoided by parliament. *2 Rol. 176. l. 20. Vide Prærogative, (D 48.)*

(H 13.) *Subsidy, fifteenth, &c.]* A subsidy was an aid granted by parliament upon land and goods, viz. 4s. by the pound upon land, and 2s. 8d. upon goods; and double upon the goods of aliens. *4 Inst. 33. Dy. 43. b.*

The fifteenth is also an aid granted by parliament; and it was at first *quinto-decima pars bonorum mobilium*. But by commission, *8 Ed. 3.* it was ascertained in every town of *England*, and recorded in the *Exchequer*, and afterwards granted according to such assessment. *2 Inst. 77. 4 Inst. 34.*

A tenth was, *decima pars bonorum*, and rated according to the fifteenth. *4 Inst. 34.*

The commons did not use to give, besides tonnage and poundage, any more than one subsidy, which amounted to 70,000*l.*, and two fifteenths, each amounting to 29,000*l.*, and the clergy only one subsidy, which amounted to 20,000*l.* *4 Inst. 33.*

*Anno 31 El.* the commons first gave two subsidies and four fifteenths. *4 Inst. 33.—So, 32 H. 8. Forst. 33.*

*Anno 35 El.* three subsidies and six fifteenths.—*So, 39 El. (Vide 4 Inst. 33.)*

*Anno 43 El.* four subsidies and eight fifteenths. (*Vide 4 Inst. 33.*)

*Anno 3 Car.* they gave five subsidies. *Ibid.*

The manner of taxation of a subsidy was by two taxers, who, being authorised by commission, chose a clerk to act with them, and these swore four or six in each county to make an assessment, which was returned by indenture. *Forst. 34.*

(H 14.) *Upon what terms granted.]* And the parliament may grant a tax, or tallage to the king, upon what terms or conditions they please. *Seld. Jud. Parl. 17. Cot. Abr. 22.*

As, *6 Ed. 3.* that the king for the time to come should not burthen his subjects. *Cot. Abr. 13.*

So, *22 Ed. 3.* a fifteenth was granted, upon condition that 40s. per sack upon wool should cease, and the deceit of the merchants should not be pardoned. *2 Rol. 173. l. 30. 174. l. 15.*

So, tonnage and poundage at first were granted upon conditions. *2 Rol. 175. l. 25. 50.*

So, a certain sum may be granted absolutely, and a large sum upon condition. *Cot. Abr. 19.*

[Commissioners must charge land-tax on the several divisions, parochial



rochial or other, according to the proportions assessed on them under 4 W. & M. *Westminster land-tax*, H. 20 G. 2. *Parker*, 74.]

*Exchequer* has a general superintendence over all concerned in the revenue; it is restrained where the commissioners have final jurisdiction, not where they exceed it or neglect their duty. *Ibid.*]

[Commissioners of window-duty (and of others *sembl.*) are only answerable for what they respectively receive, not for the deficiency of others, but the division must make it good. *Rex v. Artillery Ground*, P. 27 G. 2. *Parker*, 167.]

[The deputy post-master cannot demand any additional sum for delivering letters at the houses of the persons residing in the town. *Barnes v. Foley*, H. 8 G. 3. 4 B. M. 2149.]

[Letters must be delivered in all post towns on paying the legal postage only. *Rowning v. Goodchild*. In C. B. T. 13 G. 3. 4 B. M. 2153. 3 *Wils.* 445.]

(H 15.) *A caution that no such grant be afterwards made.*] By the *st.* 25 *Ed.* 1. 7. and 34 *Ed.* 1. *st.* 4. 3. it was enacted, that the *male-tolt* upon wools be released, and nothing taken for it in future. 2 *Rol.* 173. l. 40. 45.

By the *st.* 25 *Ed.* 1. 5, 6. the king grants that he will not draw any aids, tasks, or prises into a custom for any thing done heretofore. 2 *Rol.* 173. l. 50.

So, 36 *Ed.* 3. a great subsidy being granted, it was provided that it be not drawn into example. 2 *Rol.* 180. l. 10.

(H 16.) *Begin in the House of Commons.*] So, the grant of a supply ought to begin in the House of Commons, and if it be proposed by the lords at a conference, it will be a breach of privilege. R. 16 *Car.* 3 *Rush.* 1146.

(H 17.) *The method of granting a supply.*] No charge shall be imposed upon the subject but in a committee of the whole House. *Vide ante*, (E 13.)

Yet, in private bills, this is sometimes dispensed with.

No money shall be given to the king but in a committee.

If a motion be, that a supply be granted to the king, it shall be considered in a committee of the whole House. 15 *Feb.* 1700. So, 25 *Oct.* 1702. 30 *Nov.* 1710.

If it be resolved in a committee in the affirmative, the chairman reports, that the committee has resolved it, and directed him to report it when the House will receive it, and another day is appointed for the report. 18 *Feb.* 1700. So, 27 *Oct.* 1702. 1 *Dec.* 1710.

When the report is made, the House appoints a day to resolve themselves into a committee to consider of the said supply. 28 *Oct.* 1702. 2 *Dec.* 1710.

When any resolution is made in a committee, a day is appointed for the report. 30 *Oct.* 1702.

When a supply is resolved by the House, estimates of the charge are usually directed to be laid before the House. 2 *Dec.* 1710.

[If a company is established by parliament for a particular purpose, (as insuring *ships*,) with a limited fund, which is exempted from being taxed,

taxed, and the company afterwards by charter has its power extended (as to insure houses, &c.) with an increased fund, and they carry on their business under both jointly; the company is liable to the land-tax for their whole stock, and in their corporate capacity. *Royal-Exchange Assurance v. Vaughan*, H. 30 G. 2. 1 B. M. 155.]

(H 18.) *Limitation of the crown.*] By act of parliament, the succession to the crown may be limited. *Vide Roy*, (A 3.)

By the *st.* 7 H. 4. 2. the crowns of *England* and *France*, &c. are entailed to king *Henry*, and the heirs of his body, and then to his four sons by name, and the heirs of their bodies successively.

By the *st.* 25 H. 8. 22. the crown is entailed to H. 8. and the heirs of his body, viz. to the first son of him and Q. *Anne*, in tail general and so to every other son of their bodies successively in tail general; and for want of such issue, to the son and heir male, and so to every other son and heir male of the body of H. 8. successively in tail general; and for want of such issue, to the first issue female of H. 8. and and Q. *Anne*, viz. to *Eliz.* in tail general, and so to every issue female, &c. and for want of such issue, to the right heirs of H. 8.

By the *st.* 28 H. 8. 7. Q. *Mary* and *Eliz.* are declared illegitimate, and the crown entailed to the king H. 8. and the heirs of his body, viz. to the first son of him and Q. *Jane*, &c. with power to H. 8. to devise, &c.

By the *st.* 35 H. 8. 1. after the death of H. 8. and prince *Edward*, and the heirs of their respective bodies, the crown is entailed to *Mary* and the heirs of her body, then to *Eliz.* and the heirs of her body, &c.

Afterwards by the *st.* 1 Mar. 2 sess. 4. and by the *st.* 1 Mar. 2. Parl. 1. it is declared, that after the decease of K. *Edw.* 6. the imperial crown, &c. did descend, remain, and come to Q. *Mary*, by due course of inheritance, and by the laws and statutes of this realm.

And by the *st.* 1 El. 3. it was recognized, that in her majesty and the heirs of her body, the imperial and royal estate, crown, and dignity of this realm, was as fully invested as the same were in K. *Hen.* 8. K. *Edw.* 6. or the late Q. *Mary* at any time since the *st.* 35 H. 8. 1.

By *st.* 1 W. & M. 2. Parl. 2. the crown shall be and continue to their majesties K. *William* and Q. *Mary*, during their lives, and the life of the survivor; and after their decease, to the heirs of the body of her majesty; and for default of such issue, to the princess *Ann* of *Denmark*, and the heirs of her body, &c.

By the *st.* 12 & 13 W. 3. 2. in default of issue of the said princess *Ann*, the crown is limited to remain to the princess *Sophia*, (daughter of *Eliz.* Q. of *Bohemia*, who was daughter of K. *James* the First,) and the heirs of her body, being protestants.

[So, parliament may appoint a regent, in case the crown shall afterwards descend to a minor; and *st.* 24 G. 2. c. 24. appointed *Augusta* princess dowager of *Wales* regent, in case any of her children succeeded to the crown under eighteen years of age.]

[Stat. 5 G. 3. c. 27. impowers the king to appoint the queen, the princess dowager of *Wales*, or some person descended from *George* 2. and resident in *Great Britain*, guardian of his successor, and regent till the



the successor is eighteen; and establishes a council of regency, and other regulations.]

(H 19.) *How the limitation may be secured.*] By the *st.* 25 *H.* 8. 22. all shall swear to maintain the contents of that statute, which entailed the succession of the crown to the issue of *Q. Anne*.

By the *st.* 26 *H.* 8. 2. the oath there prescribed is, to maintain such succession, and to repute the oath to any other person as null; and not to permit, or attempt, any thing to the hindrance thereof, on any pretence, or by any means.

By the *st.* 28 *H.* 8. 7. all subjects shall swear to maintain the succession, &c. and if any other oath hath been made, to repute it as vain; and not to attempt, or permit, any thing to the hindrance, &c.

By the *st.* 35 *H.* 8. 1. all shall take the oaths for the maintenance of the succession of that act; and if they have taken former oaths, shall esteem it of the same effect, as if they had taken this.

By the *st.* 1 *El.* 3. the parliament promise to defend the queen and the heirs of her body in their title to the crown, to the utmost of their power, and therein to spend their bodies, lands, and goods, &c.

So, by the *st.* 1 *W. & M.* 2 *Parl.* 2. and by the *st.* 12 & 13 *W.* 3. 2. the parliament submit themselves and their posterities to the limitations of the crown thereby settled; and promise to maintain the same with their lives and estates against all attempts, &c.

By the *st.* 13 *W.* 3. 6. and the *st.* 1 *Ann.* 22. all in office, &c. ought to take an oath to maintain the succession limited by the said act of 12 & 13 *W.* 3. 2.

By *st.* 1 *Ann.* 17. 2 *Parl.* if any attempt to hinder or deprive the next in succession from succeeding, he shall be guilty of high treason.

(H 20.) *Settlement of the king's revenue.*] So, the parliament may appropriate a revenue for the support of the crown.

[By *stat.* 1 *G.* 3. c. 1. 800,000 *l.* per annum out of the aggregate fund, is settled on the king for life; his majesty having signified his consent, that the hereditary revenue might be disposed of for the public utility, it is thereby made part of said fund. And, as Mr. Justice *Blackstone* observes, *the public is a gainer of upwards of 100,000 l. per annum by this disinterested bounty of his majesty.*]

(H 21.) *Resumption of grants.*] So, the parliament may make a resumption of a grant made by the king: and this was usual in times past. *Cot Abr. Pref.* 9.

#### (H 22.) Matters Martial.

(H 22.) *To what the authority of parliament is necessary.*] By several statutes, none shall be charged to take arms himself, or to find men of arms, without authority of parliament, if he be not bound to it by tenure. 2 *Inst.* 528.

Nor, to go to war out of his county. *Ibid.*

Nor, to give wages to the conveyors of soldiers, nor to soldiers going to *Scotland*, *Gascony*, &c. which statutes are only declarations of the common law. 2 *Inst.* 528. *Vide War*, (B 6, 7.)

And the commons, 1 & 7 *H.* 5. made protestation, that they are not

not obliged to the maintenance of the king's foreign wars. 2 *Inst.* 528.

By the *ft. of right*, 3 *Car.* (*Vide the ft. 16 Car. 14.*) none shall be obliged to quarter soldiers or mariners.

And no commissions shall issue to execute them by martial law. — It was done otherwise. 2 *Car. Russb.* 419.

And therefore, soldiers cannot be billeted upon any subject against his consent. 3 *Russb.* 1215.

(H 23.) *Martial law.*] So, martial law cannot be used in *England*, without authority of parliament. 3 *Russb.* 1199. *App.* 76—81.

(H 24.) *What the king may do by his prerogative.*] To the king alone it belongs to make peace or war. *Acknowledged by the commons*, 19 *Jac. Russb.* 45. *Vide Prerogative*, (C 1.)

(H 25.) Matters Marine.

The maintenance of the navy is a subject worthy of the parliament, and proper for it. 4 *Inst.* 50.

*Vide Navigation*, (I 1, &c.)

(I) In what method Matters of Parliament shall be treated.

THE commons have a liberty to treat of matters in parliament, in what order they please. *By the commons*, 19 *Jac. Russb.* 53. *But the king razed it out of the journal.* *Russb.* 54. *Vide ante*, (G 7, &c.)

(K) What Things the Parliament cannot do.

THE parliament cannot by any act restrain the power of a subsequent parliament. 4 *Inst.* 42.

Nor, make a statute which a subsequent parliament cannot alter. 4 *Inst.* 42. *Bac. H.* 7.

So, it cannot do any thing out of the limit of its jurisdiction: as, it cannot make a person inheritable in *France*. 2 *Jen.* 12.

Nor, make a determination upon an original petition, in a matter which does not come before them by error, &c. *Skin.* 523. *Vide post.* (L 1, &c.)

So, an act of parliament shall not change the laws of nature. And therefore, if an act says, that a man shall be a judge in his own cause, it shall be void. *Per Hob.* 87.

*Vide post.* (L 85.)

(L) Judicature of Parliament.

(L 1.) Upon a Writ of Error.

(L 1.) *When* A Writ of error lies in parliament of a judgment in it lies.] *B. R.* 4 *Inst.* 21.

But not of a judgment in *C. B.* 4 *Inst.* 22. *Ha. J. P.* 21.

The judicature of parliament is; 1. upon a writ of error; 2. upon an adjournment; 3. upon an appeal; 4. upon an accusation against



a delinquent; 5. upon a petition; 6. upon privilege. *Seld. Jud. Parl.* 8. (3 vol. 1590.)

A writ of error lies in parliament of a judgment in *B. R.* in the *Exchequer*, in the *Exchequer-chamber*, in *Chancery*, or before justices in *Eyre*. *Co. L.* 71. b. 72. a. *Vide Pleader*, (3 B 6.)

And it shall be before the lords only, without the commons. *R* 1 *H.* 7. 20. a. *Hal. J. P.* 19. *R.* 12 *Co.* 63.

Yet, a judgment there is virtually the judgment of the whole parliament. *Vide Sal.* 510.

But error does not lie in parliament upon a judgment in *C. B.* before it be affirmed or reversed in *B. R.* *Seld.* 3 vol. 2 *P.* 1526. *Skin.* 523.

(L 2.) *How the proceeding shall be. The petition.*] Before error in parliament, there ought to be a petition, and a licence under the king's hand. *Per Coke*, 2 *Bul.* 162.

Upon a petition to the king in *French* or *English*, and his *fiat justitia*, a writ of error goes to the *Ch. J.* of *B. R.* to remove the record *in prasens parlamentum*. 4 *Inst.* 21. 1 *H.* 7. 19. b. *H. Parl.* 18.

Then the *Ch. J.* brings the roll, and a transcript of it, to the House of Lords, and there leaves the transcript, after it has been examined with the roll, and returns with the roll itself. 4 *Inst.* 21. 1 *Rol.* 14. 2 *Bul.* 162. *Vide Pleader*, (3 B 13.)

And with the transcript leaves the writ of error, and the bill or petition upon which it was allowed. 1 *H.* 7. 19. b.

And it is sufficient under the seal of *Ch. J.* tho' the writ of error commands the court to send the record *sub sigillo*. *R.* 1 *Rol.* 14.

(L 3.) *Assignment of errors.*] After the transcript is delivered by the *Ch. J.* into parliament, the plaintiff in error assigns his errors. 2 *Sand.* 224. (*Vide* 4 *Inst.* 21.)

And the errors ought to be in writing, and left with the clerk of the parliament. 1 *H.* 7. 19. b.

When errors are assigned in parliament, a *scire facias* issues against the party, returnable at the same or a subsequent parliament. 4 *Inst.* 21. *Seld.* 3 vol. 2 *P.* 1526.

And the plaintiff shall shew the errors in his bill upon which he prays the *scire facias*. 4 *Inst.* 22. *Ha. J. P.* 20.

(L 4.) *Plea to the error assigned.*] After errors assigned, the defendant shall plead *in nullo est erratum*. 2 *Sand.* 224.

*Vide Pleader*, (3 B 18, 19.)

If error in fact be assigned, it shall be sent to *B. R.* to be tried. *Skin.* 523.

(L 5.) *Judgment.*] The usage is, that the lords only in the upper house give judgment upon a writ of error. *H. Parl.* 19. *Vide ante*, (L 1.)

So, always where the commons are petitioners, the judgment shall be by the king and the lords. *H. Parl.* 26, 27.

And the lords ought to give the same judgment which ought to have been given by the court that gave the first judgment. *Vide Pleader*, (3 B 20.)

And

And therefore, if the lords, upon error in ejectment, reverse a judgment in *B. R.* given for the defendant, and that the plaintiff be restored, *B. R.* shall not give judgment, that the plaintiff recover his term; but before a *remittitur* entred upon the roll, application may be made to the lords to give a complete judgment. *R. Ca. Parl.* 57. 4 *Mod.* 127.

(L 6.) Adjournment to Parliament.

So, by the common law, a case of difficulty might be adjourned into parliament *propter difficultatem*. *Co. L.* 72. a. 4 *Inst.* 105. 2 *Inst.* 408. *Cot. Abr.* 30.

And after a determination there, a writ shall be, commanding the judges to give judgment accordingly. *Cot. Abr.* 30.

By the *st.* 14 *Ed.* 3. 5. a prelate, two earls, and two barons shall be chosen every parliament, and commissioned by the king, to hear complaints of delays, or grievances in *Chancery*, *B. R.*, *C. B.*, or *Exchequer*, shall cause the judges of the court where the delay is to bring the process before them, and calling the chancellor, treasurer, justices, and barons, as they think fit, to assist them, shall make a good judgment, and send to the justices where the plea did depend, to give judgment accordingly. *Seld.* 3 vol. 2 P. 1530.

And if the case was of such difficulty as they could not determine it, they shall bring it to the next parliament, where accord is to be what judgment shall be given; which shall be sent to the judges, with command to proceed to judgment without delay.

By which statute, the adjournment to parliament in cases of difficulty was affirmed. *Co. L.* 72. a.

And remedy was also provided against delays in judgments. *Ibid.* But this provision was only for intervals of parliament.

(L 7.) Appeal to Parliament; when it lies.

So, an appeal lies in parliament from a decree in *Chancery*. *Adm. Ca. Parl.* 15. 17. 20.

And it lies as well, where by the decree the bill is dismissed, as where relief is given without cause. *Ca. Parl.* 18. 67. 69. 76.

And such appeals have been allowed without restraint, since 21 *Jac.* 1. *Ca. Parl.* 81.

They were allowed by the commons, *inter Skinner and East-India Company*. *Ca. Parl.* 81. *R. Cont. by the commons.* *Car.* 2. and *Ann.*

And they are claimed by the lords, tho' a member of the House of Commons be a party.

And *Coke Ch. J.* said, that a defect in a decree shall be redressed only by a reference to the justices, upon a petition to the king. 1 *Rol.* 331.

So, an appeal lies from a decree in *Chancery* in *Ireland* to the lords of parliament here; and not to the parliament in *Ireland*. *R. Ca. Parl.* 83.

So, it lies from a decree in *Chancery*, upon exceptions to a decree by commissioners for charitable uses. *Ca. Parl.* 110.

So, it lies upon a decree by the delegates. *Ca. Parl.* 110. *Quare.* *Cont.* 2 *Ver.* 1:8.



So, an appeal lies from a decree of the lords in the parliament in Ireland to the parliament of England.

But the lords of Ireland denied the jurisdiction of the lords in the parliament of Great Britain; and, 25 Sep. 1715, voted, that he who shall make such appeal shall be an enemy to his country.

[Vide the st. Geo. 5. which declares that the House of Lords of Ireland have no jurisdiction to judge of, affirm, or reverse any judgment, &c. there.]

But an appeal does not lie to parliament upon a decree in Chancery upon the statute for charitable uses; for by the statute no jurisdiction is given but to the Chancery. 2 Ver. 118.

[Nor, from an order of the lord chancellor (entrusted with the care of idiots and lunatics, by the king's sign manual) touching a lunatic, but to the king in council. *Pitt's case in the House of Lords*, 14 Feb. 1726, 3 P. W. 108.]

After an appeal to parliament, if the parliament be prorogued, the Chancery shall proceed in the account. 1 Ver. 344.

#### (L 8.) Accusation in Parliament.

(L 8.) *When necessary.*] The parliament will not proceed to judgment against a delinquent without the accusation of somebody. *Seld. Jud. Parl.* 11. (3 vol. 2 P. 1591.)

For they cannot be accusers and judges. *Seld. Jud. Parl.* 11. (3 vol. P. 1591.)

So, they cannot join with the commons or others in an accusation. *Seld. Jud. Parl.* 12. (3 vol. 2 P. 1591.)

A peer cannot be indicted in parliament. *Seld. Jud. Parl.* 40. (3 vol. 2 P. 1602.)

(L 9.) *How it shall be made. By appeal.*] There are four manners of accusation in parliament; 1. By appeal; 2. By complaint, or petition; 3. By information of the attorney-general; 4. By the commons; and this by way of complaint, or impeachment, *Seld. Jud. Parl.* 11. (3 vol. 2 P. 1519.)

One peer might appeal another peer in parliament for treason, &c. and thereupon deliver his gantlet and gages for his proof, and pray an answer, and, for default, judgment. *Seld. Jud. Parl.* 82. (3 vol. 2 P. 1634.)

But now by the st. 1 H. 4. 14. such appeals are abolished.

And also all impeachments or accusations originally by one peer against another. *R. by the judges, and afterwards by the lords*, 14 July 1663. *Life of Clar.* 215—222.

(L 10.) *By complaint. Ex parte regis, &c.*] A complaint may be the foundation of a proceeding in parliament. 1. *Ex parte regis.* 2. *Ex parte dominorum.* 3. On the part of the commons. 4. Upon the complaint or petition of a private person. (Vide *Seld.* 3 vol. 2 P. 1591.)

As, if a peer petition the king, and by the king's command it is referred to the parliament; the lords will proceed upon it, without an information, or other foundation. *Seld. Jud. Parl.* 54. (3 vol. 2 P. 1599.)

So,

So, by the king's command, the parliament may proceed against a peer upon a process against him in another court; as, in the court of Chivalry. *Seld. Jud. Parl.* 57. 33. (3 vol. 2 P. 1609.)

So, upon an indictment before commissioners removed into Chancery, and by *mittimus*, to parliament. *Seld. Jud. Parl.* 40. 59. (3 vol. 2 P. 1606.)

How proceedings shall be upon a complaint to the lords by the commons, *vide post.* (L 14, 15.)

(L 11.) *By a private subject.*] A complaint by a private person is not usual for a public misdemeanor, except where he has an interest in it. *Seld. Jud. Parl.* 66. (3 vol. 2 P. 1612.)

As, articles were exhibited by the earl of *Bristol* against the duke of *Buckingham* and lord *Conway*, in the house of peers, for a misdemeanor. 1 *Rush.* 262. 264.

Articles were exhibited by the lords and others of the privy council, and two judges, to the king, against cardinal *Wolsey*. 4 *Inff.* 89.

But a complaint in parliament originally by a private subject, peer, or commoner, against another, for a misdemeanor, as well as for treason, is now illegal, if it be not by licence of the king, or by his attorney-general. *Life of Clar.* 223.

Yet upon complaint, that such a one has abused the House, or any peer, the House may examine it, and inflict a punishment as to them seems good.

Upon examination it appeared, that one combined to charge an innocent person for words in slander of the House; he was fined, imprisoned, and set in the pillory by order of the peers, without trial by a jury. 2 *Mod. Ca.* 340.

(L 12.) *By information.*] An information may be exhibited to the parliament by the king's attorney-general for high treason. *Seld. Jud. Parl.* 34. 47. (3 vol. 2 P. 1600. 5, 6.)

So, for any misdemeanor.

An information by the attorney-general shall be exhibited *ex officio*.

Or, by command of the lords, upon a complaint of the commons, &c. to examine them. *Seld. Jud. Parl.* 14. 33. 62. (3 vol. 2 P. 1592. 1599.)

(L 13.) *By indictment.*] So, if an indictment be against a peer in *B. R.* for murder or other capital crime, it may be removed to the House of Peers by *certiorari*, and there the proceedings shall be upon it.

[A peer indicted of felony and murder, and tried and convicted thereof before the lords in parliament, ought to receive judgment for the same, according to the provisions of the act 25 G. 2. *E. Ferrers's Case*, 1760. *Foster*, 138.]

[If the day appointed by the judgment for execution should lapse before such execution done, (which however the law will not presume,) a new time may be appointed for the execution, either by the high court of parliament before which such peer shall have been attainted, or by the court of *B. R.*, the parliament not then sitting; the record of the attainder being properly removed into that court. *Ibid.*]

*Vide post.* (L 16.)



(L 14.) *By accusation of the commons. By petition.*] So, the commons may exhibit an accusation to the lords in parliament, by petition or impeachment. (*Vide Seld. 3 vol. 2 P. 1591.*)

The commons may exhibit a complaint in general by petition, without naming any person in particular: as, a complaint of the farmers of the customs for extortion. *Seld. Jud. Parl. 12. (3 vol. 2 P. 1591.)*

(L 15.) *How it shall be proceeded upon.*] Upon such complaint by the commons, the lords may order that the merchants, &c. against whom the complaint was, be summoned, and their answer heard. *Seld. Jud. Parl. 13. (3 vol. 2 P. 1592.)*

If upon examination of a complaint any one appears criminal, he shall be arraigned at the suit of the king; for when an accusation by the Commons is general, it is not the suit of the commons, but of the king. *Seld. Jud. Parl. 14. (3 vol. 2 P. 1592.)*

Or, the Commons may afterwards impeach the parties discovered. *Seld. Jud. Parl. 14. (3 vol. 2 P. 1592.)*

(L 16.) *Arraignment. A peer, how tried.*] For high or petit treason, or felony, or misprision of treason, a peer shall be tried by his peers in parliament, upon an impeachment. *Vide Rusb. 268. Vide Dignity, (F 1, 2.)*

So, upon an indictment, if the king constitutes an high steward. 4 *Inst. 23. 2 Inst. 49. H. Parl. 23.*

And the Lords are judges whether it be treason, or not. 4 *Inst. 23.*

But the bishops shall not be present. *Ibid. Sta. 153. a. 10 Ed. 4. 6. b.*

And the number of peers present ought to be twelve or more. 2 *Inst. 49. Sta. 153. b. 3 Inst. 28. 30.*

The trial *per pares* is of great antiquity. It was 8 *W. 1. 2 Inst. 50.*

The queen consort, or dowager, shall be tried *per pares*. *Ibid.*

So, all women, noble by birth, or marriage, unless since the marriage, they have married under the degree of nobility. *Ibid.* By the *st. 20 H. 6. 9.*

But for offences under treason, felony, or misprision, a peer shall be tried by a jury. 2 *Inst. 49.*

So, upon an appeal. *Ibid.*

So, one of the nobility of another kingdom. 3 *Inst. 30.*

So, all under the degree of nobility, for treason or felony. By the *st. 4 Ed. 3. 2 Inst. 50.*

And the indictment shall be found by a jury. 2 *Inst. 49. 3 Inst. 28.*

And if the indictment be found against a peer in *B. R.*, or removed thither, he may plead a pardon before the justices there, tho' he shall not confess, nor plead *not guilty* before them. 2 *Inst. 49.*

So, if upon an indictment he does not appear, process shall go to an outlawry; and he shall be outlawed *per judicium coronatorum*. *Ibid.*

So, by the *st. 25 Ed. 3. st. 5. 2.* for high treason, every one ought to be tried by people of his condition.

And where the *st. 35 H. 8. 2.* provides for the trial of treason, or misprision of treason in *B. R.*, or upon a special commission in a county where the king assigns, it was enacted, that a peer, in such case, shall have his trial by his peers.

So,

So, by the *st.* 1 & 2 *Ph.* & *M.* 10. (which provides, that all trials for treason shall be had according to the due course of the common law), it was provided, that a peer indicted should answer the same indictment, and have his trial by his peers.

So, by the *st.* 5 *El.* 1 & 11. 13 *El.* 2. 18 *El.* 1. and 23 *El.* 1. for treasons by those statutes.

So, by the *st.* 27 *El.* 2. and 3 *Jac.* 4. for treasons made by those statutes.

So, it shall be in all cases, where a new treason, or felony, is made by a statute, tho' the statute does not expressly provide for it. *Sta.* 153. *b.*

A peer cannot waive his trial by his peers, and consent to be tried by a jury. *R. Kelg.* 56. *Vide Dignity*, (F 1, 2.)

And if he will not put himself upon his peers, judgment shall be against him as a traitor. *Kelg.* 57.

[Every proceeding in the House of Peers, acting in its judicial capacity, is a proceeding before the king in *parliament*, and the House is the court of our lord the king in parliament.]

[It is founded on immemorial usage, and is part of the original constitution.]

[It is open for all purposes of judicature during the continuance of the parliament; it openeth and shutteth with the session, as *B. R.* with the term.]

[Its authority is independent of any special powers derived from the crown.]

[On the trial of a peer before it, for a capital offence, whether on impeachment or indictment, it is the same court, whether an officer with the title of steward of *England*, is appointed to preside during trial, and until judgment, or not, tho' usual and expedient to make such appointment.]

[Every peer votes on law as well as fact; the majority determines. The high-steward votes only as a peer.]

[It acteth in its judicial capacity, in every order touching the time and place of trial, putting it off from time to time, allowing counsel or not, &c. all before the appointment of high-steward; it has directed in what manner, and by what form of words he should be appointed, [Lord *Danby*, and the five lords. Lord *Lowat*.] therefore its existence cannot depend on that appointment. It has received and recorded a prisoner's confession, which amounts to a conviction before his appointment; [lord *Derwentwater*;] it has allowed prisoners the benefit of acts of general pardon, [lord *Carwath*, *Widdrington*, *Salisbury*,] without the appointment of a high-steward, and after the commission dissolved.]

[The lords, on 12 *May* 1679, (on the proceedings against lord *Danby* and the five popish lords,) declared that the office of high-steward upon trial of peers on impeachments, is not necessary to the House of Peers, but that they may proceed in such trial if an high-steward is not appointed.]

[The commission then running thus, "*ac pro eo quod officium seneschalli Angliæ (cujus presentia in hac parte requiritur) ut accepimus jam vacat;*" it was apprehended this implied the necessity of a high-steward; and therefore by the committees of the lords and commons it was agreed the commission should be recalled, and a new commis-



tion issue, with these words instead of them; *ac pro eo quod proceres et magnates in parlamento nostro assembleati nobis humiliter supplicaverunt, ut seneschallum Anglia pro hac vice constituere dignaremur.*—And all commissions since, on impeachments, have been in the same form.]

[The commissions still run in the first form, on indictments, but the lords declare that the appointment of a high-steward alters not the nature of the court, which still remains the court of peers in parliament: this applies to indictments as well as impeachments.]

[The commission recites that *A.* is indicted, that the king intends he should be judged *before himself in this present parliament*; that the office of steward (whose presence is required on this occasion) is vacant; and appoints *B.* steward for this time to execute the office, with all things due in that behalf.]

[This does not constitute a court of the high-steward, a right of judicature, which the commission supposes to be in a court then subsisting before the king in parliament; he is to preside as speaker or chairman during trial, and till judgment; and in that respect, and no other, his presence is required.]

[On indictments, before the high-steward is appointed, they order *certiorari* to remove them. It is made returnable before the king in parliament; it is received and read. They construe acts of parliament relating to the conduct of the court and the right of the subject, at the trial, and make resolutions thereupon. *Lord Kilmarnock's Case.*]

[Therefore, tho' the office of high-steward determines before execution done according to the judgment, yet the court of peers in parliament, where that judgment was given, subsists for all purposes of justice during the sitting of the parliament, and may therefore appoint a new day for execution. *E. Ferrers's Case, 1760, Foster, 138.*]

[*Vide ante, (L 13. Officer, E 5.)*]

[Peers tried in full parliament are entitled to the benefit of 7 *W. 3. c. 3.* in its full extent. *Lord Kilmarnock's Case. Foster, 149. 247.*]

(L 17.) What number of peers shall be required, *vide Dignity, (F 1, 2.)*

By the common law, twelve at least of the peers ought to be present: for a verdict by a less number of peers would not be good. *R. Mo. 622.*

And if more peers are present, the verdict shall be by the major part, so that twelve, at least, agree to it. *Kelg, 56. R. Mo. 622.*

And therefore it was usual to have twenty-three peers at a trial, at least. *Kelg, 56.*

And to authorise the high-steward to summon which peers he pleases. *Mo. 621.*

But now, by the *st. 7 W. 3. c. 3.* on every trial of a peer or peers, all the peers shall be summoned twenty days at least before trial; and every one appearing (having taken the oaths, &c.) shall have a vote.

Provided, that the said act extend not to impeachments, or other proceedings in parliament in any kind.

[All the peers and spiritual lords are summoned, tho' the trial is in full parliament. *Lord Kilmarnock's Case, 1746, Foster, 247.*]

[But summoning the peers is not absolutely and indispensably necessary. *D. per Foster J.*; for the act provides, that every peer so summoned and appearing shall vote *in the trial*, which must mean throughout the trial, and bishops cannot vote to condemn or acquit. *Foster, 248.*]

A peer

A peer cannot challenge any peer by whom he ought to be tried. *R. Mo.* 621, 622. *Kelg.* 54. *in marg.*

And therefore, a peer shall be a trier, tho' he was a commissioner of *oyer* and *terminer*, before whom the indictment was taken. *R. Kelg.* 58.

(L 18.) *Upon an impeachment process against him.]* If a person, charged in parliament with a crime or misdemeanor, be absent, a writ shall be directed to the sheriff to summon him. 4 *Inst.* 39.

Or, to the party himself. 4 *Inst.* 39. *Seld. Jud. Parl.* 106. (3 vol. 2 P.)

If the party cannot be found, there shall be a writ to the sheriff to arrest all his goods and chattels. *Seld. Jud. Parl.* 23. 99. (3 vol. 2 P. 1596. 1624.)

If the party does not yet appear, there shall be a proclamation throughout all the kingdom, that he appear, otherwise such judgment will be given against him. *Seld. Jud. Parl.* 95. (3 vol. 2 P. 1621.)

So, sometimes an act of parliament shall be made, that if he does not surrender himself before such a day he shall be attainted.

(L 19.) *In what manner impeached.]* A peer may be impeached in parliament by articles exhibited at the suit of the king by the attorney-general; as, against the earl of *Bristol*. *Rush.* 249. *Vide ante*, (L 12.)

By articles exhibited by another peer. *Rush.* 254.

So, the commons may, by *parol*, charge a peer before the king and lords. *Seld. Jud. Parl.* 24. (3 vol. 2 P. 1596. 1598, 9.)

Or, a commoner. (*Vide Seld.* 3 vol. 2 P. 1598, 9.)

So, before the lords at a conference. *Seld. Jud. Parl.* 30, 31, 32. (3 vol. 2 P. 1598, 1599.)

The right of impeachment by the commons was allowed by the lords, 20 June 1701.

Upon an impeachment by *parol*, the lords by their committee may draw a particular charge, and deliver it to the party accused. *Ibid.*

Or, the commons, by a committee, may draw a particular charge, and send it to him. *Ibid.*

Or, the party, being a peer, upon report of a conference, may make answer. *Ibid.*

But the most usual proceeding is, to send impeachment by some member to the bar of the lords, and afterwards to exhibit articles. *Ibid.*

(L 20.) *In what form.]* In the proceedings upon an impeachment by the commons, a member attends with others at the bar of the lords, there, in the name of all the commons of *England*, impeaches such an one, and acquaints the house, that the commons, in due time, will exhibit particular articles against him, and maintain them. *Lords Journ.* 1. 15 Ap. 1701.

Tho' the commons impeach only for a particular grievance, they may afterwards exhibit other articles against him. *Seld. Jud. Parl.* 21. (3 vol. 2 P. 1595.)

And the delivery of articles is not necessary till the party appears. *Seld. Jud. Parl.* 23. (3 vol. 2 P. 1596.)

Except



Except where the commons will file them upon record before.  
*Seld. Jud. Parl.* 24. (3 vol. 2 P. 1596.)

(L 21.) *Articles of impeachment.*] If articles are not exhibited against the lord impeached, the lords by message remind the commons of it.  
*Lords Journ.* 5 May 1701. 15 May 1701. 4 June 1701.

But the commons are judges of the proper time for exhibiting them.  
 31 May 1701.

Yet the lords claimed a power to limit the time. 4 June 1701.

When the articles are prepared, a member carries them to the lords. 9 May 1701. *Lords Journ.*

But they are not read by the commons at the bar. *Lords Journ.*  
 9 May 1701.

Articles of impeachment need not pursue the strict forms of law.  
*Seld. Jud. Parl.* 22. 27. (3 vol. 2 P. 1595, 7.)

After the articles are read, a copy of them is prayed, and awarded to the lord impeached. *Lords Journ.* 9. 24. *Ray.* 382.

And a day given to him to answer. *Ray.* 382.

(L 22.) *When committed upon articles, or not.*] In an impeachment for a misdemeanor, the lord impeached does not find security.  
*Lords Journ.* 9 May 1701. *Seld. Jud. Parl.* 101. (3 vol. 2 P. 1624.)

Nor, shall be committed upon common fame, without a special matter against him. *Seld. Jud. Parl.* 29. (3 vol. 2 P. 1598.)

Nor shall be committed, whether he be a peer or a commoner, till judgment against him. *Seld. Jud. Parl.* 98. (3 vol. 2 P. 1624.)

So, a peer may continue in his place, except upon debate of his own cause, till judgment. *Seld. Jud. Parl.* 98. 101. (3 vol. 1624, 5.)

But, where an impeachment is for a capital offence, he shall be committed to custody. *Seld. Jud. Parl.* 97. (3 vol. 2 P. 1624.)

Yet, the commitment will sometimes be omitted, at the discretion of the lords. *Ray.* 382.

And where an impeachment is for high treason, generally, without special matter, it is usually omitted. It was omitted in the case of lord Clarendon, tho' the commons complained of it. *Life of Clar.* 251—302.

So, if a commoner be impeached for a misdemeanor, upon his answer he may be required to find surety for his attendance. *Seld. Jud. Parl.* 98. (3 vol. 2 P. 1624.)

And he may be committed for his refusal, or till bail. *Ibid.*

So, if he be in custody before impeachment, he shall answer there.  
*Seld. Jud. Parl.* 101. (3 vol. 2 P. 1625.)

So, if committed for treason, he may be bailed by the lords, with the king's licence. *Semb. Life of Clar.* 253, 257.

(L 23.) *Answer.*] After answer by a lord impeached, a copy of it is made, and sent to the commons. *Lords Journ.* 14. 24.

Then the lord impeached may petition for counsel. *Lords Journ.*  
 3 Jan. 1680.

And for his trial.

The answer does not observe any strict form. *Russb.* 274.

He

He may submit himself to the king's mercy. *Seld.* 3 vol. 2 P. 1419.  
Or, plead *not guilty* to the whole.  
Or, an act of pardon as to one article, and *not guilty* to the residue.  
3 *Rush.* 1374.

(L 24.) *Replication, &c.*] After answer, the commons join issue by replication. 23 May 1701.

And may consider whether they will reply or not. *Seld. Jud. Parl.* 199. (3 vol. 2 P. 1628.)

If the commons delay a replication, the lords remind them of it. 21 May 1701.

But upon an information *ex parte domini regis*, the commons cannot reply, or demand that the defendant shall be put to his answer. *Seld. Jud. Parl.* 109. (3 vol. 2 P. 1628. 1631. 118.)

So, upon an impeachment if the commons do not reply, the lords may. *Ibid.*

So, to the replication, the defendant may rejoin, &c.

After issue joined in capital cases, sometimes a committee has been appointed of both houses, viz. lords and commons, to adjust the preliminaries of the trial.

Sometimes omitted.

And in the case of a misdemeanor, refused, tho' desired by the commons. 6, 10, 17 June 1701.

(L 25.) *Witnesses.*] The witnesses are sworn in the house, and examined by a committee upon interrogatories agreed in the house, or at the discretion of the committee. *Seld. Jud. Parl.* 123. (3 vol. 2 P. 1632.)

Or, are examined *viva voce* at the bar, upon the trial. 16 June 1701.

If witnesses are examined upon interrogatories, the party accused shall have a copy of the depositions *pro* and *con*, after publication in convenient time before the hearing. *Rush.* 267.

If examined *viva voce*, the impeached lord may cross-examine. 16 June 1701.

(L 26.) *Trial.*] After issue joined a day shall be appointed for the trial of the impeached lord.

And the lords claim a power to appoint what day they please, tho' the commons insist, that there ought to be a previous signification of their assent. 4 & 9 June 1701.

And to do justice by the acquittal, or condemnation of the peer, in a reasonable time. 20 June 1701.

At the trial, the articles shall be read, and then the answer, and then the evidence. 16 June 1701.

A lord, being a witness, shall be sworn by the chancellor at the table, and shall give his evidence in his place. *Ibid.*

A commoner shall be sworn by the clerk, at the bar, and there shall give his evidence. *Ibid.*

The commons ought to be present before the peers; and none shall be covered but a peer. *Ibid.*

If a peer, or manager for the commons, would have any question, he ought to pray that the chancellor ask it. *Ibid.*

If



If a doubt arises at the trial, no debate shall be in court; but it shall be adjourned to the house. *Ibid.*

If several are impeached, the commons may proceed as they please: and therefore, they may try which they will first. 4 & 9 June 1701.

No peer impeached for a misdemeanor, ought to be without the bar. R. 12 June 1701.

Nor shall be precluded of his vote in any case, except his own trial. 12 June 1701.

(L 27.) *When counsel, &c. allowed.*] A peer shall have counsel in a cause criminal, or capital. R. *Rush.* 268.

In all cases of misdemeanor. *Seld. Jud. Parl.* 103, &c. (3 vol. 2 P. 1625, 6, &c.)

And the counsel assigned has been imprisoned for refusal. 1 *Clar.* 379.

So, the defendant in a case of misdemeanor, shall have a copy of the articles. *Semb. Seld. Jud. Parl.* 107. (3 vol. 2 P. 1627.)

But, in an impeachment for treason, or felony, counsel has not been allowed. *Seld. Jud. Parl.* 102, &c. (3 vol. 2 P. 1625, 6, &c.)

Yet, in these cases counsel may be allowed at the discretion of the lords. *Ray.* 382.

[By *stat.* 20 G. 2. c. 30. all persons impeached of high-treason, whereby corruption of blood, or for misprision of it, shall make their full defence by two counsel.]

(L 28.) *Causes of impeachment. For treason.*] The duke of *Suffolk* was impeached for high-treason 28 H. 6. *Vide Art.* 1, 2, 3. *Seld. Jud. Parl.* 27. (3 vol. 2 P. 1597.)

For high treason in subverting the fundamental laws, and introducing arbitrary power, Lord *Finch*, Sir *Robert Berkley*, Lord *Straford*. 2 *Rush.* 606. 3 *Rush.* 1365. (*Vide Rush. part.* 3. vol. 1. 136.)

(L 29.) *For neglect of office. As an ambassador.*] The duke of *Suffolk* was impeached 28 H. 6. for that, being ambassador; he consented to the delivery of divers towns to the king of *France*, without the privity of the other ambassadors. *Vide Art.* 4. (*Vide Seld.* 3 vol. 2 P. 1597.)

The earl of *Bristol*, that he being ambassador, gave false informations to the king. 1 *Rush.* 249.

That he did not pursue his instructions. *Art.* 2. 1 *Rush.* 250.

That he pursued his embassy for his own profit only. *Art.* 4. 1 *Rush.* 250.

Cardinal *Wolsey*, that he made a treaty between the Pope and the king of *France*, when ambassador to H. 8. without the privity of his king. 4 *Inst.* 89, 156.

That he joined himself with the king. 4 *Inst.* 90.

(L 30.) *Privy councillor.*] The earl of *Bristol* was impeached 2 Car. that he counselled against a war with *Spain*, when that king affronted us, to the dishonour and detriment of the realm. *Art.* 3. 1 *Rush.* 250.

That he advised a toleration of papists. 1 *Rush.* 251.

That

That he enticed the king to popery. 1 *Rush.* 252. 262.

*Michael De la Poole* was impeached 10 R. 2. that he incited the king to act against the advice of parliament. *Seld. Jud. Parl.* 25. (3 vol. 2 P. 1596.)

The *Spencers*, that they gave bad counsel to the king. 4 *Inst.* 54.

The earl of *Orford*, that he advised a prejudicial peace. 8 May 1701.

Lord *Finch*, that he, being speaker of the commons, refused proceeding in the House.

(L 31.) *Admiral.*] The duke of *Buckingham* was impeached, for that he, being admiral, neglected the safeguard of the sea. *Rush.* 308.

The earl of *Orford*, that he hazarded the navy, and had neglected to take ships of the enemy. 8 May 1701.

(L 32.) *Chancellor.*] *Michael De la Poole* was impeached, that he, being chancellor, acted contrary to his duty. *Seld. Jud. Parl.* 26. (3 vol. 2 P. 1596.)

Lord *Somers*, that he ratified a peace, not approved by the parties concerned, under the great seal. 16 May 1701.

That he put the great seal without warrant. *Ibid.*

And to a blank commission. *Ibid.*

That he made unlawful and irregular decrees and orders, and a delay of justice. *Ibid.*

*Michael De la Poole* was impeached, that he purchased lands of the king, which he had procured to be surveyed under their value. *Seld. Jud. Parl.* 24. (3 vol. 2 P. 1596.)

For a fraudulent purchase from the king. *Seld. Jud. Parl.* 26. (3 vol. 2 P. 1596.)

So, John Lord *Somers*. 16 May 1701.

(L 33.) *For purchasing, or having a plurality of offices.*] The duke of *Buckingham* was impeached for plurality of offices. 2 *Car. Rush.* 306.

For purchasing of offices. *Rush.* 306. 334.

The earl of *Orford*, for exercising incompatible offices. 8 May 1701.

So, the lord *Halifax*. 9 June 1701.

(L 34.) *For malefeazance to the king.*] The duke of *Buckingham* was impeached for giving a medicine to the king without advice of the physicians. *Rush.* 351.

(L 35.) *To the public good.*] So, the *Spencers*, father and son, were impeached, for that they prevented the great men of the realm from giving their counsel to the king except in their presence. 4 *Inst.* 53.

That they put good magistrates out of office, and advanced bad. *Ibid.*

The earl of *Orford* was impeached, that he encouraged pirates. 8 May 1701.

(L 36.) *For procurement of illegal patents.*] Sir G. *Mompesson* was impeached



impeached for the procurement of patents of monopoly. 18 *Jac. Rusb.* 24. 27. *Seld. Jud. Parl.* 31. (3 vol. 2 P. 1598.)

(L 37.) *For corruption in office.*] Lord Bacon, chancellor, was impeached for bribery. 18 *Jac. Rusb.* 28. *Seld. Jud. Parl.* 31. (3 vol. 2 P. 1599.)

The duke of Buckingham, for the sale and purchase of offices. *Rusb.* 334.

The lord Finch for unlawful methods of enlarging the forest, when assistant to the justices in eyre. *Art.* 3. (*Vide Rusb. part 3. vol. 1. 137.*)

For threatening other judges to subscribe to his opinion. *Art.* 4, 5, 6. *Ibid.*

For delivering opinions which he knew to be contrary to law. *Art.* 7. *Ibid.*

For drawing the business of the court to his chamber. *Art.* 8. *Ibid.*

(L 38.) *For oppression or deceit.*] So, an impeachment was exhibited for several extortions and deceits to the public. *Seld. Jud. Parl.* 19. (3 vol. 2 P. 1594, 5.)

An article was exhibited against cardinal *Wolsey*, for exercising legatine authority to the prejudice of the prerogative, and oppression of ordinaries, and houses of religion. 4 *Inst.* 89.

So, against the earl of *Orford* for converting the public money to his own use, without account. 8 May 1701.

(L 39.) *For regard to private interest.*] So, an impeachment was against the earl of *Orford*, that he procured from the king to himself, exorbitant grants in lands and money. 8 May 1701. — So, against lord *Somers.* 16 May 1701.

For taking money, &c. from a foreign prince without giving an account for it. 8 May 1701.

For selling goods taken as admiral, for his own use, without accounting for a tenth to others. 8 May 1701.

Lord *Halifax*, for obtaining grants of estates forfeited for rebellion. 9 June 1701.

For obtaining grants of money when there was a war and heavy taxes. *Ibid.*

And grants out of the king's woods. *Ibid.*

(L 40.) *Judgment upon an impeachment. By whom it shall be demanded.*] In a prosecution by the commons upon an impeachment, &c. it belongs to the commons to demand the judgment. *Seld. Jud. Parl.* 132, 133. 162. 176. (3 vol. 2 P. 1648. 1653.)

And they ought to be present at the answer or judgment given. *Seld. Jud. Parl.* 158. (3 vol. 2 P. 1647.)

And this always upon a judgment in capital cases, tho' it be not upon their accusation. *Ibid.*

So, judgment upon an information shall be demanded by the king's counsel. *Seld. Jud. Parl.* 176. (3 vol. 2 P. 1653.)

But upon a judgment by the lords for a misdemeanor, the commons need not be present, unless it be upon their impeachment. *Seld. Jud. Parl.* 162. (3 vol. 2 P. 1649.) (L 41.)

(L 41.) *By whom given.*] Judgment upon an accusation in parliament belongs to the lords only. *Seld. Jud. Parl.* 133. (3 vol. 2 P. 1637.) *Hard.* 155.

And it is sufficient that a majority of the lords be present in person or by proxy. *Seld. Jud. Parl.* 144. (3 vol. 2 P. 1641.)

In cases of misdemeanor, the judgment shall be by the lords spiritual as well as temporal. *Seld. Jud. Parl.* 136. 148. (3 vol. 2 P. 1638. 1643.)

And after debate between them, the chancellor, &c. puts the question to the youngest baron, and so to each *seriatim*, who answers *content* or *not content*. *Seld. Jud. Parl.* 167. (3 vol. 2 P. 1650.) *Vide Dignity*, (F 2.)

Judgment in capital cases shall be pronounced by the high steward. *Seld. Jud. Parl.* 177. (3 vol. 2 P. 1653.) *Vide Dignity*, (F 2.)

In cases of misdemeanor, by the chancellor. *Ibid.*

But in capital cases, the lords temporal only are judges. *Seld. Jud. Parl.* 136. 149, &c. (3 vol. 2 P. 1638. 1643.)

And the lords spiritual cannot vote in any matter relating to it. *Seld. Jud. Parl.* 150. &c. (3 vol. 2 P. 1743, 4. &c.)

And usually absent themselves from the house when a capital offence is prosecuted and debated before the parliament. *Ibid.*

Yet their absence from the house is not necessary. *Semb. Seld. Jud. Parl.* 153. (3 vol. 2 P. 1646.)

[Lords spiritual may vote in all previous questions, in a proceeding in full parliament in a case of blood. *Lords Journal*, 13 & 14 May 1672. *Foster*, 248.]

[Lords spiritual never were or could be summoned on a court of the high-steward; for there, in all points of law or practice, he giveth the rule as sole judge in the court. *Foster*, 248.]

[The *stat.* 7 W. 3. c. 3. does not give the lords spiritual any right in cases of blood which they had not before. *Ibid.*]

And a bishop may officiate as speaker of the lords during the trial, &c. *Seld. Jud. Parl.* 156. (3 vol. 2 P. 1646.)

So, the judges ought to be present upon all trials for capital offences, for their advice. *Seld. Jud. Parl.* 164. (3 vol. 2 P. 1649.) *Vide ante*, (D 18.)

(L 42.) *The king's assent, when necessary.*] So, to the judgment of the lords in capital cases, the king's assent is requisite. *Seld. Jud. Parl.* 136. 138. &c. (3 vol. 2 P. 1486. 1638. 9, &c.)

But the king's assent is sufficient, tho' the king be absent, if he signifies his assent. *Seld. Jud. Parl.* 143. (3 vol. 2 P. 1641.)

Tho' the king be absent at the trial, debate, &c. *Seld. Jud. Parl.* 146. (3 vol. 2 P. 1642.)

So, in judgment for a misdemeanor, the king's assent is not necessary. *Seld. Jud. Parl.* 144. (3 vol. 2 P. 1641.)

So, it will be good, tho' the king dissents. *Semb. Seld. Jud. Parl.* 145. (3 vol. 2 P. 1642.)

(L 43.) *What the judgment shall be. In capital cases.*] The judgment by the lords in capital cases strictly pursues the law of the land. *Seld. Jud. Parl.* 168. (3 vol. 2 P. 1650, 1.)

And cannot omit any thing material. *Ibid.* 169.

Nor,



Nor add any thing to it. *Seld. Jud. Parl.* 170.

But the form of the judgment for the same offence at common law is not necessary. *Ibid.* 169.

And for treason in surrendring of castles, judgment for beheading only was given. *Seld. 3 vol. 2 P.* 1486.

[L 44.] *Judgment by the lords, upon an impeachment for a misdemeanor.*]

The lords for a misdemeanor have pronounced sentence of perpetual imprisonment. 18 *Jac. Rusb.* 28.

Imprisonment at the king's pleasure. *Seld. Jud. Parl.* 171. (3 vol. 2 P. 1652.) 3 *Inst.* 148.

Fine and ransom; as Sir G. Mompeyson, 18 *Jac. Rusb.* 28. Lord Bacon. *Rusb.* 31. *Seld. Jud. Parl.* 171. (3 vol. 2 P. 1488. 1652.) 3 *Inst.* 148.

Forfeiture of goods and lands for life, upon Sir G. Mompeyson. 18 *Jac. Rusb.* 28. Earl of Suffolk. *Seld. 3 vol. 2 P.* 1518.

Incapacity of office, &c. upon Sir G. Mompeyson. 18 *Jac. Rusb.* 28. and lord Bacon. *Rusb.* 31. *Seld. 3 vol. 2 P.* 1497. 3 *Inst.* 148.

Incapacity to come near the king's court, upon Sir G. Mompeyson. 18 *Jac. Rusb.* 28. 3 *Inst.* 148.

That he be infamous, and may not be of a jury, &c. upon Sir G. Mompeyson. 18 *Jac. Rusb.* 27.

That he be degraded of knighthood. Sir G. Mompeyson. 18 *Jac. Rusb.* 27.

That he be not pardoned by the king. *Ibid.*

Perpetual banishment. Sir G. Mompeyson. 18 *Jac. Rusb.* 28. *Seld. 3 vol. 2 P.* 1505.

That he make satisfaction to the party oppressed, &c. *Seld. Jud. Parl.* 173. (3 vol. 2 P. 1652.)

That his fraudulent purchase shall be annulled. *Ibid.* 174.

So, if he be a peer, that he never shall take his seat in parliament. Lord treasurer, M. 3 *Inst.* 148.

[L 45.] *Execution.*] After judgment in capital cases, it shall be commanded to the earl marshal to do execution, and to the mayor, aldermen, and sheriffs of London, the constable of the tower, &c. to be assistant. *Seld. Jud. Parl.* 182. (3 vol. 2 P. 1659.)

If he be a commoner, to the marshal. *Ibid.* 183.

And it shall be in the power of the king alone to order execution to be done.

Or the lords may issue a warrant for execution.

So, the king may remit all the parts of the judgment, except the beheading. *Adm.* 23 Dec. 1680.

If judgment against a peer for a misdemeanor be, that he be imprisoned, the gentleman-usher shall have charge to conduct him to the prison. *Ibid.* 185.

If against a commoner, the serjeant at arms attending the great seal. *Ibid.*

And it shall be commanded to the constable of the tower, &c. to receive the body. *Ibid.*

If judgment be for damages, the lords may appoint how they shall be levied. *Ibid.* 187.

If they do not appoint a remedy, it shall be in Chancery, and not elsewhere. *Ibid.*

By

By the *ſt.* 12 & 13 *W.* 3. 2. no pardon, under the great ſeal ſhall be pleadable to an impeachment by the commons in parliament. *Vide poſt.* (L 46.)

(L 46.) *When a perſon impeached ſhall be diſcharged. By pardon.]* If the offence for which he is impeached be pardoned by an act of pardon, the pardon may be pleaded before the lords. *Sho.* 100.

And it ought to be there pleaded, for if he be ſent to *B. R.* by *habeas corpus*, the court will not take conſuſance of it, when the commitment was judicially by the lords. *R. Sho.* 100. *Carth.* 132.

Tho' the parliament be adjourned or prorogued. *Vide Carth.* 132. *Sho.* 100.

But by the *ſt.* 12 & 13 *W.* 3. 2. no pardon under the great ſeal is pleadable to an impeachment by parliament.

Nor, before this ſtatute. *Dub. Hard.* 155.

If an attainder be by the common law, for high treaſon, by the *ſt.* 33 *H.* 8. 20. it ſhall be of the ſame effect and advantage to the king, as if it was an attainder by act of parliament.

And by the *ſt.* 29 *El.* 2. an attainder for high treaſon, where the party is executed, ſhall not be reverſed for error.

If the attainder be confirmed by parliament, a petition for mercy ought to be exhibited to the parliament. *H. Parl.* 19.

#### (L 47.) Recognizance taken by Parliament.

So, the parliament ha ſauthority to take a recognizance *ſedente parlamento.* 1 *H.* 7. 20. a.

#### (L 48) Where the Lords have no original Jurisdiction.

But the lords in parliament have no original jurisdiction of any matter mixt with fact; for it ought to come to them *gradatim*, for they are the laſt reſort. *Sal.* 511.

And therefore, they cannot determine originally the right to goods or inheritance. *Sal.* 512.

*Vide ante* (K).

#### (M) Continuance of Parliament.

**I**F the king will not have the parliament begin at the return of the writ of ſummons, it may be continued by writ till another day. 1 *And.* 295. *Vide ante*, (E 1.)—*Poſt.* (N—O 1, 2.—P 1, 2.)

#### (N) Adjournment of Parliament.

**T**HE Houſe of Commons is a diſtinct court, and is not adjourned by the adjournment of the Upper Houſe. 4 *Inſt.* 28.

And this Houſe, by the ſpeaker, with the aſſent of the Houſe, adjourns itſelf. 4 *Inſt.* 22. *H. Parl.* 39.

The king claimed the ſole power to adjourn the parliament. 18 *Jac. Ruſb.* 35. *But it was diſallowed by the commons.* 4 *Car. Ruſb.* 537.

But the king, by letters patent, may adjourn the parliament after the ſeſſions begun, as well as the Houſe itſelf: and by ſuch adjournment all matters continue undetermined. *D'Ew.* 318. 345.



And so it was 27 *El.* *Vide the form of the letters patent.* *D'Ew.* 318.

And such adjournment may be by commissioners, as it was 28 & 29 *El.* *D'Ew.* 382. 4 *Inst.* 7.

Or, by the king in person. *D'Ew.* 551.

So, the king by the speaker, commanded, that the House be adjourned to a subsequent day. 2 *Rush.* 608.

Yet, an adjournment of the Upper House by the chancellor, with the command and in the presence of the king, is not an adjournment of the House of Commons. *D'Ew.* 550. 621.

Or, by the king himself. *D'Ew.* 551.

*A fortiori*, if by the chancellor, without the special command of the king. *Ibid.*

So, the speaker ought not to adjourn the House by the king's command, without the assent of the House. *R.* 16 *Car.* 3 *Rush.* 1137.

### (O) Prorogation.

(O 1.) Of what Effect it shall be.

**NONE** can prorogue the parliament but the king. *Co. L.* 110. a. The prorogation makes a session of parliament. 4 *Inst.* 27.

And all bills which had not the royal assent begin *de novo* at the next meeting of parliament. 4 *Inst.* 27. *H. Parl.* 38.

So, all orders, and every thing before them, determine, except a *scire facias*, and a writ of error. *Per Cur.* 17 *Car.* 2. 1 *Lev.* 165.

So, a writ of error shall be discontinued by a prorogation. 1 *Vent.* 31. 1 *Sid.* 413. *Vide post.* (P 2.)

And, if a new writ of error was taken teste'd the last day of the parliament, returnable at the day to which it was prorogued, it was doubted, whether it was not discontinued by the prorogation. 1 *Vent.* 31.

But afterwards the law was declared, and is now so taken, that a writ of error does not determine by a prorogation of parliament. *R.* by the lords in parliament. 2 *Lev.* 93.

(O 2.) How prorogued.

The king may prorogue the parliament.

And none but the king in person, or by commission.

The form of the commission, *vide D'Ew.* 77. 94.

But, tho' it be by proclamation prorogued to a certain day, it may afterwards by proclamation be assembled in the meantime. As the parliament 19 *Jac.* was adjourned to 8 *Feb.* and afterwards assembled 20 *Nov.* *Rush.* 39.

The parliament, 19 *Car.* 2. was prorogued to 10 *Oct.* 1667, and afterwards summoned by proclamation for the 25 *July* preceding, upon account of a war with *Holland*: and because peace was concluded, it was again put off to the 10 *Oct.* 1 *Sid.* 338.

### (P 1.) Dissolution.

**T**HE parliament shall not be dissolved but by the king. *Co. L.* 110. a. *Hut.* 62.

The

The king shall be present at the dissolution, in person, or by representation. 4 *Inst.* 28.

As, if he dissolves it by commission: as, 2 *Car. Russ.* 399.

The form of the commission, *vide D'Ew.* 275. 330: 390.

But, without the command of the king in person, signified by the chancellor, &c. or by the king's commission or letters patent, the parliament cannot be dissolved. *D'Ew.* 547.

By the *st.* 8. *H.* 5. 1. the parliament was not dissolved by the king's return into the kingdom, where it was summoned and held by the guardian of the kingdom. 4 *Inst.* 7.

Nor, by the *st.* 4 *Ann.* 8. *f.* 22.

A parliament called by the lords justices, by arrival of the king or queen into the realm.

Nor, by the *st.* 2 *W. & M.* 6. by his majesty's voyage, or absence out of the realm.

Nor, by the *st.* 7 & 8 *W.* 3. 15. 4 *Ann.* 8. & 6 *Ann.* 7. *f.* 4. by the death or demise of the king, queen, or her successors; but shall continue to act (or, if prorogued, shall immediately convene and sit; or, if none in being, the last parliament shall convene and sit) six months, and no longer, unless sooner prorogued, or dissolved by such successor.

When the parliament is to be dissolved, the Commons are summoned to the Upper House, and then the chancellor, by command of the king, dissolves the parliament. 4 *Inst.* 28.

By the *st.* 16 *Car.* 1. 7. it was enacted, that the parliament should not be dissolved, or adjourned, but by act of parliament.

And that parliament was declared and enacted to be fully dissolved and determined. [By the *st.* 12 *Car.* 2. 1.]

So, by the *st.* 13 *Car.* 2. 1.

By *st.* 6 *W. & M.* 2. no parliament shall have continuance longer than three years, from the day on which, by the writ of summons, it is appointed to meet. Which by the *st.* 6 *Ann.* 7. *f.* 7. extends to the parliament of Great Britain.

[By the *st.* 1 *Geo.* 1. *st.* 2. 38. all parliaments may have continuance for seven years, and no longer, to be accounted from the day on which by the writ of summons such parliament shall be appointed to meet, unless such parliament shall be sooner dissolved by the king, his heirs, or successors.]

Every parliament determined by the death of the king.

Tho' there were a statute which said, that it should not be dissolved without the consent of both Houses, without express words for the continuance after the death of the king. *R.* 14 *Car.* 2. *Kelg.* 14. [Vide the statutes quoted above which provide for this.]

## (P 2.) The Effect of a Dissolution.

When a parliament is dissolved, appeals, or writs of error, pending in parliament, do not abate by the dissolution; but the next parliament shall proceed upon them in the state which they were in at the dissolution, without beginning *de novo.* *Ray.* 383.

So, an impeachment by the commons, is not altered by a dissolution. *Ray.* 383.



For the proceeding against the party impeached may be in the next, or a subsequent parliament. *Carth. 132.*

And therefore, the party impeached shall not be bailed in *B. R.* after the dissolution. *Cont. in Ld. Danby's Case. (Vide Skin. 56. 162.) Acc. Carth. 132.*

Yet, by a dissolution, a writ of error is suspended: and therefore, a defendant in execution shall not be bailed upon the recognizance given upon the writ of error in parliament: for, if there should be a dissolution before judgment affirmed, the party would be at large. *R. by all the judges. 1 H. 7. 20. a. Vide ante, (O 1.)*

And the writ itself is determined: for there shall be another writ of error at the next parliament. *R. 2 Cro. 342.*

And execution shall be taken in *B. R.* upon the judgment. *R. Ray. 5. R. Jon. 66.*

### (Q) Session of Parliament; what shall be.

**I**F the parliament meets, and passes any statute, that makes a session. *4 Inst. 28.*

So, if error be brought there, and judgment in it, tho' no statute passes, it is a session. As, 18 *R. 2. 4 Inst. 28.*

But if no judgment be given, nor act passed, it shall be called a convention, but not a session. *4 Inst. 28. R. Hutt. 61. 2 Bul. 235. 237. 1 Vent. 22. H. Parl. 38.*

Tho' orders are made, and bills agreed on. *Hut. 61.*

Tho' bills pass each house of parliament, if there be not the royal assent, or dissent. *R. 1 Rol. 29.*

If an act continues to the next parliament, and the parliament begins, but is dissolved before any session made, the act is not determined. *Ibid.*

If an act passes the royal assent, the session does not conclude till a prorogation. *4 Inst. 27. Ha. Parl. 37.*

Or, a dissolution. *Ha. Parl. 37.*

And for avoiding doubt in this point, by the *st. 1 Car. 7.* it was enacted and declared, that the assent of the king to that or other acts shall not determine the session.

And the same provision was by the *st. 12 Car. 2. 3. f. 7.* and by the *st. 22 & 23 Car. 2. 1. f. 9.*

And a parliament may have several sessions. *Hut. 61.*

Yet each session, for several purposes, shall be a several parliament in law. *4 Inst. 27.*

### (R) Act of Parliament.

(R 1.) Relates to the Beginning of the Session.

**E**VERY act of parliament relates to the first day of the session, if it be not otherwise provided by the act itself. *4 Inst. 25. R. Pl. Com. 79. b. H. Parl. 35.*

And therefore, if an act takes away the benefit of clergy for an offence, the felon shall not have his clergy for an offence committed after the first day of the session, tho' committed before the royal assent given. *1 And. 295.*

(R 2.)

(R 2.) How long it shall have Continuance.

If an act be to have continuance for three years, and from thence to the end of the next session of parliament, it shall continue to the end of a session which begins after the three years, tho' a session within three years continues several months or years after the three years. 1 *Vent.* 22.

(R 3.) What shall be an Act of Parliament.

Every act of parliament ought to be enacted by the assent of the king, lords, and commons. 8 *Co.* 20. b. *The Prince's Case.* 4 *Inst.* 25. *Pl. Com.* 79. a. *Ha. Parl.* 31. *Vide ante*, (G 21.)

And therefore, if it appears to be passed without the assent of the commons, it shall be void. *Mo.* 824.

Or, without the assent of the lords, or of the king. *Pl. Com.* 79. a. *Ha. Parl.* 32. *Vide ante*, (G 10.)

So, if it be by the assent of the king, the lords spiritual only, and the commons, it is but an ordinance, and no act of parliament. 4 *Inst.* 25.

Or, by the king, the lords temporal, and commons. *Ibid.*

But it is not necessary that any of the lords spiritual assent, if there be a majority of the lords assembled in parliament. *Seld.* 3 vol. 2 P. 1528.

So, if all the spiritual lords assent conditionally, for the condition is void. 4 *Inst.* 35.

Or, if the spiritual lords are absent. 3 *Rush.* 1344.

So, it is not material that the assent of the king, lords, and commons be particularly expressed: for *per assensum parliamenti*, comprehends the assent of all. *Jon.* 104.

So, if by the roll it appears that the bill was sent to the lords by the commons, with a proviso annexed, and no proviso is extant upon the record, yet it shall be a good statute. *Hob.* 110.

And if the journal of parliament be variant from the record, it does not prejudice, for that is no record. *Hob.* 110, 111.

So, it is not material in what form it is expressed: for it may be in the form of a charter. *Co. L.* 98. 8 *Co.* 18, 19. *The Prince's Case.*

Or, by way of a grant by the king in parliament. *Co. L.* 98.

And therefore, if the king grants *per consilium fidelium subditorum*, and it has always had the reputation of an act of parliament, it is sufficient. 8 *Co.* 20. a. *The Prince's Case.* *Jon.* 103.

So, if the act be penned, *de concilio prelatorum, comitum, baronum et aliorum de regno nostro statuimus*, &c. (*Vide* 8 *Co.* 20. a. *The Prince's Case.*)

So, if it be certified as an act of parliament by the chancellor when *nul tiel record* is pleaded, and a *certiorari* goes to him to certify, tho' the royal assent be not expressed. 3 *Ke.* 587.

General acts are always inrolled by the clerk of the parliament and delivered to the Chancery, which inrolment in Chancery makes the original record. *R. Hob.* 109. *Vide ante*, (G 22.)

But private acts are not inrolled without special suit; but the original bill, with the assent of the lords and commons, and royal assent indorsed, and filed and labelled with the other bills to which the great



seal is annexed, which remain with the clerk of parliament, is the original record. *Hob.* 109.

(R 4.) What not.

But acts which passed in parliament before time of memory (which by the *st. W.* 1. 38. is limited to the coronation of *R.* 1. who began his reign 6 July, and was crowned 3 Sept. 1189,) are not pleadable as statutes or acts of parliament. *Hist. C. L.* 3, 4, &c.

And therefore, all statutes before the conquest, or in the times of *W.* 1. *W.* 2. *H.* 1. *Steph.* *H.* 2. are incorporated and part of the common law; but if they should be found in records or histories they ought not to be reputed as acts of parliament. *Hist. C. L.* 3.

So, acts which upon the roll or record appear to be passed without the assent of the lords or of the commons, are not statutes. *Hob.* 111.

(R 5.) How it shall be determined whether it be a Statute or not.

The judges ought to take notice of a general law, and therefore ought to determine whether it be a statute or not. *Co. L.* 98. b. *Hist. C. L.* 16. 1 *Lev.* 296. *Dy.* 93.

And therefore a man cannot plead to it *nul tiel record.* 8 *Co.* 28. a. *The Prince's Case.*

So, it shall not be proved by a journal. *Hob.* 110.

Or, alleged that the assent of the commons was conditional. *Mo.* 824.

And therefore, if no journal or record of it be now extant, the judges, by antient pleas, common allowance, &c. may determine whether it be a statute or not. *Hist. C. L.* 16. 20.

To a private act, if it be not produced in an exemplification under seal, the party may plead *nul tiel record.* *Hist. C. L.* 16. 8 *Co.* 28. b. *The Prince's Case.*

*Vide ante, (G 22.—R 3.)*

(R 6.) What shall be a general Act.

All acts which concern the king, who is the head of the commonwealth, are general laws of which the judges will take notice without pleading. *R.* 8 *Co.* 28. a. *The Prince's Case.* *R.* 4 *Co.* 13. 77. a.

So, if they concern the queen, for she is the king's wife. 8 *Co.* 28. b. *The Prince's Case.*

Or, the prince, for he is the eldest son of the king, and the heir apparent to the crown. *R.* 8 *Co.* 28. b. *The Prince's Case.*

And therefore the *st.* 2 *R.* 2. 5. *de scandalis magnatum*, is a general law, for it touches the prelates, nobles, and great officers who are of the king's council. *R.* 4 *Co.* 13.

So, the *st.* 35 *H.* 8. which concerns the capacity of the queen. 8 *Co.* 28. b. *The Prince's Case.* *R.* Pl. Com. 231. a.

So, the *st.* 11 *Ed.* 3. which makes the prince duke of Cornwall. 8 *Co.* 28. b. *The Prince's Case.*

So, a statute which concerns the whole spirituality, will be a general law: as, the *st.* 21 *H.* 8. 13. *R.* 4 *Co.* 76. a. 1 *Brownl.* 208.

So, the *st.* 13 *El.* 10. and 18 *El.* 11. 4 *Co.* 76. a. 120. b. 1 *Brownl.* 208.

So, a statute which concerns all officers in general; as, the *st.* *W.* 1.

*W. 1. 26.* that no sheriff or other minister, take reward, &c. 4 *Co. 76. a.*

So, a statute, which concerns trade in general. 4 *Co. 76. b.*

So, the *st. 1 Jac. 22.* which relates to shoemakers, &c. is a general law. *R. Lut. 1410.*

So, the *st. 2 Ph. & M. 11.* which relates to woollen weavers, &c. for the penalties are given to the king. *Skin. 429.*

So, a statute which concerns all the lords generally; as, the *st. Marl. 3.* 4 *Co. 76. b.*

So, if it concerns all persons generally, tho' it be but a special or particular thing; as, a statute which concerns appeals or assises, or other particular action. *Ibid.*

*Elegit*, attain, &c. *Ibid.*

The *st. Mert. 6.* and 4 *H. 7. 17.* concerning wards. *Ibid.*

The *st. W. 2.* [*vide W. 1. c. 20.*] *de malefactoribus in parcis*, and *charta de foresta.* 8 *Co. 138. b.*

The *st. 22 Ed. 4. 7.* and 35 *H. 8. 17.* of woods in forests, chases, &c. *R. 8 Co. 138. b.*

(R 7.) What shall be a private Act.

But a statute which concerns only a particular species or thing, or person, will be a private act, of which the judges will not take notice, without pleading it; as, the *st. 18 El. 6.* touching the colleges only in the universities. *Eton and Winchester, 4 Co. 76. a.*

[In a private act of parliament the legislature only lends its aid to the agreement of the parties in order to render it effectual, when any public reason stands in the way. By Lord Mansfield Ch. J. *Rex v. Toms, E. 20 Geo. 3. Doug. 406.*]

[It is a rule that private acts of parliament introduced only for the settlement of particular estates ought to be considered only as common conveyances, and directed by the same rules of law. By Lord Hardwicke Ch. J. *Hornby v. Houlditch, B. R. M. 10 Geo. 2. 1 T. R. 93. n. a. 1 Vent. 176.*]

[Private acts of parliament are to be construed according to the intention of the parties, and such intention must be collected from the words used by the legislature, without doing violence to their natural meaning. By Lord Kenyon C. J. *Townly v. Gibson, B. R. M. 29 G. 3. 2 T. R. 705.*]

So, the *st. 1 El. 19.* which relates to bishops only. 4 *Co. 76. a. R. 5 Co. 2. a. 13 Ed. 4. 8. b.*

So, the *st. 23 H. 6. 10.* which relates to sheriffs only. 4 *Co. 76. b. Cont. per two Ch. J. 1 Lev. 86. Semb. cont. per Hale, 2 Lev. 103. Acc. per Mont. Pl. Com. 65. Dy. 119.*

[It is now decided that this statute is a public act, and therefore the court will take notice of it, tho' it be not pleaded. And if it appear in a declaration, by the assignee of the sheriff, on such bond, that the bond is void by the provisions of the statute, the court, on motion, will arrest the judgment after verdict against the defendant, on a plea of *non est factum.* 2 *T. R. 569.*]

So, a statute which relates to licences by king *H. 6.* to corporations. *R. 13 Ed. 4. 8. b.*

So, the *st. 1 W. & M. 18.* for toleration of dissenters. *R. 1 Sal. 168.*



So, a statute which relates to a particular place or town, will be a private law, tho' it concerns all persons; as, if it relates to such a manor, town, &c. 4 Co. 76. b. Skin. 350.

[So, if it relates to a particular trade. 4 Co. 76. Kirk v. Nowill, B. R. H. 26 Geo. 3. 1 T. R. 125.]

Or, to divers particular towns. 4 Co. 76. b.

Or, to one, or divers particular counties. Ibid.

So, in a general act there may be a private clause; as, in the *st.* 3 Jac. 5. the clause which gives the benefices of recusants in such particular counties to the university, is a private law. R. 10 Co. 57. l.

The judges will not take notice of a private act, unless it be pleaded.

Tho' it makes void all proceedings to the contrary in such a place. R. Skin. 350. 407.

(R 8.) When the King shall be bound by an Act of Parliament.

If an act speaks of the king *indefinite*, being named in his politic capacity, it extends to all his successors. R. 12 Co. 110. R. 6 Co. 27. a.

So, to a queen, if the crown descends to a female. 12 Co. 110.

But, generally, the king shall not be restrained of a liberty or a right which he had before, by the general words of an act of parliament, if the king be not named in the act. Pl. Com. 240. 3 T. R.

521.

Yet, if a statute be intended to give a remedy against a wrong, the king, tho' not named, shall be bound by it: as, by the *st.* 32 H. 8. 28. to prevent a discontinuance by the husband of the lands of his wife during coverture. R. 2 Inst. 681.

So, in all statutes made against wrong to prevent fraud, or the decay of religion, the king is bound. R. 5 Co. 14. b.

And therefore, the king shall be bound by the *st.* W. 2. 1. *de donis*. 5 Co. 14. b.

So, by the *st.* W. 2. 5. against tortious usurpations. Ibid.

[So, the king, tho' not named, is bound by acts for the advancement of religion, or of learning, or providing for the poor; as, the act 10 Car. for uniting livings in Ireland. Str. 516.]

(R 9.) Repeal of a Statute; what shall be.

An act of parliament may be repealed by the express words of a subsequent statute, or by implication.

[An act of parliament cannot be repealed by *non-user*. White v. Boot, B. R. H. 28 Geo. 3. 2 T. R. 275.]

[Where the words of an act of parliament are plain, it cannot be repealed by *non-user*; yet where there has been a series of practice, without any exception, it goes a great way to explain them where there is any ambiguity. By Ld. Kenyon C. J. Leigh v. Kent, B. R. T. 29 Geo. 3. 3 T. R. 364.]

So, if a subsequent statute contrary to a former, has negative words, it shall be a repeal of the former.

So, if a subsequent statute enacts a thing inconsistent with a former: as, the *st.* 1 & 2 Ph. & M. *st.* 2. 2. which says, *all ecclesiastical jurisdiction of bishops, &c. shall be in the same estate as to process, &c. as it*

*it was temp. H. 8. repeals the st. 1 Ed. 6. 2. which says, process shall be in the king's name, &c. R. 12 Co. 8.*

So, if the *st. 1 Ed. 6. 2.* be repealed by the *st. 1 & 2 Ph. & M. st. 2. 2.* and this is repealed by the *st. 1 El. 1.* as to all particulars not expressed afterwards, and the *st. 1 El.* revives expressly the *st. 25 H. 8. 20.* which is contrary to the *st. 1 Ed. 6. 2.* the *st. 1 Ed. 6. 2.* continues repealed. *R. 12 Co. 8.*

So, if a subsequent act be contrary to a former in matter, it shall be a repeal of the former, tho' the words are affirmative: as, the *st. 1 & 2 Ph. & M. 10. that all trials for treason, &c. shall be according to the common law,* is a repeal of the *st. 33 H. 8. 23. that any examined before the king's counsel, who confesses treason, &c. shall be tried in the county where the king pleases. R. 11 Co. 63. a.*

The *st. 1 Ed. 6. 14.* which takes away chantries, is a repeal of the *st. W. 2. 41.* which gives a *cessavit de cantar. 11 Co. 63. a.*

But a later statute, general and affirmative, does not abrogate a former which is particular: as, the *st. 5 El. 4. that none use a trade without being apprentice,* does not take away *4 & 5 Ph. & M. 5. that no weaver use, &c. R. 6 Co. 19. b.*

So, a subsequent act, which may be reconciled with a former, shall not be a repeal of it. *R. 11 Co. 63, 64.*

As, the *st. 16 R. 2. 5. that a person attainted in a premunire shall forfeit all lands,* does not repeal the *st. de donis,* as to lands in tail against the issue in tail. *11 Co. 63. b.*

[It is a general rule that subsequent statutes, which add accumulative penalties, do not repeal former statutes. *Rex v. Jackson, E. 15 Geo. 3. Cowp. 297. 6 Mod. 140.*]

Tho' there are negative words; as, the *st. 1 & 2 Ph. & M. 10. that all trials shall be according to the course of the common law, and not otherwise,* does not take away *35 H. 8. 2. for trial of treason beyond sea. R. 11 Co. 63. a.*

[So, the bare recital in *stat. 3 Jac. 1. c. 14.* is not sufficient to repeal the positive provisions of the *stat. 23 H. 8. c. 5.* without a clause of repeal. By *Asburst J. Dove v. Gray, B. R. E. 28 Geo. 3. 2 T. R. 365.*]

So, an act, which repeals a statute by which another was repealed, will be a revivor of the statute which was repealed. *R. 12 Co. 7.*

So, tho' the words are, *that no statute not expressly mentioned shall be revived,* if thereby another statute is revived which mentions it to be in force: as, the *st. 21 H. 8. 13. of pluralities,* being mentioned to be in force by the *st. 25 H. 8. 21.* which was revived by the *st. 1 El. 1.*; tho' it says that no statute repealed by the *1 & 2 Ph. & M. st. 2. 2.* shall be in force, if it be not specially revived.

Yet if a statute be repealed by several acts, a repeal of one act, and not of all, does not revive the first statute. *R. 12 Co. 8.*

#### (R 10.) How a Statute shall be expounded.

[Where the words of a statute are doubtful, general usage may be called in to explain them, but where they are clear, the usage of a particular place cannot controul them. *1 T. R. 728.*]

(R 10.) *According to the intent.* Every statute ought to be construed



strued according to the intent of the parliament: and therefore, if a corporation be misnamed, if it appears that it was intended, it is sufficient. *R. 10 Co. 57. b. Vide Parols, (A 18.)*

[The statute of limitations does not begin to run against a foreigner, until he come into this realm. *3 Will. 145.*]

Where the *st. 18 Ed. 1. 1. quia emplores terrarum*, says, every one shall hold of the lord paramount *secundum quantitatem terre*; this shall be construed according to the value: for so was the intent. *Pl. Com. 10. 57. b.*

Tho' it be a penal statute. *Pl. Com. 10. Hard. 208.*

For every statute ought to be expounded, not according to the letter, but according to the intent. *2 Rol. 318. Pl. Com. 353. 363.*

[If the enacting words can take in the mischief, they shall be extended for that purpose, tho' the preamble does not warrant it. *Basset v. Basset, M. 1744, 3 Atk. 203.*]

[In an inclosing act, if the lands to be inclosed are to be subject to the same charges and incumbrances as the owner's former lands were, it means incumbrances on the estate, (as dower, &c.) and not the being subject to the repair of a church. *Moncafter v. Watson, P. 3 G. 3. 3 B. M. 1375.*]

[The *st. 22 C. 2. c. 11.* which enacts that a certain toll shall be paid for wharfage and cranage of goods brought unto, shipped off, loaden or unloaden at *Brook's wharf*, does not extend to such goods as are not landed there, but put on board lighters, while the vessel is moored and fastened to the wharf. *Stephen v. Coster, T. 3 G. 3. 3 B. M. 1408. 1 Bl. 413. 423.*]

(R 11.) *Expounded by the preamble.*] The preamble is a good means for collecting the intent.

So, the ground and cause of the making of a statute explains the intent. *Pl. Com. 173. 204.*

[But in a variety of cases it has been determined that strong words in the enacting part of a statute may extend it beyond the preamble. By *Ld. Mansfield C. J. Pattison v. Bankes, B. R. H. 17 Geo. 3. Cowp. 543.*]

[But the preamble of a statute cannot restrain the enacting part of it, where the enacting part is clearly larger than the preamble. By *Ld. Mansfield C. J. Perkins v. Sewell, B. R. E. 8 Geo. 3. 1 Bl. 659.*]

[If in the same act of parliament there be one clause which applies to a particular case, and another which is conceived in general terms, the former shall not restrain the signification of the latter. By *Buller J. Andree v. Fletcher, B. R. M. 28 Geo. 3. 2 T. R. 164.*]

(R 12.) *By the rules of the common law.*] So, a statute ought to be construed according to the reason and rule of the common law. *Pl. Com. 10. b.*

[Tho' it be a private act. *3 Will. 496.*]

The *st. Marl. 25.* provides, that the vill be not amerced by the justices in eyre, if a sufficient jury appears; which was conformable to the common law, by which jurors who make default, tho' twenty-four are summoned, should not be amerced if twelve appear. *2 Inst. 148.*

After

After the *st. of Wast. Gloc. 3.* which gives wast against tenant by curtesy or dower, against whom it lay by the common law, it shall not be brought against their assignee, tho' he be within the words of the statute; because it does not lie against their assignee by the common law. 2 *Inst.* 301.

(R 13.) *When expounded by equity. A remedial statute. To another conveyance.*] So, the judges expound a case within the mischief and cause of an act, to be within the statute by equity, tho' it be not within the words. *Co. L. 24. b. Hard. 208. Vide post. (R 15.)*

As, if a statute be remedial, it shall be extended by equity to other cases within the same mischief.

And therefore, where the *st. Marl. 6.* provides, that a feoffment to the heir, to defraud the lord of ward, &c. be void, it extends to a grant, fine, recovery, lease and release, confirmation, or other conveyance. 2 *Inst.* 110.

Where the *st. W. 2. 1.* prohibits, *quod illi quibus tenementum fuit datum non habeant potestatem alienandi*, the heirs of the donees by equity, are under the same prohibition. *Pl. Com. 13. b.*

[So, the *st. 3 & 4 Ann. c. 9.* relative to promissory notes, must have a liberal construction, it being made for the benefit of trade and commerce. 3 *Willf. 3.*]

[On the expiration of several insolvent debtors' acts, and the revival of them, the court held equitably, "that the prisoners should have" another term after the then first term allowed them to lodge their "petitions. *Williams v. Rougheedge, H. 32 G. 2. 2 B. M. 747.*]

[*Stat. 2 G. 2. c. 22.* continued by *29 G. 2. c. 28.* expired 1st June 1759. *Stat. 32 G. 2. c. 28.* commenced 15th June 1759, so there was a chasm of fourteen days. The court declared, they would construe equitably, and that *Trinity term 1759* ought to be considered as the term in which such prisoners (as had been precluded by the expiration of the former act from completing their discharge under it) were charged in execution, and therefore they had *Michaelmas term* for the first term next after their being charged in execution. 2 *B. M. 901.*]

But a prohibition by an inferior conveyance, does not extend to a superior way; as, the *st. 31 H. 8. 13.* which exempts from tithes, lands, &c. which by surrender, dissolution, forfeiture, &c. or other means, come to the king, does not extend to lands, &c. which come to the king by a subsequent act of parliament. 2 *Co. 46. b.*

[A *casus omisus* can in no case be supplied by a court of law; for that would be to make laws. By *Buller J. Jones v. Smart, B. R. M. 26 Geo. 3. 1 T. R. 52.*]

(R 14.) *To other persons.*] So, if a statute makes the securities given by the sureties of the farmers of the excise, to be exempted out of the act of oblivion, *a fortiori* the securities of the framers themselves shall be exempted. *R. Hard. 424.*

The *st. Marl. 6.* which gives remedy to the lord for his ward against a feoffee by collusion, extends to the heir, or feoffee of the feoffee, and all those who have a conveyance from the lord by fine or otherwise, by collusion. 2 *Inst.* 112.

But if a statute begins with inferior persons, the general words do



not extend to superior persons: as, the *ft. W. 2. 41. si abbates, priores, custodes hospitalium, et aliarum domorum religiosarum*, does not extend to a bishop. *Dy. 109. b. (Vide 2 Inst. 457.) Vide post. (R 26.)*

So, the *ft. 13 El. 10.* which restrains leases by colleges, deans and chapters, parsons, vicars, and others having spiritual promotions, does not include bishops. *2 Co. 46. b.*

(R 15.) *To all cases within the same mischief.]* So, in all cases within the same mischief, the case shall be construed within the intent, tho' it be not within the letter of the statute. *Vide ante, (R 13.)*

As, the *ft. Marl. 29.* which gives remedy to the successor *ad bona ecclesie repetenda*, extends to trespass for cutting down trees; *2 Inst. 152.*

(R 16.) *But a thing out of the mischief, shall be out of the purview, tho' within the letter of the statute.]* So, a case out of the mischief intended to be remedied by a statute, shall be construed to be out of the purview, tho' it be within the words of the statute. *2 Inst. 386.*

[All statutes *in pari materia*, are to be construed as one law. *Doug. 30. 1 T. R. 53. 3 T. R. 135.]*

(R 17.) *So a statute extends to a provision made by a subsequent statute.]* Therefore a statute shall be extended to cases provided by a subsequent statute; as, if extendors value goods too high upon the *ft. Aston Burnel, 13 Ed. 1.* they shall take them at the same price, as was provided by the *ft. de Merc. 11 Ed. 1. Hard. 211.*

The *ft. M. Ch. 9 H. 3. 9.* which says, *omnes barones de quinque portubus habeant omnes libertat. et consuetudines suas*, shall be restrained to such liberties as are not taken away by another branch of the same statute; and therefore they shall not hold *placita corona*. *2 Inst. 31.*

A statute made in affirmance of the common law extends to all future times. *2 Inst. 236.*

(R 18.) *And for necessity, shall be expounded contrary to the letter.]* So, for necessity, that there be not a failure of justice, a statute shall be expounded contrary to the words: as, the *ft. M. Ch. 9 H. 3. 12.* which says, *quod assise non capiant. nisi in suis comitatibus*; but an assise of a commote in the marches of *Wales* shall be taken in the county of *Glocester*, tho' it lies out of the county: for the lord of the marches shall not be a judge in his own case. *2 Inst. 25.*

So, the *ft. of Mer. 3.* which gives a *rediffisin*, to be tried by the first jurors; it shall be tried by others, where there was no first jury. *2 Inst. 84.*

The *ft. of Marl. 4.* which says, *nullus ducet district. extra com.*, does not extend to a case where the manor is in another county. *2 Inst. 106.*

The *ft. of Marl. 22.* says, *nullus jurare faciat tenentes suos contra voluntates*, but they may be sworn to present articles of a court-baron. *2 Inst. 142.*

(R 19.) *Tho' the statute be penal in some respect.]* So, a statute for suppression of wrong, or for public good, shall be taken by equity, tho' it be penal against the offenders. *Pl. Com. 82. a. 17. b.*

[Where an offence created, or made penal by statute, is in its nature

ture single, one single penalty only can be recovered, tho' several join in committing it; but if the offence is in its nature several, each offender is separately liable to the penalty. *Rex v. Clark, T. 17 Geo. 3. Cowp. 610.*]

As, the *st. of Gloc. 5.* which gives treble damages, &c. in waste against tenant for years, extends by equity to a tenant for half an year. *Pl. Com. 178.*

The *st. W. 2. 11.* which gives debt against a gaoler for an escape of one committed for arrearages of an account, extends to an escape of any committed in execution for debt. *Pl. Com. 178. a. 35. b.*

So, the *st. Gloc. 5.* which gives remedy for waste against a lessee, extends to a devisee for life, or years. *Pl. Com. 10. a.*

The *st. 1 Ed. 2. de frangentibus prisonam*, says, that a felon who breaks prison shall be guilty of felony: but it shall not be so, if the prison was on fire. *Pl. Com. 13. b.*

(R 20.) But, generally, a penal statute shall not be taken by equity.] But a penal statute, generally, shall not be taken by equity: and therefore, the statute against maintenance shall not be construed by equity. *R. Pl. Com. 86. b.*

Nor, a statute which gives a penalty in an attain. *Pl. Com. 86. b.*

The *st. de malefactoribus in parcis* does not extend to those in forests. *Pl. Com. 124. a.*

So, the general words of a penal statute shall be restrained for the benefit of him against whom the penalty is inflicted.

As, the *st. W. 2. 11.* that the body of an accountant shall be committed by the auditors to gaol, without saying at what time; but he cannot be committed by them, if it be not immediately upon the account. *Pl. Com. 17. b.*

[So, where the *st. 19 G. 2. c. 34. s. 2.* directs that the sheriff should proclaim the order in council against offenders under that act, in two market towns near the place where such offence was committed; the word near shall be taken to mean a reasonable vicinity, tho' not equivalent to next. 1 *Wils. 164.* 1 *Bl. 20.*]

If a statute for any offence gives a forfeiture of body and goods, it shall be restrained to the liberty of his body, and is not taken to be capital. *R. Hob. 270.*

The *st. of Gloc. 1.* says, damages shall be recovered in mort d'ancestor as in assise; but they shall not be recovered against an occupier who is not tenant to the writ, tho' they shall be recovered against him in an assise, when the disseisor is insufficient. 2 *Inst. 287.*

[The *stat. 7 G. st. 2. ss. 8.* enacts, that all contracts for South-Sea stock, or an abstract signed by the party, shall be registered, or in default to be void; and all such entries shall express the name of the person for whose use such contract was made. Plaintiff and defendant made a contract, and plaintiff registered the contract verbatim, and under it, this is for my proper use and benefit, and signed it with his own name; it was resolved to be well. *Wilkinson v. Myer, P. 10 G. 2 Ld. Raym. 1350. Str. 585.*]

[A penal statute may also be a remedial law. 1 *Wils. 126.*]

[And a statute may be penal in one part, and remedial in another part. *Dougl. 702.*]



(R 21.) *The words shall be taken beneficially for the king.*] So, a statute made for the benefit of the king shall be construed most beneficially for him: as, the *st.* 17 *Ed.* 2. *de Præ. Regis*, which says, *that the king shall have the ward of his tenant seised in fee*, extends to his tenant seised in tail. *Pl. Com.* 11. a.

(R 22.) *Words of permission shall be obligatory.*] If a statute says, that a thing for the public benefit may be done, it shall be construed that it must be done: as, the *st.* 23 *H.* 6. 10. says, *the sheriff, &c. may bail*, he shall be bound to bail. (*Vide Sal.* 609.) *Vide Bail*, (F 10.)

So, where the *st.* 14 *Car.* 2. 12. says, *churchwardens and overseers, &c. may make rates to reimburse the constable*; an indictment lies against them if they refuse it. *R. Sal.* 609.

(R 23.) *Affirmative words do not take away the common law.*] So, affirmative words in an act of parliament do not take away the common law. *Pl. Com.* 112. b.

And therefore, where by the *st.* 1 *El.* 2. a minister, who does not read the common prayer, shall lose the profits of his benefice for the first offence, and being convicted, &c. for a second offence, shall be deprived; yet he might be deprived by the high commission erected by the power of the common law for the first offence, without a conviction, &c. or the methods directed by the statute. *R.* 5 *Co.* 5. b. *De Jur. Eccl.*

So, general words do not take away a particular privilege or benefit: as, the *st.* *W.* 2. 18. which gives an *elegit*, does not take away the privilege an infant has, that he shall not be sued during his nonage, if an *elegit* be against the heir of a conusor, being an infant. 2 *Inst.* 395.

(R 24.) *Nor, a former custom.*] So, where *Southwark* chose scavengers by custom, the *st.* 14 *Car.* 2. 2. which says, *constable and churchwardens, &c. shall meet in Easter-week, and choose*, does not take away a custom to choose at the leet. *Dub.* 2 *Mod.* 41.

[So, affirmative statutes do not take away a prior exemption. *Dougl.* 188.]

(R 25.) *Nor a former statute.*] So, the *st.* 23 *El.* 1. which gives 20 *l.* per month against a recusant, does not take away the penalty of 12 *d.* for every Sunday, given by *st.* 1 *El.* 2. 11 *Co.* 63. b.

But where affirmative words in sense contain a negative; as, where a new ordinance is made, which directs the form or order of the proceeding, it shall be otherwise. *Pl. Com.* 113.

(R 26.) *Words which begin with inferior persons, do not include superior.*] A statute, which begins with a prohibition to inferior persons, does not extend to persons of a superior degree: as, where by the *st.* *W.* 1. 3. *finés or amerciaments shall not be levied for escapes by sheriffs or others*, it does not extend to *B. R.* 2 *Inst.* 165, 166. *Vide ante*, (R 14.)

So, where an act of oblivion excepts accounts by *sheriffs, bailiffs, or other officers*; accounts by superior officers, as *cofferer, &c.* are not excepted. *R. Hard.* 442.

So,

So, the *st. Marl.* 29. which gives trespass to the successor of an abbot, prior, or other prelate of the church, does not extend to a bishop. 2 *Inst.* 151.

But where a statute begins with inferior courts, and concludes, *vel in aliis curiis*, this extends to superior courts; otherwise the words, *vel in aliis curiis*, are void. 2 *Inst.* 137.

As, the *st. Marl.* 19. *quod in comitatu, hundredo, curia baron., vel aliis curiis, the tenant shall not be sworn to his essoign*, extends to the courts of Westminster. *Ibid.*

(R 27.) *Repugnant words controlled by the common law.*] So, where the words of an act of parliament are against common right and reason, repugnant, or impossible to be performed, they shall be controlled by the common law. 8 Co. 118. a. *Bonham.*

And therefore, where by the *st. W.* 2. 21. a writ of *cessavit* is given *heredi petenti super hered. petent.*, &c. the heir shall not have a *cessavit* for a *cesser* in the time of his ancestor, and the rent does not belong to him, and it would be against right and reason that he shall have an action in such case. 8 Co. 118. a. 2 *Inst.* 402.

So, the *st. of Carlisle*, 35 Ed. 1. that in the orders of the *Cistercians* and *Augustines*, the common seal shall be in the custody of the prior and four of the most discreet of the house, and that a deed sealed when the seal is not in such custody, shall be void, is impossible and impertinent, and therefore it shall be void; for when the abbot uses the seal for sealing a deed, it cannot be in their custody, and it would be unreasonable that a deed should be avoided by a bare surmise. 8 Co. 118. a.

So, a saving in the *st.* 1 Ed. 6. of chantries, &c. given to the king, to the donor, of all services, is void; for, by law, the king cannot hold of any. 8 Co. 118. b.

If an act of parliament gives to the lord of a manor the conuſance of all pleas within his manor, he shall not have conuſance where he himself is party. *Ibid.*

[Where a special authority is delegated by act of parliament to particular persons to take away a man's property and estate against his will; there it must be strictly pursued, and must appear to be so upon the face of the proceedings. *Rex v. Croke*, E. 14 Geo. 3. *Cowp.* 26.]

[Usages that can vary the construction of an act of parliament must be universal, and not the usage of any particular parish alone. *Rex v. Hogg*, E. 27 Geo. 3. 1 T. R. 721.]

(R 28.) *The exposition shall be such that the statute be not eluded.*] But such exposition of a statute ought to be favoured, as hinders the statute from being eluded. 2 *Roh* 127.

*Vide* more concerning Parliament, in *Antient Demesne* (F 2.—I—K).—*Dignity*, (C 5).—*Franchises*, (F 3).—*Ireland* (C).—*Pleader*, (3 B 6).—*Scotland*, (D 4).—*War*, (B 6, 7.)

## PAROL.

### Parol Agreement.

*Vide* Chancery, (2 C 3).—*Parcener*, (C 5. 8.)



## Parol demurring.

*Vide Infant, (D 1, 2.)*

## P A R O L S.

## (A) How expounded.

## (A 1.) Obsolete Words.

**W**ORDS in antient grants shall be expounded according to the usage and construction at the time of the grant.

As, by the word *foke*, the grantee may claim the suit of his tenants. *Bro. Quo Warranto, 2. Kel. 145. a. 2 Rol. 245.*

By the word *sake*, conuſance of pleas of his tenants. *Bro. Quo W. 2.*

Or, amerciaments of his tenants. *Kel. 145.*

By the word *murder*, amerciaments of murderers. *Bro. Quo W. 2.*

By the word *toll*, the tallage of his villeins. *Bro. Quo. W. 2. (Vide Kel. 145. a.)*

By the word *them*, the iſſues of his villeins. *Kel. 145. 2 Rol. 245. l. 51.*

By a grant of *infangthief*, &c. the trial of felons taken within his precinct. (*Vide Blo. Nom. in Verbo.*)

A grant of *outfangthief* imports the trial of thoſe of his fee taken for felony in another precinct. *Ibid.*

## (A 2.) Terms of Art.

So, words used as terms of arts ought to be obſerved. *Vide Gaſ-ranty (A).—Indictment, (G 1, &c.)*

## (A 3.) Ambiguous Words.

(A 3.) Ought to be taken as near as may be to the intent of the parties.]

So, ambiguous words ſhall be expounded as near to the intent of the parties as may be: as, if an obligation be for payment of 100 *l.* at the 10th *Jan.*, on three months' warning; it ſhall be paid afterwards upon three months' notice, tho' it was not required at the 10th *Jan.* *Semb. Ray. 61. Vide poſt. (A 18.)*

[Where tenant for life, with a power to leaſe in poſſeſſion and not in reversion, granted a leaſe to his only daughter, for 21 years "from the day of the date," it was held that the parties underſtood, and uſed the word "from" in that ſenſe which would make their deed effectual, and that therefore this was a leaſe in poſſeſſion. *Cowp. 717. 725.*]

If a leaſe be to *A.* for life, rendring rent at *Michaelmas*, and after his death, to his executor till *Michaelmas*; the executor ſhall have it for the whole day of *Michaelmas*; otherwiſe, no rent would be due. *Per Coke, 3 Leo. 211.*

If a covenant be to make an aſſurance of divers lands, &c. it ſhall be conſtrued of the whole, or of part, according to the intent. *R. 1 And. 57.*

If a term be deviſed to *A.*, and if ſhe dies before ſhe accompliſh her years

years of lawful age, to B.; if A. dies after 18, and before 21, B. shall have it: for, *lawful age*, shall be understood the age of 21 years, except where it is spoken of a ward in socage. R. 1 Cb. R. 99.

If an obligation be to pay at *Lady-day*, it shall be at the next which follows. R. 3 Leo. 7.

[If the mayor is to be sworn before the major part of the free burgesses, and it is found he was elected by the majority, and sworn in *presentia quamplurimorum liberum burgensium*, it is not good; for *quamplurimi* only signifies a good many. *Cassel v. Carter*, T. 11 G. 2. Str. 1097. Andr. 119. 241.]

[If a man settles money (on failure of heirs-male of A.) to be equally divided between B., C., D., and E., or the *respective issues of their bodies*, in case they or any of them are dead at the failure of A.'s issue, share and share alike, viz. to each of them, or their *respective children*, one fourth, provided if any are dead without issue at the failure of A.'s issue, then to be equally divided among the survivors of their *respective children*, in case any of them also shall be dead leaving issue of their bodies; the word *children* shall be extended to mean issue; and if B. dies without issue, and C. leaves children alive, D. children and great-grandchildren, and E. only grandchildren, the descendants of each shall have a third, which shall be divided among them *per capita*. *Wyth v. Blackman*, H. 1748, 1 Vesey, 196.]

[If A. demises to B. for ninety-nine years, if she so long live, and after her death, if she dies within the said term, or other determination of said term, the remainder thereof to her son C., for the residue of the said term, with penalty if B. or C. grind at another mill, heriot to be paid on the death of B. or C.; covenant that both shall repair, and A. covenants that both shall enjoy; the word *term* shall be understood to mean the time, (and so C. shall have it for the residue of the ninety-nine years,) and not the estate, whereby he would have nothing, as it would expire at B.'s death. *Wright v. Cartwright*, P. 30 G. 2. 1 B. M. 282.]

[A turnpike-act directs the road to and from the town of A. to be repaired, the same act describes roads as *from, to, and through* other towns; the town of A. was paved lately before the act, and is kept in repair by the inhabitants; the act extends not to the town of A. *Hammond v. Brewer*, T. 30 & 31 G. 2. 1 B. M. 376.]

[A devise to the prisoners in the *Marshalsea* prison in the borough of *Southwark*, means not the *King's Bench* prison, but the prison of the Palace-court, which in common parlance is called the *Marshalsea* prison. *King's Bench prisoners v. Marshalsea prisoners*, T. 33 & 34 G. 2. 2 B. M. 1037.]

[The word "farm," in a will, is sufficient to pass a leasehold estate, if it appear to have been the testator's intention that it should so pass. *Lane v. Stanhope*, B. R. T. 35 Geo. 3. 6 T. R. 345.]

(A 4.) *Most strong against the grantor, and for the grantee.*] So, ambiguous words shall be taken most strong against the grantor, and most beneficial for the grantee. Pl. Com. 10. b.

As, if a lease be by A. at will, rendring 6l. per ann. and A. grants *eundem redditum* to B. for his life; B. shall have 6l. per ann. tho' the lease determines; for it shall be taken for such rent. R. Cro. El. 241.



## (A 5.) Words abbreviated.

If words are written with an usual abbreviation, notice shall be taken of it; as, if a *venire facias* be awarded *de visu de B.* it shall be understood for *vicineto*, which is the usual abbreviation, tho' it be written without a dash. 2 *Rol.* 246. l. 15.

## (A 6.) Synonymous.

So, words of the same import may be used promiscuously: as, *quondam*, for *nuper*, and *vice versa*. *R. Pl. Com.* 190. b.

[Indenture is always understood to be a deed. *Dodd v. Atkinson*, *M.* 10 G. 2. *B. R. H.* 342.]

[Friends is synonymous to relations. *Gower v. Mainwaring*, *M.* 1750, 2 *Ves.* 87.]

## (A 7.) Words, how explained.

The general words in the premises of a deed or grant, may be corrected, restrained and explained, by the *habendum*, or an exception. *Hob.* 169. *De quo vide Fait*, (E 5, &c. 9, 10.)

Or, by a condition annexed. *Hob.* 169. *De quo vide Condition.*

Or, by the context, or recital of the deed. *Vide post.* (A 18, 19.)  
—Covenant, (D 1.)

Or, by synonymous expressions, or clauses. *Vide post.* (A 16. 20.)  
—Covenant, (D 1.)

[Lands at C., in the tenure of A. B., devised by will, comprize woods and timber excepted in A. B.'s lease; "the tenure" are words of additional description. 1 *Bl.* 255.]

(A 8.) *By a viz. or scilicet.*] So, they may be explained by a *viz.* or *scilicet*, which is an ancillary clause, that expresses particularly what was general or doubtful. *Hob.* 172.

[So, words may be explained by putting stops, or using a parenthesis; and altho' stops are never inserted in acts of parliament or in deeds, yet the courts of law in construing them, must read them with such stops as will give effect to the whole. By Lord Kenyon, C. J. *Doe v. Martin*, *B. R. M.* 31 *Geo.* 3. 4 *T. R.* 65.]

As, if a man grant to A. and his heirs, *viz. heirs of his body*, it shall be an entail. *Hob.* 172.

But, if it be repugnant to the precedent words, it shall be void and rejected: as, if a man grant an entire rent out of B. and W., *viz. so much out of B., and so much out of W.*, this does not make several rents. *Ibid.*

So, if A. covenant to pay 83 *h* quarterly, *viz. 20 l. at Michaelmas, 21 l. at Christmas, 20 l. at Lady-day, and 21 l. at Midsummer*, which do not amount to 83 *l.*, and if the *viz.* be rejected, the time of payment does not appear; for it shall be understood at the usual quarters by equal portions. *R.* 2 *Lev.* 99.

So, they cannot enlarge or diminish the precedent matter granted: as, if a man having three acres in D., grant all his land in D., *viz. B. acre and W. acre*, the third acre also passes. *Hob.* 172.

So, if he grant all his land in D. *viz. B. and F.*, which lies out of D., that does not pass. *Ibid.*

If

If a man grant all the wood in his manor of *D.*, viz. in *B. Wood*, and *C. Wood*, this does not restrain the grant in the residue of the manor. *R. Hob. 170.*

(A 9.) Collective.

So, *nomen collectivum* shall be extended to all persons comprised within the general name; as, if a man devise that his *heir* shall have his land as long as he pays such annual payments, and if his *heir* do not pay, that his executor shall have the land; this extends to all his heirs successively. *R. 2 Rol. 253. l. 25. 35.*

So, if a devise or limitation be to *A.* for life, and after his death to the *heir* of his body; tho' *heir* is a name of purchase, yet, being coupled with the words, *of his body*, it shall be taken as *nomen collectivum*, and make an estate-tail executed. *R. 2 Rol. 253. l. 40. 50.*

(A 10.) Exclusive.

So, a release of all demands, till such a day, viz. 24th *April*, excludes the 24th *April*, and an obligation made the 24th of *April* is not discharged. *R. 2 Mod. 280.*

(A 11.) Copulative.

So, words shall be expounded *conjunctim*, where they are with a copulative; as, if *A.* leases for twenty years, *if A. and B. so long live*; if one of them dies, the lease determines. *R. 2 Cro. 378. [Pollex. 645.]*

So, words in the disjunctive shall be taken *copulativè*, where the intent requires it: as, if a devise be after the death of him and his wife to the issue living at the death of him, his wife, *or* the survivor; the issue does not take, tho' living at the death of the testator, if it was not living at the death of the wife; and therefore, *or* shall be taken for *and*, otherwise the word *survivor* is superfluous. *R. 2 Ver. 389. [Moor. 422. 3 Atk. 390. 1 Wilf. 140. 2 Str. 1175. 3 T. R. 470. 4 T. R. 442.]*

(A 12.) Disjunctive.

So, words shall be construed disjunctively to answer the intent of the parties: as, if a covenant be to make an assurance by *A.* and *B.* *et eorum utrumque* devised; an assurance, devised by them severally, ought to be executed. *R. 1 And. 55. [1 Leon. 74.]*

If an obligation be to pay, if a ship, goods, or the obligor return safe; it shall be construed to pay, when any of them return safe, which first happens. *R. 1 Lev. 55.*

If a covenant be, that a lessee repair a house during the term, *or* within three months after upon notice; they shall be construed distinct covenants, and the lessor shall have election to sue for not repairing during the term, or to give notice afterwards, and then sue if he do not repair within three months. *R. 2 Rol. 250.*

(A 13.) Distributive.

So, words shall be expounded *distributivè*, *reddendo singula singulis*: as, if a demise be to *A.* for ten, and of other land to *B.* for twenty years, and after the determination of the several leases, to *C.*; he



shall have the land demised to *A.* immediately after his lease determines, tho' the other lease continues. *R. 5 Co. 7. b. Vide Eftates, (B. 20.)*

If a devise be of legacies to a woman and four issues of her eldest son, upon condition, that if they do not release respectively, when they become of full age all right to his estate, their legacies shall be void; it shall be *distributive*, that the legacy of each, who does not release, shall be void. *R. 2 Ver. 478.*

(A 14.) Relative.

(A 14.) *When referred to the next antecedent.*] Relative words, generally, are referred to the next antecedent, where the intent upon the whole deed does not appear to the contrary: as, if an obligation be, *1 Apr. 2 El.*, to pay *21 Apr. next*; the word relates to the month, and not to the day: for the payment shall be, *21 Apr. 3 El. R. 2 Rol. 351. l. 30. But afterwards R. cont. there, l. 35. 2 Cro. 646. 677.*

If a grant be of land in the parish of *B.*, which has three vills, *A.*, *B.*, and *C.*, and of the tithes in *A.* and *B.*; and of all tenements in *B. aforesaid*; this refers to the parish of *B.*, and the tenements in *C.* pass. *R. 2 Rol. 251. l. 15.*

If *A.* be bound to pay *10 l.* before *20 Oct.*, (if *B.* be then living,) and that he levy a fine, &c. *that he* refers to *B.*, who is last named, tho' in a parenthesis. *R. 2 Rol. 252. l. 15.*

In *assumpsit* brought in an inferior court, if the plaintiff declares that the defendant, in consideration of carrying the goods of *B.* to London, *ad tunc et ibidem* assumed, &c.; *ibidem* refers to London, and so, the undertaking being out of the jurisdiction, it is bad. *R. 2 Rol. 252. l. 20.*

Covenant upon an indenture, reciting other indentures, *cumque per unam aliam indenturam*, &c. *testatum est per indentur. præd.*, the word *præd.* relates to the last indenture. *Semb. Sho. 72.*

If an obligation, *5th June*, with a condition to pay on the first day of *Trinity* term next, which began the *7th June*, it ought to be paid the *7th* of the same *June*, tho' the essoign-day of *Trinity* term was *3d June*. *R. Sav. 124.*

(A 15.) *When not.*] But where the intent appears otherwise, the reference shall be to support the intent; as, if the king grant a manor in the parish of *R.* (which has in it three vills, *R.*, *A.*, and *B.*) and all tithes in *R.* and *A.*, and all his lands in *R. aforesaid*; this refers to the parish of *R.* and not to the vill, tho' it was the next antecedent. *Dub. 2 Rol. 251. l. 15.*

So, if an obligation, the *23 April* be, to pay *24 April* next, it shall be referred to the month or to the day, as the intent is found to be. *2 Rol. 251. l. 30. 35.*

Submission to an award, *ita quod factum sit, on this side the 8th of June, before four o'clock of the same day*, the word *day* does not refer to the *8th June*, but to the day before, when the award is made. *R. 2 Rol. 251. l. 50. Vide 3 Lev. 239.*

If a writ be teste'd *1<sup>o</sup> Martii*, (which was after *Lent* began,) returnable *ig quarta septimana quadragesima prox. futur.*, the words, "*prox.*" "*futur.*"

"*futur.*" relate to the fourth week, and not to *Lent.* *R. Mo. 365. Popl. 100.*

If a feoffment be to *B. senior*, to the use of *B. junior*, for life, and afterwards a remainder is limited to the heirs of *the said B.*, he who was last named shall be understood. *Pol. 63.*

If a condition be, to pay where *A.* dies before *Michaelmas* without issue then living, it shall be referred to the death. *Per three J. Dy. 15. a.*

If an information *apud W. in com. M.* says, *quod A. de B., in com. S. apud W. in com. M. implacitasset, &c.* it shall be referred to the county of *M.* *3 Sal. 199.*

[In declarations, "the county *aforesaid*," where more than one county is named, always refer to the county named in the margin. *2 Bl. 847.*]

(A 16.) *When the reference shall be to all the words precedent.*] So, indefinite words are tantamount to universal, and refer to all the particulars precedent: as, if a man devise *A.* to his wife, and *B.* to his wife, and afterwards devise *the same lands* to his son; this refers to all the foregoing lands, and not to those in *B.* only. *Semb. 1 Vent. 368. Vide post. (A 20.)*

So, words at the end of a sentence, which may be applied to all the preceding, shall be restrictive and relative to all the preceding; as, if the king grant the rectory of *L. cum decimis spectan. ac omnes terras & tenementa in tenura B. sub annuali redditu 3l.*, the last words refer to the rectory as well as all the lands; and if they are not in the tenure of *B.* at the same rent, the grant is void. *R. per three J. 2 Cro. 34.*

So, if a covenant be, that he is seised in fee according to the indenture of his purchase; the covenant is, that he is seised in fee absolutely, for the reference to the indenture imports only the certainty of the estate, not the title. *R. 1 Lev. 40.*

(A 17.) *When not.*] So, if there are distinct clauses, restrictive or explanatory words at the end of the last clause do not refer to the preceding: as, a grant of all tithes *infra dominicum de B. ac omnes alias decimas monasterio de B. spectan. quæ fuer. collect. per ballivum ejusdem monasterii*; tithes, *infra dominicum de B. pass.* tho' not collected by the bailiff of the abbey, for that refers only to all the other tithes, which is a distinct clause. *R. 2 Cro. 48. Mo. 754, 755.*

So, a grant of lands in *A. aut. alibi in com. B. monasterio de C. spectan.*, the words, *monasterio de C. spectan.* refer only to lands *alibi in com. B. per quosdam.* *2 Cro. 51.*

(A 18.) *Words expounded according to the intent of the parties. With regard to the context.*] The general construction of words ought to be for supporting the intention of the parties; and therefore, if a devise be to his daughter *A.*, upon condition *that she marry D.*, and if she refuses, or marries another before her age of twenty-one years, to *B.* his daughter; *D.* dies, and *A.* afterwards marries another before her age of twenty-one years, the estate does not go to *B.*, for the intent appears that she shall not marry another to prevent her marriage with *D.*, but when this becomes impossible by the act of God, her marriage



riage with another does not lose the estate. *R. 4 Mod. 68. Vide Covenant, (D 1.)—Parliament, (R 10.)*

A promise in consideration, *quod ulterius non prosequeretur B.* an averment, *quod prosequi abstinuit & hucusque aliquantulum abstinet*, is sufficient; for *aliquantulum*, in regard to the context, imports *quod omnino abstinet*. *R. 2 Rol. 246. l. 50.*

A writ to the escheator says, *quod tam escheator quam jurat. sigilla sua alternatim appon.*; both ought to seal the same return, and not the escheator one, and the jurors the other. *R. 2 Rol. 248. l. 10. Hob. 253.*

In a lease of land, except a wood, the lessor covenants that the lessee shall take firebote *super premissis*; he shall not take it in the wood excepted. *R. 1 Leo. 117.*

If a covenant be, that he hath not done nor will do any act to disturb the plaintiff, but that he will hold without any disturbance; the last shall be taken with reference to the former words, and it is not a breach if he be disturbed without his act. *R. Mo. 58.*

If a wager be, whether king *W.* takes *Ireland* into his power by his present or any other title before 30 *Dec.* it shall be understood of his actual administration, because, by his present or other title, shews the intent was not such administration as he then had. *R. Sho. 182.*

[If it is agreed, "that several causes shall be bound by the verdict given in one," it means *such a verdict* as the court thinks ought to stand; therefore if after verdict a new trial is granted, the others are not bound by the old verdict. *Hodson v. Richardson, P. 4 G. 3. 3 B. M. 1477.*]

[Words in an agreement, "that *A.* shall hold and enjoy," &c. if not accompanied by restraining words, operate as words of present demise. *Secus*, if they be followed by others which shew that the parties intended that there should be a future lease. The whole must depend on the intention of the parties. *Jackson v. Ashburner, B. R. H. 33 Geo. 3. 5 T. R. 163.*]

[Demise from *A.* to *B.* for twenty-one years, if both should so long live; but if either should die before the end of the said term, then the heirs, executors, &c. of the person so dying should give twelve months' notice to quit, &c. It was holden, that the lease could only be determined by twelve months' notice given, by the representatives of the party dying before the end of the term, and consequently that such notice given by the lessor to the representatives of the lessee (who died during the term) did not determine it. *Legg v. Benion, C. P. H. 11 Geo. 2. Willes, 43.*]

So, synonymous covenants. *Vide Covenant, (D 2.)*

(A 19.) *With regard to a recital.* So, the construction of a deed shall be with regard to a recital; as, if a lease be to *A.* except a close; and *A.* covenants to make all grants, agreements, *contenta aut recitata*, &c. it will be a breach if he disturbs the lessor in the close excepted. *1 Leo. 117.*

But a recital does not confine subsequent words by which the intent appears more large: as, if a condition of an obligation recites, *whereas a ship is bound to A. and is to return to the port of B. or London,*  
or

or any in England; the obligor shall pay 20 l. after the next return to the port of B. or L. or other port of England, or elsewhere where she makes her right discharge; if she makes a discharge at Venice, he ought to pay. R. 2 Rol. 247. l. 30.

(A 20.) *To a restriction annexed.*] So, where restrictive words are annexed to the end of several expressions, all are restrained by it: as, if the king grant a portion of tithes in L., with all tithes in L. in the occupation of B.; the portion or other tithes do not pass, if they are not in the occupation of B. R. 2 Rol. 193. l. 5. *Vide ante*, (A 16.)

So, if a covenant be to assure such land as descends to him, the same land to be 40 l. per ann.; he need not assign more than 40 l. per ann. tho' more descends. *Semb.* Leo. 27.

(A 21.) *Words shall be transposed.*] So, words shall be transposed to support the intent of the parties: as, if a lease be 6th Aug. for twenty years, rendring rent *annuatim* at Lady-day and Michaelmas; there shall be a transposition, to Michaelmas and Lady-day; otherwise it cannot be paid *annuatim*. Co. L. 217. b. R. per two J. Brown cont. Pl. Com. 171. *Vide Abatement*, (H 11.)

A devise to a woman for life if she does not marry, and if she marries to A. in tail, &c. shall be an estate in tail tho' she does not marry; for, it shall be taken that A. shall enter immediately if she marries. R. 3 Lev. 125.

A devise to A. for life, and afterwards to his first, second, and other issues, remainder to B. for preserving estates; the words shall be transposed to make the devise to B. precedent to the disposition to the issues. R. 2 Ca. Ch. 10.

(A 22.) *Insensible, rejected.*] If a lease be for forty years, and the lessor covenants that the lessee shall enjoy for the said term of eighty years; the words *eighty years* being insensible, shall be rejected, and the covenant shall be that he shall enjoy for the said term. Sav. 71.

If a *distringas* be returnable *tres Trin. nisi* the judge of assize come 3<sup>o</sup> *eiusdem mensis Junii*, where no such month was mentioned before, *eiusdem* shall be rejected. R. Hard. 330.

But if by the rejection of insensible words, no sense remains, there the whole is void: as, if accopt be for *septem ponderibus cera*, it is utterly insensible: for *pondus ponderis* is a weight, *pondus pondi*, a pound. R. 2 Rol. 247. l. 15.

(A 23.) *General, restrained.*] So, always a construction shall be made of words, if it can, to support that which seems to be the intent of the parties; as, a lease *pro octoginta & terdecim annis*, shall be construed for 93 years, and not for 80 and 30. R. Cro. Car. 386. 2 Rol. 247. l. 5. *Vide ante*, (A 20.)

A devise to A. for life, with power *six months before his death*, to make a lease for six years; he may make a lease at any time before his death, tho' it be not six months before; for the time of death being uncertain, the intent was, that he might make a lease for six years at any time. R. 2 Rol. 247. l. 26.

A lease by the king of a manor and profits of courts, (reciting a former lease of the manor,) to begin after the former lease, *reddendo inde extunc* 78 l. annually, viz. 36 l. for the manor, 6 l. for the profits,



*Ec.* The rent commences upon the commencement of each lease; for, for the profits not leased before, it commences immediately; for the manor, after the former lease. *R. 2 Rol. 252. l. 5.*

An obligation, with a condition to meet at *A.*, there to choose arbitrators, who, with arbitrators of the plaintiff, might determine all matters between them; it is not sufficient to be there the last minute of the day: for it ought to be understood, that he shall be there in time to determine all differences. *R. Mo. 545.*

If a condition be, *anno 1648, to pay when the king is restored*; it shall be understood of king *Charles I.* *Per two J. 1 Sid. 314.*

But where words have no ambiguity, an exposition shall not be made against the exprefs words.

So, general words are not restrained by restrictive added in *majorem cautelam*: as, if the king grant a manor belonging to the priory of *C.*, and all lauds, tenements, and hereditaments to the said priory of *C.* appertaining, and all liberties, piscaries, *Ec. eidem manerio spectan.*; a piscary, *Ec. in gross*, appertaining to the priory, passes; for being comprehended in the word *hereditaments*, it shall not be excluded by the words, *eidem manerio spectan.*, which were added for greater caution. *R. 2 Rol. 186. l. 5.*

So, if the king grant all lands, *Ec. in L.*, and afterwards grant the rectory of *L.*, (where there were two rectories,) and all lands, tenements, and hereditaments, *Ec. the rectories pass by the general words.* *2 Rol. 193. l. 10.*

So, general words are not restrained by affirmative words more restrictive; as, if a man grant to *A.* all the wood in his manor, and afterwards covenant that *A.* shall take all the wood within five years; he shall not be confined to five years for taking the wood. *R. Hob. 173.*

So, a grant of *5 l. per ann.* to husband and wife for their lives, and if the wife survives, that she shall have *3 l. per ann.*; if she survives, she shall have *5 l. per ann.* *Hob. 173.*

A covenant, that a lessee shall take *botes* by assignment; he may take them without assignment. *Hob. 173.*

For more concerning *Words*, and the exposition of them, vide *Abatement*, (H 3, 11.)—*Action upon the Case for Defamation, per Totum.*—*Chancery*, (3 A 8.—3 Y 1., *Ec.*)—*Condition.*—*Covenant*, (D 1, 2.—G 2.)—*Devise*, (N 1, *Ec.*)—*Estates*, (A 2.—B 3. 12. 19.)—*Fait*, (E 5.)—*Feoffment*, (A 3.)—*Franchises*, (F 6.)—*Garranty* (A).—*Grant*, (E 1, *Ec.*)—*Libel.*—*Obligation*, (B 1, *Ec.*)—*Pardon* (C—D).—*Parliament*, (R 10, *Ec.*)—*Pleader*, (C 25, *Ec.* 45, *Ec.* 77.—V 5.—2 L 1, *Ec.*)—*Poiar*, (A 2.—B 1, *Ec.*)—*Rent*, (B 2.)—*Uses*, (L 3.)

## PARSON.

(A) Parson, who shall be.

**A** PARSON is he *qui personam gerit ecclesie.* *Co. L. 300. a.*  
*Vide Ecclesiastical Persons*, (C 6.)

Who

Who may be, or not, and his interest in the rectory, *vide Ecclesiastical Persons*, (C 7, 8, 9.)

(B) Must be *infra sacros Ordines*.

(B 1.) *Qui sunt sacri Ordines*.

BY the *st.* 13 & 14 *Car.* 2. 4. no person shall be capable of being admitted to any parsonage, vicarage, benefice, &c. before he be ordained priest, according to the form thereby established, unless he have before episcopal ordination, on pain of 100 *l.*, &c. and disability to take the order of priest for a year.

*Sacri ordines, strictè loquendo, sunt 4 tantum, viz. subdiaconatus, diaconatus, presbyteratus, & episcopatus.* Lind. 27. *Verb. Sacros Ordines.*

*Et in clausulâ pœnali, verba non debent extendi ad minores ordines.* Lind. 27. *Verb. Sacros Ordines.*

*Large tamen loquendo, omnes ordines, etiam minores (viz. cantores, acolyti, exorcista, & ostiarii) dicuntur sacri.* Lind. 27. *Verb. Sacros Ordines.*

If a man takes a benefice, not having episcopal ordination, it shall be, *ipso facto*, void. 1 *Mod.* 11.

(B 2.) What shall be a lawful Ordination.

By the *st.* 5 & 6 *Ed.* 6. 1. (which was repealed by the *st.* 1 *M.* 2. and afterwards revived by the *st.* 1 *El.* 2.) to the book of common prayer, was added a form of making and consecrating archbishops, bishops, priests, and deacons, to be of like force and authority as the said book.

And by the *st.* 8 *El.* 1. the same form shall be of force, and shall be used and observed in all places, &c.

By the *st.* 13 & 14 *Car.* 2. 4. the book of common prayer, with the form of making, ordaining, and consecrating bishops, priests, and deacons, is recommended by the king to the parliament, to be used by all that make or consecrate bishops, priests, and deacons; and the same is established by that act.

By the 36th article of the 39 articles established anno 1562, it was declared, that the book of consecration of archbishops and bishops, and ordaining priests and deacons set forth in the time of king *Ed.* 6. doth contain all things necessary for such consecration, and ordaining, &c.

And by the *st.* 13 & 14 *Car.* 2. 4. *f.* 30, 31. it is enacted, that all subscriptions of the said article shall be taken and applied to the form thereby established.

*Vide Ecclesiastical Persons*, (C 8.)—*Esglise*, (N 10.)

(C) Must declare his Assent to the Book of Common Prayer.

SO, by the *st.* 13 & 14 *Car.* 2. 4. *f.* 6. every person put into an ecclesiastical benefice, or promotion, shall in the church, &c. belonging to his benefice, within two months after actual possession, &c. on the Lord's day, publicly read morning and evening prayers appointed



appointed by the book of common prayer, and afterwards, before the congregation, declare his unfeigned assent and consent to the use of all things therein contained, in the words, *I declare my unfeigned assent and consent to all and every thing contained and prescribed in and by the book, &c.*

And he who neglects it within the said time (unless let by impediment allowed by the ordinary, and then within one month after the impediment is removed) shall be *ipso facto* deprived of all his ecclesiastical promotions. And the patron, or donor, may present, &c. as if he were dead.

Every parson, vicar, &c. ought to declare his assent, &c. within this act.

So, a stipendiary priest, provided by the lessee of a college, deanery, &c. tho' no presentation is required, but a nomination to the dean, and approbation by him. *R. 3 Lev. 83.*

[By *stat. 23 G. 2. c. 28.* it is declared, that the bishop's allowance of lawful impediment for not reading the common prayer, extends to not reading the declaration of assent.]

But, a man deprived for not giving his assent within two months, is not disabled to be presented *de novo.* *3 Lev. 8.*

And, if a stipendiary priest continues in the exercise of his function, after the two months, with the approbation of the nominor, and dean who ought to approve; this amounts to a new nomination: and if he gives his assent, &c. at any time, it is sufficient. *R. 3 Lev. 83.*

*Vide Difmes.—Esglise.*

#### PARSONAGE.

*Vide Ecclesiastical Persons, (C 6, &c.)—Parson.*

#### PARTIALITY.

*Vide Chancery, (2 K 6.)*

#### PARTICEPS CRIMINIS.

*Vide Chancery, (3 M 7.—4 W 28, 29.)*

#### PARTICULAR ESTATE.

*Vide Estates, (B 13, &c.)*

#### [PARTICULARS, BILL OF.]

[IN an ejectment for a forfeiture of a lease, the court of *B. R.* will compel the plaintiff to deliver a particular of the breaches of covenant, on which he intends to rely. *Birch v. Phillips, B. R. H. 36 Geo. 3. 6 T. R. 597.*]

[A defendant cannot demand a bill of particulars till after appearance. *Kitchin v. Blanchard, C. P. H. 39 Geo. 3. 1 Bos. & Pull. Rep. 378.*]

## P A R T I T I O N.

*Vide Chancery* (4 E).—*Parcener*, (C 1, &c.)—*Pleader*, (3 F 1, &c.)

## P A R T N E R S A N D P A R T - O W N E R S.

*Vide Abatement*, (E 12.—F 8.)—*Chancery*, (3 V 4. 6, 7.)—*Merchant*, (D).—*Navigation*, (I 3.)

## P A R T R I D G E S.

*Vide Justices of Peace*, (B 46.)

## P A R T Y.

## Parties to an Agreement or Deed.

*Vide Chancery*, (2 C 13. 15.)—*Fait*, (B 1.—C 2.—D 2.—E 3.)

## Parties to an Action, or Suit.

*Vide Abatement*, (E 8, &c.—F 4, &c.)—*Action*, (B 1, &c.—C 1, &c.)  
—*Baron and Feme* (V &c.)—*Chancery*, (E 2.—T 3.—2 M 1, 2.  
—3 V 1, 2.)—*Parcener*, (A 4, 5.)

## Parties and Privies.

*Vide Fine*, (I 1.)—*Pleader*, (O 1, &c.)

## Act of Party.

*Vide Abatement* (H 41, &c.—O).

## Judge and Party.

*Vide Justices*, (I 3.)

## Misdemeanor of Jury, or Party.

*Vide Pleader*, (S 46, 47.)

## Neglect of Party.

*Vide Return*, (D 2.)

## Prece Partium.

*Vide Abatement*, (I 21.)

## P A T E N T.

## (A) Grant by the King; how made.

**T**HE king cannot grant, or take any thing, but by matter of record. *Vide Prerogative.*



## (B) The Form of Letters Patent.

**T**HE king in his patents was named in the singular number, till the time of king *John*: but since, has used the plural number.

2 *Inst.* 2.

So, the direction of patents, till *R. 2.*, was (and now is, of patents of dignity) *omnibus archiepiscopis, ducibus, marchionibus, comitibus, episcopis, &c.* But in other patents it is now, *omnibus ad quos presentes littere venerint, &c.* 2 *Inst.* 1.

So, the king, by his patent, ought to make a grant of lands.

But, by the *st. 31 H. 8. 13. s. 19.* a patent, by which the king bargained and sold lands which belonged to a monastery, (without the word *grant*;) being made after *27 H. 8.* and within three months after the *st. 31 H. 8.* shall be good. *R. Mo. 681.*

So, the clause of *his testibus* was used *temp. H. 3. Ed. 1. 2 & 3.* and before, in grants of franchises and inheritances. 2 *Inst.* 77.

And is now used in patents for creation of dignity. 2 *Inst.* 77. 1.

But *temp. R. 2. teste meipso* was inserted in the place of *his testibus*, in other patents. 2 *Inst.* 78.

## (C) Under what Seal made.

## (C 1.) The several Seals of the King.

**W**ILLIAM the Conqueror sealed his patents with an impression upon wax. 2 *Rol.* (180.) l. 45. 181. l. 30. *Vide Fait, (A 2.)*

So, *William Rufus.* (*Vide 2 Rol. 181. l. 36.*)

*Rich. 1.* first used a seal of arms for his seal. 2 *Rol.* 181. l. 21.

And after his return from *Jerusalem*, changed his arms from two lions combatant to three lions passant. 2 *Rol.* 181. l. 25.

The law takes notice of three seals of the king, the great seal, the privy seal, and the signet. 2 *Inst.* 554.

If mention be of the king's seal generally, it shall be understood of the great seal. 2 *Inst.* 555.

The great seal is in the custody of the chancellor, the privy seal in the custody of the clerk, or lord-keeper of the privy seal, and the signet in the custody of the principal secretary, who has four clerks of the signet. 2 *Inst.* 554, 5, 6.

## (C 2.) When under the Great Seal.

By the common law, no grant of the king is available, or pleadable, unless under the great seal. *R. 2 Co. 16. b. 2 Rol. 182. l. 5.*

And therefore, if the king presents to an advowson, to which he has a right *jure corona*, unless under the great seal, it shall be void. *R. Cro. Car. 99.*

So, a grant of all inheritances, or chattels real, ought to be by the great seal. *Mo. 476.*

A grant of a protection, or *essoine de servitio regis.* 2 *Inst.* 555. *Vide post. (C 5.)*

So, a grant of an office to another in fee, or for life, &c. *R. 11 Co. 4. a.*

So,

So, an office, or commission for entitling the king, ought to be under the great seal. *R. Cro. Car.* 173.

So, a grant of a ward ought to be under the great seal. *Cro. El.* 851.

So, the king's writ ought to be sealed with the great seal. *2 Co.* 17. b.

For, by the *st. Art. super Chartas*, 28 *Ed.* 1. 6. under the little seal shall not issue a writ which touches the common law. *Vide post.* (C 5.)

A grant under the great seal shall be good, where it might have been made under another seal: as, if the king presents to a church of his ward, under the great seal; tho' it might have been made under the seal of the court of wards. *Cro. Car.* 99.

If he grants lands within the duchy of *Lancaster*, rendring rent to the court of augmentations; tho' such rent was payable before to the duke of *Lancaster*; and the grantee shall pay only the latter rent. *Dal.* 9.

(C 3.) When under the *Exchequer* Seal.

But, by the course of the *Exchequer*, a lease for years by the king, by the *Exchequer* seal, will be good. *R. 2 Co.* 16. b. *2 Rol.* 182. l. 35. *R. 1 And.* 191. *2 Cro.* 109.

So, a lease for lives. *R. 2 Rol.* 182. l. 45. *Cro. Car.* 513.; for it is the antient usage of the court. *Dub. but no judgment.* *F, g.* 90. 290.

So, the grant of the benefit of an outlawry. *R. 2 Rol.* 182. l. 30.

So, the king may make any one bailiff of his manor, by patent under the *Exchequer* seal. *2 Rol.* 182. l. 25.

So, a commission under the *Exchequer* seal, for the information of the king only, will be good. *R. Cro. Car.* 173.

So, the custody of lands forfeited for attainder, &c. may be under the *Exchequer* seal. *R. 2 Cro.* 109.

So, a grant under the seal of the court of wards, of a thing which related to his ward, was good: as, a presentation to an advowson of his ward. *R. Cro. Car.* 99. *R. 2 Cro.* 248.

So, a lease by the king of the lands of the ward, during the ward's minority. *R. Cro. El.* 851.

But a presentation under the *Exchequer* seal is not good. *2 Cro.* 248.

(C 4.) Or the Duchy Seal.

So, a grant under the duchy seal, of lands within the county palatine of *Lancaster*, shall be as good as if it was under the seal of the county palatine of *Lancaster*. *Semb. 1 Ver.* 295. *R. 1 Lev.* 28.

So, leases in possession or reversion, of lands within the county palatine, under the duchy seal, are of the same validity as a lease of lands of the crown under the great seal. *4 Inst.* 209.

And by the *st. 3 H. 7.* grants of lands, advowsons, &c. parcel of the duchy of *Lancaster*, are void, if not under the duchy seal. *Vide Pl.* 218.

And therefore, a grant under the great seal only is not good. *Hard.* 171.

So, a grant to a corporation of lands within the duchy, is good under the duchy seal.

So,



So, the king may make a corporation under the duchy seal, within the county palatine; tho' not out of it. *Mo.* 167. *2 Leo.* 151.

So, a grant of the next avoidance of a church, the advowson of which belongs to the duchy, under the great seal, is not good; for it ought to be under the duchy seal. *2 Rol.* 182. *l.* 20.

So, a presentation to an advowson, parcel of the duchy, ought to be under the duchy seal. *R. cont.* that it may be under the great seal; for it is a fruit fallen, and not within the *st.* 3 *H.* 7. being but a recommendation of a clerk to the ordinary, which may be by *parol.* *1 Rol.* 182. *l.* 15. *Mo.* 874. *1 Brown,* 162.

(C 5.) Or, under the Privy Seal.

So, the king may dispose of a *seal* under his privy seal: as, he may issue his treasure under the great or privy seal. *11 Co.* 92. *2 Rol.* 183. *l.* 7. *Mo.* 476. *4 Inst.* 116. *2 Inst.* 555.

Or, make an obligation under his privy seal. *2 Rol.* 183. *l.* 15.

Or, discharge a debt. *2 Rol.* 183. *l.* 30. *Hard.* 204. *Sav.* 22.

Tho' it be a debt upon a recognizance forfeited. *2 Rol.* 183. *l.* 25. *2 Inst.* 555.

So, by the privy seal, the king may dispose armour, horses, or other personal things. *Mo.* 476.

Or, present to an avoidance: for an interest does not pass; but it is the nomination of a clerk to the ordinary, which may be by *parol.* *2 Cro.* 248.

So, the king may grant, by patent under his privy seal, to make a general attorney in all pleas. *2 Rol.* 183. *l.* 12. *F. N. B.* 26. *A.*

Or, may commit to another the office of chancellor in Ireland. *2 Rol.* 183. *l.* 17.

Or, make a warrant for a patent. *Semb. Dy.* 133. *b.*

So, the king may inhibit, by private seal, *quod ne exeat regnum.* *2 Rol.* 183. *l.* 28. *2 Co.* 17. *b.*

Or, require the levying of his debts. *Mad.* 593.

Or, make a *superfedeas* of process in the case of the king. *2 Inst.* 555.

Or, grant a *nisi prius*, where the king is a party. *Ibid.*

Or, allow a plea against the king. *Ibid.*

So, in other small matters which do not cause delay to the subject. *Ibid.*

But by the *st. Art. super Chartas* 6. *de south le petit ne isserra de formes nul brieve que touche le common ley.* *2 Rol.* 183. *l.* 20. *2 Inst.* 554.

So, a protection or warrant of *essoigne*, under the private seal, is of no force. *2 Rol.* 183. *l.* 30. *Vide ante,* (C 2.)

Nor, a grant of an office. *R.* 11 *Co.* 4. *a.* *Vide ante,* (C 2.)

(C 6.) Under the Privy Signet.

So, the king may forbid to go out of the realm, under the privy signet. *F. N. B.* 85. *A.* *2 Rol.* 183. *l.* 51. *2 Co.* 17. *b.* *2 Inst.* 556.

But the privy signet is not a sufficient warrant to issue treasure. *11 Co.* 92. *2 Rol.* 183. *l.* 50. *Mo.* 476. *4 Inst.* 116.

Nor, to discharge a debt. *2 Co.* 17. *b.* *2 Rol.* 183. *l.* 55.

Nor, to confess a bill in equity, which prays to be discharged from a debt or account. *R. Hard.* 204.

(C 7.)

## (C 7-) Sign Manual.

If the sign manual be to a grant or warrant, regularly it ought to be countersigned by a principal secretary of state, or the lords of the treasury. *Eq. Ca. 54. 209.*

And if it be but a direction for another act, as for letters patent to be made, &c. it is sufficient that it be countersigned. *Eq. Ca. 54.*

If it be of itself the principal act, it is countersigned, and also sealed by the signet, or privy seal. *Eq. Ca. 54.*

But where an act of parliament directs, that the king assign securities, &c. by his sign manual, it need not be countersigned. *Eq. Ca. 209.*

(D) The Manner of passing a Patent; by the Stat.  
27 H. 8. 11.

**I**F the king makes a grant by letters patent to be passed under the great seal, by the *st. 27 H. 8. 11.* every gift, grant, or writing made by the king, or any of his posterity, for that intent, to any person, signed by his sign manual, before it pass any of his seals, or other process be made of the same, shall be brought to the king's principal secretary, or one of the clerks of the signet, to be passed at the office of the signet.

And this extends to any gift or grant, &c. to pass the great seal of England, Ireland, duchy of Lancaster, or other county-palatine, or principality of Wales, or by other process out of the *Exchequer*; and to all grants, which the master of the wards, or surveyor-general of the king's lands, or other officer, by act of parliament, or the king's grant, made or to be made, can make. *By the same statute.*

By the same *st. 27 H. 8. 11.* one of the clerks of the signet, to whom such writing shall be delivered signed with the king's hand, shall, by warrant of the same bill in eight days after its receipt, (unless he have knowledge from the king's principal secretary, or, otherwise, of the king's pleasure to the contrary,) make in the king's name, letters of warrant under the hand of such clerk, and sealed with the king's signet, to the lord-keeper of the privy seal, for further process to be had therein. *Vide 2 Inst. 556.*

And the clerk of the privy seal, by examination of the warrant from the signet by the lord privy-seal, shall in eight days (unless commanded by the lord privy-seal to the contrary) make other letters of like warrant, subscribed by the said clerk of the privy seal, to the lord chancellor or keeper, chancellor of the duchy of Lancaster, or Ireland, treasurer and chamberlain of the *Exchequer*, chamberlains of other county-palatine, or principality of Wales, or other officer, and every of them, by writing, and sealing with their seals in their respective custodies, letters patent or close, or other process requisite to such grants. *By the same stat. sect. 2.*

And no clerk, or other person, shall make or procure any warrant, grant, &c. to be passed under the said seals in other fashion, on pain of 10 l., a moiety to the king, a moiety to him that will sue, &c. *By the same stat. sect. 3.*

Provided, not to prejudice warrants or precepts which the lord-treasurer, by virtue of his office, may direct immediately to the lord chancellor,



chancellor, &c. for making grants, or letters patent from the king, of any offices, farms of lands, &c. belonging to his nomination or disposition: but that the same may pass without signet or privy seal, as before. *By the same stat. sect. 5.*

Provided, leases of lands, &c. in the county-palatine of *Lancaster*, or duchy of *Lancaster*, which the chancellor may grant in the king's name, may pass under the seal of the duchy, &c. as heretofore. *By the same stat. sect. 6.*

Provided, not to prejudice any, whom the king by express command directs to procure any thing to be sealed with the king's seals, concerning the king's private affairs, or the affairs of the realm; but such things may be written and sealed without warrant or fees, at the signet or privy seal. *By the same stat. sect. 11.*

But if a patent passes by bill signed, without a privy seal, the patent is subscribed *per ipsum regem*, and the bill signed remains with the chancellor for his warrant. 8 Co. 18. b. *The Prince's Case.*

If it passes by bill signed and privy seal, the bill signed remains with the clerk of the signet, and an extract of it is made by the lord privy-seal, for making the privy seal, and the privy seal remains with the chancellor, and the patent is subscribed, *per breve de privato sigillo*. 8 Co. 18. b. *The Prince's Case.*

*Et auctoritate parliamenti* is added if it passes according to the stat. 27 H. 8. 11. 8 Co. 18. b. *The Prince's Case.*

If the king signs the patent itself in the upper part, and the signature goes with the great seal, it is subscribed *per ipsum regem manu sua propria*. 8 Co. 118. b. *The Prince's Case.*

If it be made by authority of parliament, it is subscribed, *per ipsum regem & totum concilium in parlamento*. 8 Co. 19. a. *The Prince's Case.*

If a warrant for a patent be dated 31 Oct. 37 H. 8. and upon delivery to the chancellor, a memorandum is indorsed 1 Dec. deliberat., omitting the year, yet being filed among the memoranda of the 37th year, and the patent being dated 1 Dec. Anno 37 H. 8. it will be well. *Semb. Dy. 133. b.*

### (E) Inrolment of a Patent.

SO, a patent ought to be inrolled; otherwise it will be void. *Vide post. (G).*

And therefore, if a lease for years be acknowledged before commissioners, with a prayer that it be inrolled, and such prayer be indorsed, but the lease to the king never is inrolled in the life of the lessor, or of the king, it will be void. *R. Lane, 35. 60. Vide infra.*

[And the patent must be inrolled within the time limited; and if, by any mistake, it be not inrolled within that time, the date cannot be altered in favour of the patentee. 1 Brown, Ch. Rep. 578.]

If an officer surrender his office, and his surrender is recorded in court, yet if the patent is not delivered to be cancelled, the surrender is not effectual. *Semb. Dy. 176. Vide post. (G).—Vide Officer (K 9.)*

So, if a patent be delivered to be cancelled, but there is no actual surrender, or cancelling, or *vacatur* entered of the inrolment of the patent, it is not sufficient. *Semb. Lane, 14.*

But if a deed, by which a grant is made to the king, be acknowledged

leged before a master in *Chancery*, and delivered to be inrolled, it is sufficient, tho' it be not inrolled, but put into a chest: for, if it be in *filaciis* or *memorandis* of the *Exchequer*, it may be inrolled at any time. *Cont. Dy. 355. a. But the opinion is denied there in marg. and said to be R. acc. Mo. 676. Hut. 1.*

So, if a deed be inrolled, by mistake, before the day of the date. *R. Mo. 676.*

So, if it be acknowledged before the attorney of augmentations, out of court; for he is a judge of the court. *Ibid.*

So, if a prayer, that it be inrolled, be indorsed, it is sufficient; tho' it be not inrolled till after the death of the king. *Semb. Lane, 32. But in this case it was R. cont. Lane, 35. 60. Vide supra.*

[A patent is void, if the specification be ambiguous, or give directions which tend to mislead the public. *1 T. R. 602.*]

[So, if the patentee say that by one process he can produce three things, and he fail in one. *Ibid.*]

[So, if the specification direct the same thing to be produced several ways, or by several different ingredients, and any one of them fail. *Ibid. Vide Trade, (D 4.)*]

[Not sufficient for the party applying for a patent merely to answer objections to its being granted, but must make out a proper case for it. *Ex parte, O'Reily, 1 Ves. jun. 112.*]

[On such application, the lord chancellor will take care that the king is not deceived, nor his object disappointed, and will represent the whole matter to his majesty; but will not decide on the merits of the various claimants. *Ibid.*]

[Will not sign a patent which does not put the parties under some control, altho' there be no *caveat*. *Ibid.*]

[*Qu.* Whether a patent can be the subject of a trust? *Ibid. 123.*]  
*Vide Estoppel (C).*

## (F) Repeal of a Patent.

### (F 1.) In what Cases it may be.

(F 1.) *Where the patent was of a thing [F the king grant a thing not which the king could not grant.]* grantable, he, *jure regio*, for the advancement of justice and right, may have a *scire facias* for repealing his own letters patent. *4 Inst. 88.*

As, if he grant lands which were conveyed to the king by covin to defeat a subject of his feigniory. *Dy. 269. a.*

If the king grant possessions, part of the duchy of *Cornwall*, his eldest son, when born, may have a *scire facias*, in the name of the king, for repealing it, without alleging fraud, &c. *2 Rol. 162. l. 5.*

But if the patent be void in itself, *non concessit* may be pleaded to it, without a *scire facias* to repeal it: as, if a commission be, that, upon a discovery of defective titles, a grant shall be made upon the warrant of the commissioners, without other warrant, and a patent is made by their warrant, of a thing out of their commission. *R. 2 Rol. 191. l. 20.*

[Patent even in *fee* cannot stand, if abused. *Ex parte, O'Reily, 1 Ves. jun. 118.*]



(F 2.) *Or, founded upon a false suggestion.*] So, if a grant be founded upon a false suggestion, the king, *jure regio*, may have a *scire facias* for repealing it. 4 *Inst.* 88. 2 *Rol.* 191. l. 35.

As, if it recites another to have an office, and grants it *cum post mortem, sursum redditionem*, &c. *vacare contigerit*; when he had then forfeited it. *Dy.* 197. b.

If a patent be for a market, *ad nocumentum* of another market. *R.* 3 *Lev.* 221.

Tho' a writ of *ad quod damnum* was executed before the patent passed, which found it not *ad nocumentum*. *R.* 2 *Vent.* 344.

(F 3.) *Or, a forfeiture be committed.*] So, if an officer makes a forfeiture of his office, granted by patent, the king may have a *scire facias* for repealing his patent. *Dy.* 197, 198. 211. a. *Vide post.* (F 5.) —*Vide Officer*, (K 11.)

And that, without an inquisition, or office found of the forfeiture. *R.* *Dy.* 211. a.

(F 4.) *If there are two patents of the same thing.* When a *scire facias* lies by the patentee.] So, if the king grant, by his letters patent, the same thing to several persons, a *scire facias* lies for repealing the last patent. 4 *Inst.* 88.

And, in such case, the *scire facias* shall be brought by the first patentee. 4 *Inst.* 88. *Dy.* 197. b. 198. a. *Adm. Dy.* 133. b. 2 *Rol.* 191. l. 50. *Cont.* 39 *H.* 6. 33.

Tho' both patents are made of the reversion of an office, to take effect at the same time. *Dy.* 198. a.

And a *scire facias* by the last patentee shall not be allowed, tho' he seems to have the right with him. *R.* *Dy.* 276. b. 277. a. *Vide post.* (F 5.)

So, if a patent be made to the prejudice of another, he may have a *scire facias* to repeal it: as, if a market, fair, &c. be granted to the annoyance of an antient market of another. *Dy.* 276. b.

So, if a tenure be found of the king by office, upon which the king grants the ward, after traverse of the office, *A.*, who was really the lord, may have a *scire facias* against the grantee. 2 *Rol.* 191. l. 45.

(F 5.) *When a scire facias is not necessary.*] But if there be only one patent, the patentee shall not be ousted by the king for a cause of forfeiture, without a *scire facias* against him at the suit of the king. *Dy.* 198. a. *R.* *Dy.* 211. a. 2 *Rol.* 192. l. 2.

Except where the cause of forfeiture appears by office, or other record: for then the king may oust the patentee without a *scire facias*. *R.* 9 *Co.* 95, 96. 2 *Rol.* 191. l. 10.

If the king grants by patent to *A.*, and afterwards by a second patent grants another thing to *B.*, who by colour of it ousts *A.*, where in truth *A.* had not a grant for the same thing; he shall not have a *scire facias*, but an assize. 2 *Rol.* 192. l. 12.

If the king grants the same thing to divers, by two several patents, the second patentee cannot have a *scire facias* against the first. 2 *Rol.* 191. l. 52. *Vide ante*, (F 4.)

(F 6.) *Scire facias for repealing a patent.* In what court it lies.] A  
scire

*scire facias* for repealing a patent may be sued in *Chancery*. 4 *Inst.* 79. 88. *Dy.* 197. *b.* 3 *Lev.* 220. *Vide Chancery*, (C 1.) *Vide ante*, (F 1, &c.)

[If *scire facias* out of the Petty Bag is returnable *coram nobis in cancellaria nostra in octab.* &c. *ubicunque tunc fuerit*, it is good without being limited *ubicunque in Anglia*. *Rex v. Hare*, H. 5 G. Str. 146.]

So, a *scire facias* for repealing a patent of the king, may be brought in *B. R.* 4 *Inst.* 72.

If it be returnable there, only *B. R.* hath jurisdiction to examine the irregularity of the issuing, return, &c. *Mod. Ca.* 229.

It may be sued by the king, or by him who has a prejudice by the patent. *R. Mod. Ca.* 229.

(F 7.) *In what manner used.* A *scire facias* ought to be founded upon some record; and therefore, a *scire facias* to repeal a patent ought to be in *Chancery*, where the patent is upon record; or in a court where a forfeiture, or other cause of repeal appears by office, or other matter upon record in the same court. *R.* 3 *Lev.* 223. *Semb. Mod. Ca.* 229.

But the patent itself is a sufficient record, upon which a *scire facias* may be founded for repealing the patent. *R.* 3 *Lev.* 223.

So, an inquisition, which finds a patent, and a cause of forfeiture, is a sufficient ground for a *scire facias*. *Vide Officer*, (K 11, &c.)

So, an information, or an indictment, for an offence which is a cause of forfeiture, and a conviction in it:

A *scire facias* is sufficient, if it alleges a matter by *datum est nobis intelligi quod*, &c.; for that is sufficient to put the party to an answer. *R.* 3 *Lev.* 222.

So, if a *scire facias* be by the king for repealing a patent upon a forfeiture of an office, the cause of forfeiture ought to be mentioned in the writ. *Dy.* 198. *b.*

But if a *scire facias* be by a former patentee, the writ need not mention any cause of forfeiture. *Dy.* 198. *b.*

(F 8.) *Plea to a scire facias, and judgment upon confession, or by default.* If the defendant in a *scire facias* can say nothing for maintaining the patent, judgment may be for annulling the patent upon his confession. *Dy.* 197. *b.*

So, judgment shall be in the same manner, if the defendant, being returned warned, makes default. *Dy.* 197. *b.* 2 *Rol.* 192. *l.* 20. 25.

Or, if the default be upon two *nibils* returned. *Dy.* 198. *a.*

So, the defendant may demur upon a *scire facias*, if the matter alleged be not sufficient for a repeal of the patent. 3 *Lev.* 221.

[That the *grant* (without mentioning the user) is to the prejudice of, &c. is a good issue. *Rex v. Eyre*, H. 3 G. Str. 43.]

The judgment in a *scire facias* for repealing a patent shall be, *quod litera patentes domini regis revocentur, cancellentur, evacuentur, & annullentur, & vacua, invalide, & pro nullo penitus habeantur, ac quod irrotulamentum eorum cancelletur, cassetur, & adnibiletur.* 4 *Inst.* 88. *Dy.* 197. *b.*

### (G) Surrender of a Patent.

SO, if a man surrender his patent, and it be cancelled, and a note of it indorsed, and afterwards the surrender inrolled, it shall be vacated by it. *Dy.* 167. *a.*



And after the *vacatur* entred upon the roll, a *constat* of it shall not be granted. *Dy. 167. a. in marg.*

If a patent be to two, and the chancellor makes a duplicate, and delivers the original to one, and the duplicate to the other, a surrender of the original patent is sufficient, tho' the duplicate be not surrendered or cancelled; for the duplicate was made by the chancellor, without warrant. *R. Dy. 179. b.*

But a surrender, and cancelling with an indorsement of it, is not sufficient, if the surrender be not inrolled. *Dy. 167. a. 195. a.*

Nor, a surrender to a master in *Chancery* out of court, which was accepted by him, and inrolled, without delivery of the patent to be cancelled. *Semb. Dy. 176. Vide Officer, (K 9.)*

*Vide ante (E).*

### (H) How a Patent shall be pleaded.

**I**F a man pleads a grant by letters patent, he ought to shew under what seal. *Per Hale, 1 Vent. 222.*

[When the defendant pleaded letters patent to a *quo warranto* information, and made a profert of them, the court refused *oyer* in another term than that in which the profert was made. *1 T. R. 149.*]

*Vide Pleader, (C 62, &c.)*

### Right Patent.

*Vide Droit (B 1, &c.—D).*

*Vide more relating to Patent, in Dignity, (C 4.)—Disfranchisement, (C 5.—E 7.)—Grant, (G 1, &c.)—Parliament, (L 36.)—Viscount, (G 5.)*

### P A T R O N.

*Vide Advowson.—Ecclesiastical Persons, (C 10, 11.)—Esghise, (H 2. 5.)—Visitor, (A 4.)*

### P A U P E R.

*Suit in Forma Pauperis,*

*Vide Formâ Pauperis.*

### Poor.

*Vide Justices of Peace, (B 64, &c.)*

### P A W N.

*Vide Mortgage.*

### P A W N A G E, or P A N N A G E.

*Vide Chase, (O 2.)—Grant, (E 8.)*

### P A Y M E N T.

*Vide Chancery (4 F.)—Merchant, (F 1, &c.)—Pleader, (2 G 10.—2 W 29.)*

### Payment of Debts.

*Vide Administration*, (C 1, 2.)—*Chancery*, (3 A 3, &c.—3 P 1, &c.—4 H 1.—4 W 14.)

### Payment of Legacies.

*Vide Administration*, (C 3, &c.)—*Chancery*, (3 A 3, &c.—3 G 2, &c.—3 Y 3. 6.)

### P E A C E.

*Vide Lect*, (M 9.)—*Prærogative*, (D 1, &c.)

### Justices of Peace.

*Vide Title Justices of Peace*.—*Dismes*, (M 4.)—*Forcible Entry*, (A 1.—D 1, &c. 12, &c.)—*London*, (K 6.)

### Clerk of the Peace.

*Vide Justices of Peace*, (D 5.)

### Contra Pacem.

*Vide Action upon the Case*, (C 4.)—*Pleader*, (3 M 8.)—*Prohibition*, (F 7.)

### Surety of the Peace.

*Vide Forcible Entry*, (D 16, &c.)—*Justices of Peace*, (B 5, 6, 7.)

### P E C U L I A R.

*Vide Administration*, (B 6.)—*Administrator*, (B 3. 5.)

### PEER AND PEERAGE.

*Vide Abatement*, (D 4.)—*Chancery*, (D 2.)—*Dignity, per totum*.—*Ecclesiastical Persons*, (C 1.)—*Nobility*.—*Officer*, (E 5.)—*Parliament*, (L 16, &c.)—*Scotland*, (D 4. 6.)—*Serement* (C).

### P E N A L S T A T U T E.

*Vide Action upon Statute, per totum*.—*Forfeiture* (C).—*Parliament*, (R 19, 20.)

### P E N A L T Y.

*Vide Allegiance*, (B 4.)—*Chancery*, (3 S 2.—4 D 16. 19.)—*Forfeiture*.—*Herefy*, (B 6.)—*Penal Statute*.—*Prærogative*, (D 60.)

### P E N S I O N S.

*Vide Prohibition*, (G 11.)—*Tenths* (D).

### PERAMBULATION OF A FOREST.

*Vide Chase*, (G 1.—I 1, 2.)



## PERAMBULATIONE FACIENDA.

*Vide Pleader, (3 G.)*

## PERFORMANCE.

*Vide Chancery, (2 C 1, &c.—2 X 1, 2.—4 D 4. 14.)—Condition, (G 1, &c.—K 1.—L 1, &c.—M 2, &c.—Covenant, (E 2.)—Estates, (A 7, 8.)—Pleader, (C 51, &c.—2 G 15.—2 V 13.—2 W 33.)*

## PERJURY.

*Vide Action upon the Case, (B 7, 8.)—Justices of Peace, (B 102, &c.)*

## PERPETUITY.

*Vide Chancery, (4 G 1, &c.)*

## PERSONATING.

*Vide Action upon the Case for a Deceit, (A 3.)*

## PETITION.

*Vide Parliament, (F 1, &c.—L 2. 14, 15.)—Prærogative, (D 78, &c.)*

## PETIT CAPE.

*Vide Process, (D 5.)*

## PETIT CONSTABLE.

*Vide Leet, (M 6.)*

## PETIT LARCENY.

*Vide Justices, (O 4.)*

## PETIT TREASON.

*Vide Forfeiture, (B 3. 5.)—Justices, (L 1, &c.—Y 4.)*

## PHEASANTS.

*Vide Justices of Peace, (B 46.)*

## PHYSICIANS.

## (A) Physicians; The College of Physicians.

**A**LL medicines are administered by physicians, apothecaries, or surgeons.

By charter 23 Sept. 10 H. 8. the king incorporated the physicians in London, *per nomen presidentis & collegii, sine communitatis facultatis medicina* London. 8 Co. 108. 114.

And

And granted by the same charter, that within 7 miles of *London*, or within *London*, none shall practise physic, if he be not allowed by the president and college, *sub pœna* 5 l. *per mensem*, a moiety to the king, a moiety to the college. 8 Co. 114.

And that there be four censors annually chosen by the college, *qui habereant scrutinium, correctionem, et gubernationem omnium medicorum facultatem illam uten. in London, aut suburbia, aut 7 milliar. in circuitu ejusdem civitat., et omnium medicinarum, &c.* (Vide 8 Co. 114. b.)

By the *st.* 14 H. 8. 5. this corporation, and every clause in the same charter, are confirmed.

And afterwards, by the *st.* 1 Mar. 9.

So, by the same *st.* 1 Mar. 9. it is enacted, that if the said president and college, or such as they yearly authorise to search, examine, correct, &c. commit any offender for his offence, to any prison in *London*, the gaoler, &c. shall keep him without bail, till discharged by the president, or those authorised, &c. on pain of double the fine or amerciamment assessed on the offender; so as such fine, &c. exceed not 20 l. at any one time; a moiety to the king, a moiety to the college.

So, by the *st.* 14 H. 8. 5. no person shall practise physic thro' *England*, till examined at *London* by the president and three elects, and having letters testimonial from them; except he be a graduate of *Oxford* or *Cambridge*, &c.

[A doctor of physic, who has been licensed by the college of physicians to practise physic in *London*, and within seven miles, cannot claim as a matter of right to be examined by the college in order to his being admitted a fellow of the college. *Rex v. Coll. of Phy. E. 37 Geo. 3. 7 T. R. 282.*]

[The college, who have power by their charter (confirmed by act of parliament) to make bye-laws, have made bye-laws respecting the qualifications of persons to be admitted into the college; by them it is ordained that no person shall be admitted into the class of candidates before admission into the college, unless he has taken a degree of M. D. at *Oxford*, *Cambridge*, or *Dublin*; except in two cases; in one of those cases, the president may propose once in every other year a doctor of physic of a certain standing, and if he be approved of the college he may be admitted a fellow; — in the other any fellow may propose a doctor of physic of a certain age and standing, and if approved at certain meetings he may be admitted a fellow. It was ruled that these were reasonable bye-laws. *Ibid.*]

And therefore if any (not a graduate of one of the universities) practise physic in *London*, or within 7 miles, without licence of the college of physicians, he shall be subject to 5 l. *per month* penalty. R. 2 Bul. 185.

Tho' he be a man of skill: for the *st.* 14 H. 8. 5. extends to all physicians, *Pal.* 486.

So, if he practise in another part of the kingdom, without their licence.

Tho' the king, by patent, grants him a licence to practise. R. 4 Mod. 47.

And this penalty of 5 l. *per month* every one will be subject to pay, tho' he does not use male-practice. 8 Co. 117. b.

And an information lies for the penalty. *Ibid.*



Or, an action of debt by the president and college, *qui tam*, &c. 2 *Cro.* 121. *Cro. Car.* 256.

And, if the president dies after judgment, and before execution, his successor, and not his executor, shall have execution. 1 *Brownl.* 93. 2 *Cro.* 159.

But an action does not lie by the president alone. [R. 2 *Bul.* 185.

So, for male-practice of physic, the censors may punish any one by fine, amerciamment, imprisonment, &c. *secundum quantitatem delicti.* 8 *Co.* 117. b.

Tho' he did not use male-practice for the space of a month. 8 *Co.* 117. b. 120. b.

And they may, for cause allowed by the charter and statute, impose a reasonable fine, and make a record of it, and for non-payment immediately imprison him. 8 *Co.* 120. 121.

And therefore they have a judicial power in cases within their consuance. R. 1 *Sal.* 396. *Cart.* 494.

And they are a court of record: for otherwise they could not fine and imprison. *Ibid.*

And therefore, if they make a judgment of a thing within their consuance, it cannot be traversed: as, if they determine any medicines to be hurtful and unwholesome. *Ibid.*

But, by the *st.* 14 *H.* 8. 5. none shall practise physic thro' England, except a graduate of Oxford or Cambridge, who hath accomplished, &c. his form, without any grace.

And therefore, a graduate in an university may practise physic, without licence of the college, in any part of the realm, out of London, or the suburbs. 2 *Brownl.* 251.

So, he may in London, or the suburbs; for he is not within the enacting part of the statute, or at least he is excepted by the exception. *Per Daniel J. Warburton cont.* 8 *Co.* 116. b.

So, any may practise in London, without a licence, if he does not use it for a month. 8 *Co.* 117. b. 120. b. 2 *Brownl.* 264.

And if he uses it for a month, he can have no other punishment than 5 *l.* per month. 8 *Co.* 120. b.

So, an apothecary may send physic to a patient, for a distemper which he knows, without direction by a doctor, tho' he has not a licence. R. *cont.* B. R. But this was reversed in parl. *Mod. Ca.* 44.

So, the censors have no power, by charter or statute, to punish any by fine or imprisonment for practising physic without licence; for their power of punishment extends only to male-practice. R. 8 *Co.* 117. 120. 2 *Brownl.* 264.

So, they cannot impose a fine, but for a certain cause. 8 *Co.* 121. a. *Skin.* 676.

Neither can they impose a fine for themselves; for the fine belongs to the king. R. 8 *Co.* 119. b. 121. a.

Neither ought it to be imposed by the president and censors, but by the censors only. 8 *Co.* 119. b.

Neither ought it to be imposed, without making a record of it. 8 *Co.* 120.

And if there be imprisonment for non-payment, it ought to be inflicted immediately. 8 *Co.* 119. b. 120. a.

1. a remedy for a fine, or penalty, ought not to be by plaint before

fore themselves; but by action, &c. at the common law. 2 *Brownl.* 265.

So, none shall be fined, and also imprisoned for the same offence. *Ibid.*

### (B) Privilege of a Physician,

SO, by the *st.* 32 *H.* 8. 40. the president or fellows of the college of physicians shall not exercise the office of constable, or other office in *London*, or the suburbs, nor keep watch or ward; but if chosen to the office, &c. his election shall be void.

[The fees of a physician are honorary, and not demandable of right; and a physician cannot maintain an action for them. *Chorley v. Balcot*, B. R. T. 31 *Geo.* 3. 4 T. R. 317.]

### (C) Apothecary.

BY the *st.* 32 *H.* 8. 40. mention is made of the wardens of the mystery of apothecaries in *London*.

And, by the same statute, the president of the college of physicians may yearly appoint four most discreet of that faculty, who being, sworn by the president, may, as oft as they see fit, enter the houses of apothecaries in *London*, to search wares, &c. And such as they find corrupt or unmeet for medicines, to destroy: and an apothecary refusing entrance for such purpose, forfeits 5 *l.* for each offence. And a person elected, refusing to be sworn, or make search, &c. 40 *s.*

### (D) Surgeon.

BY the *st.* 3 *H.* 8. 11. no person in *London*, or seven miles, shall practise physic or surgery, unless examined and allowed by the bishop of *London*, or dean of *St. Paul's*, with four doctors of physic, and for surgery, others expert, (four at least so approved,) on pain of 5 *l.* per month, &c.

And this statute continues as to surgeons, tho' as to physicians it is varied by the *st.* 14 *H.* 8. 5. and 1 *Mar.* 9.

But, by the *st.* 3 *H.* 8. 11. a graduate of either university is excepted.

So, by the *st.* 32 *H.* 8. 40. since the science of physic comprehends the knowledge of surgery, the president and fellowship of physicians, or the fellows admitted by them, may practise physic in all its parts.

[By *st.* 32 *H.* 8. c. 42. the surgeons of *London* are incorporated with the barbers of *London*; but they are separated from them by *st.* 18 *G.* 2. c. 15.]

[But the latter act only dissolves the union. The two separated companies remain under the same regulations as before. 4 *Bur.* 2133.]

So, by the *st.* 34 *H.* 8. 8. any subject, who hath the science or experience of herbs, roots, or water, by speculation or practice, may minister, &c. to any outward sore, swelling, disease, &c. in *London*, or elsewhere, any herbs, ointment, baths, plaisters, &c. according to their cunning, or drinks for the stone, stranguary, or agues, without penalty, &c.

And



And this liberty for application in surgery to external fores, &c. for potions in three particulars, continues not repealed by the *st. 1 Mar. 9.* which regards physicians. *Per Cro. Richardson cont. Cro. Car. 257. Lit. 169, 212. 351. Jon. 261. R. cont. 2 Cro. 121.*

Yet the *st. 34 H. 8. 8.* enables only to make application to external fores, &c. not to internal.

So, it extends only to good women in the country, &c. who act for charity; not to those who administer for profit. *R. Lit. 351.*

## P I C A G E.

*Vide Market, (F 2.)*

## P I E - P O W D E R.

*Vide Market, (G 1, 2.)*

## P I L L O R Y.

*Vide Leet (K).—Tumbrel (B).*

## P I O U S U S E S.

*Vide Uses, (M—N 1, &c.)*

## P I P E.

*Vide Courts, (D 9, 13.)*

## P I R A C Y.

*Vide Admiralty, (E 3.)*

## P I S C A R Y.

## (A) The Nature of the Privilege.

[THE right of fishing in the sea is a right common to all the king's subjects; and therefore, a prescription for such a right as annexed to certain tenements, is bad. *Ward v. Creswell, C. P. T. 14 & 15 Geo. 2. Willes, 265.*]

A piscary is the liberty of fishing in the water of another. *Nom. verb. Piscary.*

And this liberty may be claimed by grant or prescription. *Vide Prerogative, (D 50.)*

By a grant of a piscary, the liberty only passes, and not the soil. *Co. L. 4. b. Cont. Dav. 55. b.*

And a grant may be made *de liberâ, vel de separali piscariâ.*

If a grant be *de separali piscariâ*, the grantee ought to have the soil; for in trespass for fishing in *separali piscariâ, liberum tenementum* of another, is a good plea. *Sal. 637.*

If a grant be *de liberâ piscariâ*, the grantee shall have the property of the fish there, and shall maintain trespass for fishing there. *Semb. Sal. 637. 4 Mod. 186, 7. Skin. 342.*

And

And it may be a free fishery in his own soil. *Skin. 678.*

So, by a grant of the water, the fishery passes, but not the soil.  
*Co. L. 4. b. Dav. 55. b.*

So, the water may belong to one; all the profits in it, and the soil, and ferry to another. *Sav. 14.*

Yet, a man may have an estate of freshold or inheritance in a fishery. *Dav. 55. b.*

And may make livery upon a grant of a several fishery. *Co. L. 4. b.*

So, an assise lies of a several fishery. *Dav. 55. b.*

So, it may be demanded by a *precipe*. *Ibid.*

So, a *quod permittat* lies of a fishery. *Ibid.*

And a *monstraverunt*. *Ibid.*

So, a writ *de rationalibus divisis*. *Dav. 57. b.*

[By *st. 5 G. 3. c. 14. s. 3.* persons taking, killing, or destroying any fish, in any river or stream, pond, pool, or other water, (not being in any park or paddock, &c.) shall forfeit for every offence the sum of 5*l.* to the owner, &c. to be recovered before a justice of peace.]

[Or, by *s. 4.* the owner may recover the penalty by action, brought within six calendar months next after the offence committed.]

[But by *s. 5.* none are subject to the penalties of this act who have a just right or claim to take, kill, or carry away any such fish.]

[By virtue of the latter clause, a person who fishes in a fishery belonging to another, but to which he has a claim, for the purpose of giving occasion to an action in order to try the right, is not liable to the penalty under this statute. *Doug. 517.*]

If a man justifies for using a piscary, he ought to shew whether it be a common, free, or several piscary. *R. Hard. 407.*

So, whether it be appurtenant to a manor or messuage, &c. for it is an interest, and not an easement. *Hard. 407.*

### (B) Ferry.

SO, a ferry does not belong to him who has the water, for a fishery in it. *Sav. 11.*

A ferry is a franchise, which cannot be set up without the king's licence. *Hard. 163.*

If it be erected by licence, another cannot erect a ferry to the nuisance of it. *Vide Action upon the Case for a Nuisance (A).*

Tho' it be upon his own soil. *Cont. Hard. 163.* But the reporter makes a qu.

But he who has the privilege of a ferry, ought to have a right to the soil upon both sides of the water; for he cannot land upon the soil of another, without his assent. *Sav. 11.*

A ferryman ought to be privileged, that he be not taken for a soldier. *Ibid.*

A common ferryman may be indicted, if he does not keep his ferry in good repair. *Hard. 163.*

So, an action upon the case lies against him, if he refuses passengers, or takes excessive prices. *Hard. 163. Adm. Carth. 191. 194.*

And it is sufficient to say, that all the inhabitants of the town have used *transire ad libitum*. *R. Carth. 191.*

And it is no excuse, that he built and repaired a bridge for passage. *R. Carth. 193.*

But



But an action upon the case does not lie, for not keeping his ferry, without special damage, ~~any~~ more than for a common nuisance. *R. Carth.* 194.

[If there be an exclusive ferry from *A.* to *B.*, it does not prevent persons from going by any other boat from *A.* directly to *C.*, tho' it be near *B.*, provided it be not done fraudulently, and as a pretence for avoiding the regular ferry. *Tripp v. Frank*, *B. R. E.* 32 *Geo.* 3. 4 *T. R.* 666.]

## P L A C E.

*Vide Pleader*, (S 9, &c.)—*Privilege*, (A 2.)

## P L A I N T.

*Vide Abridgment*.—*Affise*, (B 11.)—*County*, (C 8. 12.)—*Courts*, (P 7.)—*Pleader*, (C 9.—3 K 2.)

## P L A N T A T I O N S.

*Vide Navigation*, (G 1, &c.)

## P L A Y.

*Vide Action upon the Case for a Deceit*, (A 1.)—*Bankrupt*, (D 38.)—*Justices of Peace*, (B 42.)—*Pleader*, (2 G 8.—2 W. 26.)

## P L E A.

*Vide Abatement, per totum*.—*Accomp*, (E 3, &c.)—*Accord*.—*Action upon the Case upon Assumpsit*, (H 5, 6. 8.)—*Action upon the Case for a Deceit*, (F 4.)—*For a Disturbance*, (B 2.)—*For Negligence*, (C 3.)—*For a Nuisance*, (E 2.)—*Action upon the Case upon Trover*, (G 6.)—*Admiralty*, (E 21.)—*Amendment* (K 1.—M).—*Antient Demefne*, (F 5, 6.—G 2, 3. 5.)—*Annuity* (F).—*Appeal*, (G 3. 7, &c.)—*Arbitrament*, (I 4.)—*Affise*, (B 12, &c.—C 3, 4.)—*Attachment* (H—I).—*Attaint*, (C 4.)—*Attornment* (M).—*Attorney*, (B 22.)—*Bail*, (R 3, &c.)—*Bankrupt*, (D 35. 39.)—*Bargain and Sale*, (B 12.)—*Baron and Feme* (2 D).—*Bastard*, (D 1.)—*Chancery*, (I 1, 2.)—*Charters*, (B 3.)—*Copyhold*, (P 4.—Q 7.)—*Courts*, (P 10.)—*De-wife* (P).—*Disfmes*, (M 15.)—*Droit*, (C 5.)—*Error* (D).—*Fine*, (H 1, 2.)—*Indictment* (K—L).—*Information*, (D 5.)—*Justices*, (W 3.)—*Parliament*, (L 4.)—*Patent* (F 8.—H).—*Pleader*, (E 1, &c.—M 2.—O 2.—Q 6.—Y 3.—2 A 3.—2 D 3, &c. 12, &c.—2 E 3.—2 G 1, &c.—2 L 2, 3.—2 S 11. 17.—2 V 4, &c.—2 W 13. 16, &c.—2 X 3, &c.—2 Y 4, &c.—2 Z 3.—3 A 8.—3 B 18, 19.—3 E 4.—3 F 3.—3 I 7, &c.—3 K 11, 12.—3 L 10, &c.—3 M 11, &c.—3 N 4.—3 O 7, &c.)—*Poiar* (F).—*Prerogative*, (D 74.)—*Prescription* (H).—*Quo Warranto*, (C 4.)—*Receipt*, (B 3.)—*Surrender* (N).—*Temps*, (G 19.)—*Voucher*, (B 1, 2.—F 1, 2.)—*Utilagary*, (C 2.)

## Common Pleas.

*Vide Courts*, (C 1, &c.)—*Pleader*, (C 4. 11, &c.—3 B 2.)—*Quod Permittat*, (D 2.)

## Conuſance of Pleas.

*Vide Courts, (P 1, &c.)*

## Court of Pleas.

*Vide Chancery, (A 1.)—Courts, (D 2.)—Dett, (G 14.)*

## P L E A D E R.

### (A) The Advantage of Pleading.

[THE substantial rules of it are founded in strong sense, and in the soundest and closest logic; and so appear, when well understood and explained; tho', by being misunderstood and misapplied, they are often made use of as instruments of chicane. *D. per Ld. Mansfield. Robinson v. Raley, P. 30 G. 2. 1 B. M. 319. Dougl. 666.*]

[In the absence of decided cases, the books of entries and the returns of writs are the best authorities. By *Alburt J. Boothman v. Surry, B. R. T. 27 Geo. 3. 2 T. R. 10. 3 T. R. 161.*]

[Pleading is the formal mode of alleging that on the record, which would be the support or defence of the party on evidence. By *Buller J. Read v. Brookman, B. R. E. 29 Geo. 3. 3 T. R. 159.*]

[And the use of pleading is to reduce the matters in litigation to a single point. By *Ld. Kenyon Ch. J. Douglas v. Patrick, B. R. T. 30 Geo. 3. 3 T. R. 684.*]

[Pleadings were antiently pronounced by the counsel, *ore tenus*, and minuted down by the prothonotaries, and afterwards entred of record in the *Latin* language.]

It is one of the most honourable, laudable, and profitable things in our law, to have the knowledge of well pleading in actions real and personal. *Lit. f. 534.*

Plea (from the Saxon *pleo* or *pleoh*, i. e. *juris actio*) comprehends all that every party to the action alleges in court. *Bl. Nom. Lex. Verb. Plea.*

And of this rolls are made.

Antiently the writ was entred on a roll, and the tenant or defendant sometimes might appear at the day given by the roll. *1 Sal. 64. Vide post. (B 6.)*

Now there are only, the imparlance roll, on which are entred the declaration and imparlance.

The plea roll.

By *rule, M. 1654*, in *C. B.* the rolls of *Easter* term shall be brought into the prothonotary entred and doggetted on or before the first day of *Trinity* term, and the rolls of every other term, ten days before the essoign day of the next term, on pain of 10*s.* for each roll wanting; the rolls of *Easter* term shall be delivered by the prothonotary to the clerk of the warrants within six days, and of other terms before the essoign day, and the clerk of the warrants in five days shall deliver



Give them to the clerk of the essoigns. (*Vide Rules and Orders of C. B.* 10, 11.)

By rule P. 34 Car. 2. the rolls of *Easter* term shall be brought in by the first day of *Trinity* term, those of *Trinity* term by *Michaelmas* day, those of *Michaelmas* term by the 6th of *January*, and those of *Hilary* term, four days before *Easter*. (*Vide Rules and Orders of C. B.* 85.)

By rule P. 5 W. & M. the rolls of *Easter* term shall be brought in to the clerk of the essoigns before *Trinity* term, and of every other term before the essoign day of the next term. (*Vide Rules and Orders of C. B.* 113.)

And no roll ought to be received *post terminum*, without the leave of the court on motion. 1 Sal. 88.

By the *st.* 36 Ed. 3. 15. all pleadings in the king's court, or any other, shall be debated and adjudged in *English*, and enrolled in *Latin*.

And *Latin* comprehends not only that which is allowed by grammarians, but also words of signification well known to the sages of the law: as, *messuagium*, *toftum*, *gardinum*, &c. 10 Co. 133. a.

So, the words newly invented with an *Anglicè*. 10 Co. 133. a. *Vide Abatement*, (H 2.)—*Action upon the Case*, (G 4.)—*Amendment*, (D 2.)—*Obligation*, (B 3. 5.)

But an addition in an indictment, &c. by *English* words will be well. 1 Sid. 101. *Vide Indictment*, (G 1.)

So, a return of a proceeding, in *English*, on a writ of error to *Berwick*, where the entry ought to be in *English*, is good. R. 1 Sal. 269.

And by the *st.* 4 G. 2. 26. all writs, process, and returns, and proceeding thereon, all pleadings, rules, indictments, informations, inquisitions, verdicts, records, patents, &c. bonds, fines, &c. and all proceedings relating thereto, &c. in courts leet, courts baron, or any court of justice in *England*, or the *Exchequer* in *Scotland*, or which concern the administration of justice, &c. shall be in *English* only, and written in a legible hand, close, in words, at length, and not abbreviated, on pain of 50*l.*

[The *English* notice to appear must be added to all common process where the defendant is not held to bail, whether the cause of action do or do not amount to 10*l.* *Lumley v. Fitz*, B. R. T. 37 Geo. 3. 7 T. R. 337.]

So, by the *st.* 5 G. 2. 27. and 6 G. 2. 14. in actions under 10*l.* or under and above in *Wales*.

But these acts extend not to the usual method of writing numbers by figures, common abbreviations, names of writs, or technical words. *Vide the st.* 6 Geo. 2. 14. *sect* 5.

### (B) Appearance.

(B 1.) What shall be.

**T**HE first act of parties in court is, that the defendant appears to the process against him.

And the appearance is, when the defendant shews himself in court, in person, or by his attorney ready to answer to the action.

And

And he ought to enter his appearance by filing common bail, or special bail when it is required. *Pr. Reg.* 40.

When special bail shall be required, *vide Bail*, (K 4.)

And therefore, the plaintiff cannot declare in *B. R.* until a *committitur* of the party is made, or bail put in. *1 Rol.* 581. *l.* 10.

[And nothing is a performance of the condition of the bail bond, but putting in bail above. *5 Bur.* 2683.]

Nor, in *C. B.* till bail is put in, or the party is brought into court by *habeas corpus*.

But by the *st.* 4 & 5 *W. & M.* 21. a declaration may be delivered to a prisoner or gaoler, &c.

And by the *st.* 12 *Geo.* 29. where the cause of action amounts not to 10*l.* on *affidavit* of process being served, if the defendant appears not in four days (by *st.* 5 *Geo.* 2. 27. in eight days) after the return, the plaintiff may file common bail, and enter an appearance, as if the defendant had appeared.

So, if the attorney for the defendant accept a declaration from the plaintiff's attorney, it shall be an appearance for the defendant. *Pr. R.* 39.

If he undertakes that he will appear, after a writ taken out, it shall be an appearance. *Mod. Ca.* 42.

[If an attorney has undertaken to appear, the court will oblige him to do it, even tho' he had no authority from the defendant. *Lorymer v. Hollister*, *P.* 12 *G. Str.* 693.]

But if the tenant or defendant be in court, and says that he will not appear; this is not an appearance. *1 Rol.* 580. *l.* 15.

So, if the tenant in an assise makes default, and another appears for him as his bailiff, and he comes into court and disavows him to be his bailiff, this is no appearance; for he comes for another purpose, *viz.* to disavow his bailiff. *1 Rol.* 580. *l.* 20.

So, if the attorney accepts the declaration for the defendant, *if he approves of it*; it shall not be an appearance, if he afterwards sends back the declaration. *Pr. R.* 41.

So, if before the writ issues, he undertakes that he will appear; it is not an appearance, tho' the writ be afterwards shewn to him. *Mod. Ca.* 42.

So, if he undertakes, after the writ is sued out, but afterwards refuses, he shall be compellable to enter an appearance, but it is no appearance till it is entred. *Mod. Ca.* 86.

So, it is not an appearance if it is not recorded; for, *whether he appeared or not*, ought to be tried by the record. *Bro. Default*, 32. *R. Cro. El.* (466.) *per two J. Keilw.* 180.

[If a man abroad enters into a bond, conditioned for his appearance in *B. R.* at his arrival in *England*, to answer any demand that may be made against him, by or on the behalf of *A.*, the court, to prevent forfeiture of his bond, will admit his appearance, and direct him to enter into recognizance with sureties to answer the demands in the condition. *A black merchant v. Dorrell*, *T.* 30 & 31 *G. 2.* 1 *B. M.* 398.]

In an action against a bailiff and commonalty, it is not an appearance, if the bailiff appears without the commonalty; for they are but one corporation. *1 Rol.* 582. *l.* 30.

[A cor-



[A corporation aggregate cannot appear in any other manner than by attorney. *Bro. Abr. tit. Corporation, 28.*]

Nor, in an action against husband and wife, if the husband appears without the wife, or *contra*: *Vide post*: (B 4. 10.)

[Appearance cures all errors and defects in process. *Barnes, 163. 167. 415. 424.*]

(B 2.) Where it shall be entered.

An appearance on a *copias* in C. B. shall be entered in the filazer's office, out of which it issued. *Compl. Att. 31.*

On an attachment of privilege it shall be entered in the remembrance roll of the prothonotary out of whose office it issued. *Ibid.*

By the *st. 5 & 6 W. & M. 21. s. 37.* (and *9 & 10 W. 3. c. 25. s. 33.*) the defendant shall cause an appearance or common bail to be entered or filed in eight days after the return of the process, on pain of *5l.* to the plaintiff, for which judgment shall be awarded immediately, and execution taken out.

By the *st. 4 & 5 Ann. 16.* the attorney for the plaintiff or demandant shall file his warrant of attorney the same term he declares; and the attorney for the defendant or tenant the same term he pleads.

(B 3.) How it shall be enforced.

If an action be against an officer of a court, he ought to appear of necessity, otherwise he shall be condemned; for he is always present in court. *1 Rol. 580. l. 22. 8 H. 6. 16. a.*

As, an attorney; for being upon record, he is always present in court.

So, a sheriff upon his account. *1 Rol. 580. l. 25.*

So, a man who is a prisoner in the same court. *8 H. 6. 16. Bro. Default, 36.*

Otherwise, if he be a prisoner in another court. *1 Rol. 580. l. 29.*

And therefore, if such a one be brought in by *habeas corpus*, there is no occasion for an appearance. *Bro. Default, 33. 36.*

By the *st. 13 Car. 2. 2. sess. 2.* any, having cause of personal action against a prisoner in the *Fleet*, may sue forth his original and have a *habeas corpus* directed to the warden to bring up the prisoner at a certain day in term before the just. of C. B. and put in a declaration on such original against the prisoner present at bar, who shall be bound to appear in person or by attorney, and if he does not plead on a rule given to be out in eight days after appearance, judgment by *nihil dicit* shall be entered against him.

By the *st. 4 & 5 W. & M. 21.* if any be arrested on any writ out of the courts at *Westminster*, and detained for want of sureties for his appearance, the plaintiff, before the end of the next term, after such process shall be returnable, may declare and cause a copy of a declaration to be delivered to the prisoner or gaoler in whose custody he is; and if the prisoner does not appear and plead, the plaintiff shall have judgment, as if he had appeared and refused to plead.

[If defendant is regularly entitled to be superseded, (the order for his being superseded having become absolute two days before the end of a preceding term,) yet is not actually superseded, but remains in

in custody of the marshal, and on the fifth day of next term, a declaration is delivered to him at the suit of another plaintiff, he is well charged. *Hutchins v. Kenrick*, T. 33 & 34 G. 2. 2 B. M. 1048.]

[To charge a defendant already in custody with a new suit in vacation-time, plaintiff must file a bill as of the preceding term, and then deliver or leave a copy of declaration as of preceding term, and make affidavit of it; there is no occasion for *habeas corpus ad respondendum*. *Hills v. Kenrick*, T. 33 & 34 G. 2. 2 B. M. 1048.]

[A convict on an act working no forfeiture, ordered to be pardoned on condition of transporting himself, may on motion be charged in custody in a civil action, but not held to bail, nor have execution against his person; for that would prevent his performing the condition of his pardon. *Coffin v. Gunner*, T. 4 G. 2. Str. 873. *Ld. Raym.* 1572. *Fost.* 61. 1 *Wils.* 217. 4 *T. R.* 316.]

[But the court will not take notice of the king's intention to pardon, tho' signified by the attorney-general. *Macdonald's Case*, 1747, *Foster*, 61.]

[A prisoner, upon conviction for a libel, being in contempt upon an injunction in *Chancery*, may be charged with an attachment, attorney-general consenting. *Basket v. Rayner*, M. 9 G. 2. B. R. H. 170.]

[A prisoner, on a charge of felony, may be charged with a *latitat*. *Daintree v. Justice*, H. 9 G. 2. B. R. H. 190.]

If a man arrested upon process is bailable and can find surety, the sheriff dismisses him, if common bail is sufficient, on the undertaking of some attorney of the same court to appear for him: if special bail is required, the sheriff takes a bond with surety for his appearance at the return of the process.

By the *st.* 13 Car. 2. 2. *sess.* 2. the sheriff shall not require a bond above the penalty of 40 *l.* for appearance upon an arrest or process out of B. R. or C. B., unless the cause of action be specially expressed in the writ.

After which statute the clause of (*ac etiam billa*) was inserted in process out of B. R.

And afterwards, by rule of court before North Ch. J., it was inserted in process out of C. B. *Comp. Sol.* 67.

[*Ac etiam* to answer in a plea of trover, and for converting the goods of the plaintiff; the cause of action is here sufficiently expressed, to hold to bail under 13 C. 2. c. 2. *Callaghan v. Harris*, H. 9 G. 3. 2 *Wils.* 392.]

By the *st.* 12 Geo. 29. amended by 5 G. 2. c. 27. made perpetual by 21 G. 2. c. 3. if the cause of action amounts not to 10 *l.* or in inferior courts to 40 *s.*; and now, by 19 G. 3. c. 70. to 10 *l.*, the same as in superior courts, the plaintiff shall not arrest, but shall personally serve the defendant with a copy of the process, and if an appearance be not entered in four days after the return of the process, on an affidavit of service filed, shall enter a common appearance, and proceed as if the defendant had appeared.

By the *st.* 5 Geo. 2. 27. if not entered in eight days.

[If, on defendant's not appearing to a writ of *Easter* term, plaintiff file common bail as of *Trinity* term, the cause is out of court. B. R. H. 138.]



[The plaintiff cannot file common bail according to the statute after the succeeding term after the writ is returnable. 2 T. R. 719.]

[If the defendant be rightly named both in the writ of *capias ad respondendum*, and in the declaration delivered *de bene esse*, and in the affidavit of service of the writ, but not in the appearance entered by the plaintiff according to the statute, this may, on application to the court, be amended. 3 Wils. 49.]

[Notice to appear must be given with all process served. Barnes, 404.]

[It must be given before nine at night. Barnes, 310.]

[If the notice is directed to plaintiff, instead of defendant, it is faulty, or if the word *next* is omitted, or *next* inserted instead of *instant*. Barnes, 306. 308. 310. 409. 411. 419.]

[This is exploded; and notice is good without *instant*, *next*, or *gear*. Barnes, 425.]

[If the *latitat* be sued out against the defendant by one christian name, and the *alias* by another, and the plaintiff afterwards proceeds, the court will set aside the proceedings for irregularity. Corbett v. Bates, B. R. E. 30 Geo. 3. 3 T. R. 660.]

[If there is no notice subscribed to the copy of the process served, it is irregular; but if defendant's attorney takes the declaration out of the office, and pays for it, it is a waiver of the irregularity. Morgan v. Luckup, P. 9 G. 2. B. R. H. 242.]

[If the defendant's name is not put to the notice at the bottom of *latitat*, it is bad, and shall be quashed. Bebema v. James, T. 18 G. 2. Wils. 104.]

[Notice on the copy of process must be to appear on the *essoign-day*, tho' a Sunday. Barnes, 293, 294, 295.]

[Notice to appear on the *quarto die post*, is good. Sumner v. Brady, C. F. E. 31 Geo. 3. 1 H. Bl. 630.]

[If there is variance between the name in process and in notice, proceedings shall be staid. Barnes, 298.]

[Affidavit of service must be made, or proceedings will be staid. Barnes, 412.]

[If the date is omitted, if it is to appear before the king's justice, (instead of justices,) or not fifteen days between *teste* and return, proceedings shall be staid. Barnes, 420. 426, 427.]

[And where a rule to set aside proceedings for irregularity, and to stay proceedings in the mean time, is obtained, the proceedings are suspended for all purposes till the rule is discharged. Swayne v. Crammond, B. R. H. 31 Geo. 3. 4 T. R. 176.]

[It is not necessary to shew defendant the original writ, but only to deliver him a copy. Per Curiam. Worley v. Glover, M. 4 G. 2. Str. 877. Barnes, 302. 422.]

[But if defendant, served with copy of process, demand to see the original process, and is refused it, it is not good service. Semb. Edgar v. Farmer, T. 8 G. 2. B. R. H. 138.]

[In debt, if it is above 10 l., there is no occasion to put the notice to appear at the bottom of the process, under the *st. G. 2. 1 Wils. 22.*]

[So, if the copy of *latitat* served is only to answer *A.*, without saying in a plea of trespass, or shewing any cause of action, and defendant

defendant takes the declaration out of the office, it amounts to an appearance, which is a waiver of the defect in the process. *Caswall v. Martin*, P. 10 G. 2. B. R. H. 369.]

[But if the plaintiff's name is omitted in the writ, defendant may at any time apply to set aside proceedings, for it is no process at all; otherwise, if service of writ is irregular only, for there he must apply as soon as possible after notice. *Thompson v. Browne*, T. 10 & 11 G. 2. Andr. 16.]

[If it is doubtful whether the place where defendant was served be in the county where process issued, or not, it shall be deemed good service, especially if defendant promised to appear to any process. *Drew v. Marriott*, T. 17 G. 2. Wilf. 77.]

[A bill of *Middlesex* should not be served in *London*, or elsewhere out of the county of *Middlesex*. *Doug.* 369. 1 T. R. 187. *Kelly v. Shaw*, B. R. M. 35 Geo. 3. 6 T. R. 74. *contra.*]

[But it seems that a *latitat* may be served in any county. 1 T. R. 187.]

[The court refused to set aside a bill of *Middlesex*, which was to answer plaintiff in a plea of debt instead of trespass. *Barber v. Lloyd*, B. R. T. 28 Geo. 3. 2 T. R. 513.]

[A defendant must not be served with process while he is attending his cause at any of the courts at *Westminster*. 2 Str. 1094.]

[Service of a writ at any time of the return-day, tho' after the court is risen, is good. *Hall v. Gatton*, H. 2 G. 2. *Moss v. Powel*, T. 11 & 12 G. 2. *Weyburn v. Neale*, M. 19 G. 2. *Maud v. Barnard*, T. 32 & 33 G. 2. 2 B. M. 812.]

[Service of a *latitat* at eight o'clock in the evening of that day on which it is returnable, is good, tho' the declaration be left in the office in the course of the same day. 1 T. R. 191.]

[Service of a *mesne* process on the return-day is good in C. B. as in B. R. *General Rule*, P. 8 G. 3. 2 Wilf. 372.]

[Copy of process put through key-hole to defendant who knows the contents, good service. *Barnes*, 405.]

[Copy sent by letter, if defendant takes it out and reads it, is good service. *Barnes*, 422.]

[Copy of process tendred to defendant at his house, and left there, is good service. *Barnes*, 278.]

[Service of copy of writ, *except what relates to other defendants*, not good. *Barnes*, 405.]

[If process is dated subsequent to service, it is irregular. *Barnes*, 408.]

[Service is good, tho' in a liberty and not by proper officer; but the party injured may bring action. *Barnes*, 404.]

[By 2 G. 2. c. 23. s. 22. every copy of any writ or process that shall be served on any defendant, shall, before the service thereof, be subscribed or indorsed with the name of the attorney or solicitor, who shall be retained or employed by the plaintiff in such writ or process.]

[But this does not extend to the case of an attorney suing by attachment of privilege. 4 T. R. 275.]

[So, if the writ is not directed to the sheriff of any county, (yet advantage may be otherwise taken. *Semb.*) *Barnes*, 404.]

[Service of special original is not sufficient, it must be of process against



against the person; or plaintiff may have *pone* and distress on his original. *Barnes*, 407. 410.]

[Original once used, (tho' improperly, as by serving copy,) cannot be afterwards used. *Barnes*, 417.]

[It appearing that the bill in a penal action had been taken off the file, the court permitted it to be supplied from a copy taken by the plaintiff himself. *Petrie v. Benfield*, *B. R. M.* 30 *Geo.* 3. 3 *T. R.* 476.]

[Appearance entered by plaintiff does not cure process being served on a wrong person. *Barnes*, 406.]

[Process directed to the sheriff of *Kent* served in the *Cinque Ports*, is bad; it should be *testat. cap.* to the constable of *Dover Castle*. *Barnes*, 422.]

If an attorney of *B. R.* or *C. B.* accepts a warrant, (or undertakes to appear, *Med. Ca.* 86.) or subscribes a process or warrant to make an appearance, and does not enter an appearance accordingly, he shall be subject to an attachment, or to be erased out of the roll, and the party cannot countermand appearance after retainer. *Ord. Compl. Att.* 292, 293.

If the party afterwards countermands the warrant, the attorney shall be compellable to enter an appearance. *Pr. R.* 38.

But if there are several defendants, the attorney is bound only to appear for such of them as give him authority. *Pr. R.* 39. 1 *Sal.* 87.

If, upon an arrest, the sheriff takes surety for appearance, and the party does not appear, the sheriff may be amerced, on a rule being given to bring in the body; and so *toties quoties*. *Comp. Att.* 311.

[The sheriff takes bail at his peril; and, on the common rule, he must either bring in the body, or justify good bail in court. *Wolfe v. Collingwood*, *H.* 23 *G.* 2. 1 *Wils.* 262.]

[If the sheriff brings defendant in person into court, they commit him charged with the *cap. ad respond.* *Barnes*, 392.]

[If defendant in custody, at the suit of plaintiff only, has a *superse-deas*, plaintiff cannot charge him with a new declaration. *Barnes*, 368.]

[If defendant is in custody at suit of several plaintiffs, one may discontinue, pay costs, and serve defendant in custody with common *capias*, and notice to appear, and sign judgment for want of plea. *Barnes*, 392.]

But the usual way is to assign the bail-bond to the party. *Vide Bail*, (K 5.)

And now, by the *st.* 4 & 5 *Ann.* 16. if, on an arrest by process from the courts at *Westminster*, the sheriff, &c. takes bail, he, at the request and costs of the plaintiff, shall assign to him the bail-bond, &c. by indorsing it under his hand and seal in the presence of two witnesses, which may be done without stamp, if stamped before put in suit; and if such bond be forfeited, the plaintiff may sue it in his own name, and the court may, by rule or rules of court, give such relief to the plaintiff or defendant in the original action, or to the bail, as is reasonable; which rule shall be in the nature of a defeazance to the bail-bond.

But an action upon the case does not lie against the sheriff for a false return; for he is compellable to accept bail by the *st.* 23 *H.* 6.

10. R. 2 Sand. 60. 1 Sid. 23. 439. R. 1 Rol. 92. l. 50. 887. l. 50. R. Noy. 39.

If the plaintiff does not take an assignment of the bail-bond, but proceeds, by amerciamment of the sheriff, to enforce the appearance of the defendant, he ought to give 4 d. to the sheriff to make a return of the writ, and if he returns *cepi corpus*, or *reddidit se*, he shall give a rule to the sheriff to have his body on pain of 40 s.; and if he has it not, he may have an *habeas corpus*, upon which the sheriff can return nothing, (if he has not the body,) but *languidus in prisona*, and then shall issue a *duces tecum licet languidus*; if the sheriff does not return the *habeas corpus*, he shall be amerced; and so *toties quoties*, and the amerciaments may be estreated into the crown office, and from thence into the *Exchequer*. Compl. Att. 311. Vide Bail, (K 5.)

But after the estreat of the amerciaments, they may be compounded or discharged, upon motion in the *Exchequer*, and a certificate of the plaintiff's attorney that the debt is satisfied. 1 Sal. 54.

(B 4.) In an action against husband and wife.]—[Service of husband good for both, and plaintiff may enter appearance for both. Barnes, 406. 412.]

In an action against a husband and wife, if the husband be taken on the *capias* or exigent out of B. R., he shall remain in prison till bail given for himself and his wife. 1 Rol. 583. l. 7. 20. 1 Sal. 115.

So, if he appears on the exigent. 1 Rol. 583. l. 5. R. Cro. El. 370.

So, if he appears on the original. 1 Rol. 583. l. 15.

So, if the husband is arrested on a *latitat*. 1 Rol. 583. l. 30. Pr. Reg. 66.

And if the husband be an attorney, &c. he cannot appear in person and put in bail for his wife, but he ought to put in bail for himself and his wife; for he shall not have privilege in an action against him and his wife. R. 1 Rol. 580. l. 45. Vide Attorney, (B 17.)

So, if the action be against husband and wife as executrix. R. Cro. El. 118. 1 Leo. 138.

So also, in an action against husband and wife in C. B. if the husband comes in upon the *capias* or exigent, he must put in bail for his wife. Bro. Default, 7. Bro. Baron and Feme, 5. 8. 37. 1 Rol. 583. l. 10. cont. for a *superfedeas* shall go for the husband, and he shall go without day; for he cannot answer without his wife, and process shall continue against her till she be waived. R. acc. for the appearance of the husband shall not be recorded, nor a *superfedeas* allowed for him, till he gives an appearance also for his wife. 1 Leo. 138. Cro. El. 118. R. Hob. 179.

So, if the husband be taken on a *capias* or exigent. Bro. Baron and Feme, 1. 10. R. Cro. Car. 58.

So, if the husband be outlawed and sue a charter of pardon and a *seire facias* upon it, it shall not be allowed without his wife. Bro. Baron and Feme, 10. 19. R. Cro. Car. 58.

So, in an action against husband and wife, if the husband appears by attorney, he shall enter an appearance for both. 1 Brownl. 46. Mod. Ca. 86. 1 Sal. 115.

[But in C. B. it is said, that if husband and wife be joined in



the writ, and the husband enter an appearance for himself only, the plaintiff cannot afterwards sign judgment for want of a plea, without making a demand of a plea. *Clark v. Norris, C.P. E. 29 Geo. 3. 1 H. Bl. 235.*]

So, if he gives bail, he shall give it for both. *Mod. Ca. 17. 1 Vent. 49. 1 Sal. 115.*

In an action against husband and wife, if the wife be taken on the *capias*, and not the husband, an exigent shall issue against the husband, *et idem dies datus* to the wife. *Bro. Baron and Feme, 1.* But it is said that the wife shall go without day. *Ibid. 10. 11. Vide post. (B 10.) R. 2 Cro. 445. Cro. Car. 58. Hut. 86. Semb. 1 Vent. 49.*

So, if the wife renders herself on the exigent. *Cro. Car. 58. Hut. 86.*

So, if the husband was before in custody, and the wife is taken, and *non est inventus* returned for the husband; the wife shall be discharged upon common bail, and other process shall go against the husband with an *idem dies* to the wife. *R. 1 Sal. 115.*

If the husband and wife are both taken upon the *capias*, the husband only shall be committed, if he does not give bail for himself and his wife, and the wife shall be discharged. *Adm. 1 Lev. 1. Semb. cont. 1 Vent. 49. Acc. 1 Lev. 216.*

If the husband on the exigent be returned *outlawed*, the wife shall go without day, for the process is determined. *Cro. Car. 58. Hut. 86.*

If the process continues till the husband is outlawed, and the wife waived, and she be taken upon process, and the outlawry of the wife is pardoned, but of the husband not, she shall be discharged from her imprisonment. *Dy. 271. b. 1 Sid. 21.*

If the husband be taken, or renders himself on the exigent, and the wife is returned *waived*, the husband shall go without day. *Cro. Car. 58.*

If the husband and wife are both taken, the wife shall be discharged, tho' the action be against them for the debt of the wife *dum sola*, and she was first in custody. *R. 1 Lev. 216.*

So, if both are taken in execution. *R. 1 Lev. 51.*

But if there be judgment against a woman, who afterwards marries, execution goes against the wife only, and she shall be in execution. *R. 2 Cro. 323. 2 Bul. 80.*

So, in *B. R.* if the wife be arrested and not the husband; the husband is not compellable by the course of the court to appear for himself and his wife. *Per Cur. 1 Rol. 583. l. 30.*

So, in *B. R.* where the husband is compellable by the course of the court to appear for himself and his wife, it is in the election of the court whether he shall be compelled to give bail for his wife; for all bails are in the discretion of the court. *R. 1 Rol. 583. l. 22.*

(B 5.) At what Time the Appearance ought to be.

(B 5.) *At the day of the return of the writ.*] The defendant ought to appear, regularly, at the return of the writ or process. *Co. L. 135. a.*

[And a bill of *Middlesex* may be returnable the same day that it is sued out, *Oxlade v. Davidson, B. R. E. 32 Geo. 3. 4 T. R. 610.*]

And

And if he does not appear at the return of the first process, he may at the return of any subsequent process.

By rules upon the *st.* 4 & 5 *W. & M.* 21. if a declaration be delivered to a prisoner, according to that statute, before *Mens. Pas.* or *Craft. Animar.*, and affidavit of it filed with the proper secondary, the defendant ought to enter his appearance with the proper officer within ten days after *Easter* or *Michaelmas* term, otherwise upon a rule given to appear and plead, to be expired in eight days, and to be given after the process upon which he was taken is returned, and on a copy of the affidavit produced to the prothonotary, and a certificate that no appearance is entred, judgment shall be signed against the defendant. *Vide post.* (C 4.—E 41.)—(*Vide Rules and Orders of C. B.* 114, 115.)

So, if a declaration be delivered in *Hil.* or *Trin.* term, or upon or after *Mens. Pas.* or *Craft. Animar.* in *East.* or *Mich.* term, the defendant ought to enter his appearance within two days before the assign-day of the next term. *Vide Rules and Orders of C. B.* 115.

So, in *replevin*, if the process continues till a *pluries* issues out of *Chancery*, upon which the sheriff returns in *bank*, *property claimed*, tho' no day is given by this writ to the parties, but to the sheriff to excuse his contempt in not executing the writ before, yet the parties may appear; otherwise, there would be a great mischief; for there is no other subsequent process. *R. 1 Rol.* 581. l. 40. *Dub. Dy.* 246. a.

So, if a *pluries* was returnable in *Mich.* term, and nothing is done till *East.* the parties may then appear if they will. *1 Rol.* 581. l. 50.

So, if after a *pluries*, upon which the sheriff does nothing, an attachment issues to the coroners against the sheriff, and they return, that the sheriff is attached, but they cannot have view of the cattle, for which shall issue a *distringas vic.* and *withernam* of the defendant's cattle; the defendant may appear on the *withernam.* *Cont. Bro. Jour.* 70. 82. *Acc. Dy.* 189. a.

Tho' the very day of the return of the writ be the day for appearance. *Dy.* 269. b.

Yet, it is sufficient, if the defendant or tenant appears on the *quarto die post.* *Co. L.* 135. a.

If the attorney does not enter common bail before the end of the term in which he appears, he shall be put out of his office. *Ruled 1 Rol.* 372.

By the *st.* 5 & 6 *W.* 3. 21. and 9 & 10 *W.* 3. 25. s. 33. the defendant shall cause an appearance or common bail to be entred or filed within eight days after the return of the process on which he is arrested, on pain of 5*l.* to the plaintiff, for which the court shall award judgment immediately, whereon the plaintiff may take out execution.

And if several defendants are arrested, and one of them appears, and the others do not enter their appearance within eight days, judgment for the 5*l.* shall be given against him who does not enter his appearance. *Per C. B. Pas.* 8 *Ann.*

But if none of the defendants enter their appearance within eight days, judgment shall be against all only for one 5*l.* for they may appear jointly, and it shall not be intended they would do otherwise. *R. in C. B. Pas.* 8 *Ann.*

[Defendant has eight days to appear to common *capias*, tho' the demand



demand is above 10*l.* and notice must in all cases be given. *Barnes*, 242. 245. 300.]

(B 6.) *When at the day by the roll.*] And if the sheriff does not return his writ, the defendant may appear *gratis* by the roll, if he be in danger, otherwise to lose his inheritance. 1 *Rol.* 582. *l.* 10. *Co. L.* 135. *a.*

As, in a *sequeatur suo periculo* against a vouchee, he may appear, tho' the writ is not returned; for otherwise he will lose in value. 1 *Rol.* 582. *l.* 12. *Bro. Journ.* 93.

So, in a *præcipe quod reddat*, &c. *Bro. Journ.* 1.

So, in an appeal.

So, where the defendant is to have corporal pain if he does not appear. 1 *Rol.* 582. *l.* 22. *Bro. Jour.* 48. 51. 64. 93. *Bro. Averment cont. Ret. Vic. Co. L.* 135. *a.*

So, where a defendant gives a bond or surety for his appearance, he shall appear, tho' the writ be not returned; and there shall be a special entry upon the record, *that he appears for the indemnity of himself and his bail.* *R.* 1 *Leo.* 90. [*Vide* 1 *Wils.* 39.]

So, if the court does not sit, or the justices do not come, 1 *Leo.* 90.

And the antient course was to enter the writ upon the roll, and then the defendant might appear at the day by the roll. 1 *Sal.* 64.

So, where the defendant will have other damage, if he does not appear, he may appear at the day by the roll: as, in trespass, after an exigent awarded, the defendant may appear at the day by the roll, tho' the exigent be not returned. 1 *Rol.* 582. *l.* 25.

So, to a return of *withernam* in a *hom. replegiando.* *Sal.* 583.

So, in an *audita querelâ*, if it be returned *nihil*, &c. 1 *Rol.* 582. *l.* 35.

So, in debt, if it be not returned, for fear of a *capias.* 1 *Rol.* 582. *l.* 37. *Sal.* 583.

Or, if it be returned *nihil*, &c. 1 *Rol.* 582. *l.* 40.

But the plaintiff is not obliged to count against him, when he appears *gratis* at the day by the roll to an original. 1 *Rol.* 582. *l.* 39. *Bro. Jour.* 13. 25. *Bro. Averment cont. Ret. Vic.* 10. 28.

Yet if the sheriff returns *nihil*, &c. and the defendant appears contrary to the return of the sheriff, the plaintiff is bound to count against him. *Semb. Bro. Averment cont. Ret. Vic.* 1. 11. *Bro. Default*, 67.

But where the defendant will lose nothing, he cannot appear at the day by the roll, if the writ be not returned; as, if a defendant outlawed be pardoned, and sues a *scire facias* against the plaintiff, which is not returned; the plaintiff shall not appear at the day by the roll, for he loses nothing. 1 *Rol.* 582. *l.* 15. *Bro. Averment cont. Ret. Vic.* 26.

So, in a *scire facias* against the garnishee, he shall not appear at the day by the roll, if the sheriff returns *nihil*, &c. for he shall lose nothing. 1 *Rol.* 582. *l.* 27.

So, in error, if the sheriff does not return a *scire facias*, or returns a *tardè*, &c. *Bro. Jour.* 48. *Bro. Default*, 64.

So, in a second deliverance. *Bro. Averment cont. Ret. Vic.* 28.

So, where the defendant will lose nothing but issues. *Bro. Averment cont. Ret. Vic.* 12. *Semb. cont.* 21. *Acc. Bro. Default*, 41.

*Cont. 64.* And it is said *cont.* that the defendant may appear at the day by the roll when he shall lose issues. *Co. L. 135. a.*

So, the defendant may appear at the day by the roll, when he will have damage otherwise, tho' the writ was not served: as, if a man sues execution on a statute, and the conusor sues an *audita querela* upon the acquittance of the conusee, which is not served, but the conusee prays execution; he ought to answer to the acquittance at the day by the roll, tho' the *audita querela* was not served. *1. Rol. 582. G.*

So, in *audita querela* after release of a judgment in trespass. *Cont. Bro. Jour. 51. Semb. acc. Bro Averment cont. Ret. Vic. 25.*

So, in a *scire facias* upon a recovery in annuity where *nihil* is returned, the defendant may appear at the day by the roll; for otherwise, upon the first *nihil* there shall be execution against him. *Bro. Averment cont. Ret. Vic. 20, 21.*

So, the defendant may appear, if the sheriff returns the writ *tardi.* *1 Rol. 582. l. 20.*

Or, if he returns *nihil per quod summoniri potest.* *1 Rol. 582. l. 35.*

Or, *mandavi ballivo qui nihil inde fecit.* *1 Rol. 582. l. 43.*

So, if he returns *non est invent.* *Bro. Default, 17.*

Or, *languidus in prisona.* *Bro. Jour. 2.*

(B 7.) When a Man, who appears to one Process, shall answer to another.

If the defendant be taken on a *capias*, and comes in by *cepi corpus* to one writ, and has a day by distress to two other writs, he ought to answer to the writs in which he has day by distress. *1 Rol. 580. l. 33.*

So, if he comes in on a *cepi corpus*, he ought to answer to an action of another person there depending. *1 Rol. 588. l. 30.*

So, if a man be brought in by *habeas corpus* out of the Fleet to C. B. he shall answer to an action there depending. *1 Rol. 588. l. 35. Vide ante, (B 3.)*

So, if he be brought in by *habeas corpus* out of B. R. *1 Rol. 588. l. 40.*

(B 8.) When not.

But if the defendant appears *gratis* to one action in B. R. he need not answer to another action there depending. *1 Rol. 580. l. 35.*

So, if he appears on a *habeas corpus* upon pretence of privilege, he need not answer to an action there depending against him; for he ought to be discharged or remanded. *1 Rol. 588. l. 45.*

So, if he appears to a bad process, as to a *capias*, where a *disfringis* lies, and no *capias*, he need not answer. *Bro. Default, 11. Cont. per Needham, Bro. Jour. 36.*

(B 9.) When one Defendant, who appears, shall answer without the other.

In personal actions against several, if one defendant appears, and the other makes default, he who appears shall make answer without the other.

And



And if one only appears and files bail, and the other not, and the plaintiff proceeds against both, it will be error. *R. 2 Rol. 46.*

But, if bail be omitted by the other, thro' covin, it shall be amended. *2 Rol. 46.*

So, in ejectment of ward, or ravishment of ward; for those are in the nature of trespass. *1 Rol. 589. l. 15.*

(B 10.) When not.

But in all real actions where the process is by attachment and distress, if one appears, he shall not be put to answer till the other also appears (except where the process is determined against the other); for he who does not appear shall not lose his freehold by the plea of the other. *1 Rol. 589. l. 35.*

As, in a *quod permittat* against two. *1 Rol. 589. l. 40.*

So, in a *præcipe quod reddat* against two, the one who appears shall not be put to answer till after the return of the *grand cape*. *1 Rol. 589. l. 5.*

So, in debt against husband and wife, if the husband appears, and the wife makes default, the husband shall not be put to answer, but the process shall continue against the wife, and *idem dies* be given to the husband. *R. 1 Rol. 589. l. 30. Vide ante, (B 4.)*

So, in trespass against husband and wife. *Semb. cont. 1 Rol. 589. l. 20.* But there the process was discontinued against the wife.

So, if the wife appears and the husband makes default, she shall not answer without her husband. *1 Rol. 589. l. 27. 1 Sal. 115.*

So, if the husband is outlawed and the wife waived, and the wife is taken and produces a charter of pardon, the pardon shall not be allowed; for she cannot have a *scire facias* without her husband against the plaintiff to force him to declare against them, and the pardon is conditional *si stare recta in curia*. *R. Dy. 271. b.*

But, if process be against husband and wife, who appear on the exigent, but the husband refuses bail for himself and his wife; the wife alone may make an attorney to appear for her, to avoid being waived. *Dy. 271. b. in marg.*

[If there is process against two, on a joint cause of action, and one only appears, the other must be outlawed before there can be further proceedings. *Edwards v. Carter, M. 8 G. Str. 473.*]

(B 11.) Default of Appearance.

If the plaintiff or demandant, tenant or defendant, does not appear in court at the return of every process, or at every continuance, it shall be a default. *Co. L. 259. b.*

[And the general rule is, that, where by the writ each party has a day in court, and the defendant may be damnified by not appearing, he may appear and demand the plaintiff, and this even tho' the writ be not returned as on a *capias*, *exigent*, or *disfringas*, or *recordari facias loquelam*. *1 T. R. 373.*]

Or, if he does not cast an *essoign* when he may; for that excuses his appearing till the day to which the *essoign* is adjourned.

Default may be before or after appearance.

If default be before appearance in all *præcipe's quod reddat*, a *grand cape* issues, and at the return, if the tenant does not save or excuse his

his default, he shall lose the land. *Mod. Ca. 4. Lut. 861. Vide Process, (D 4.)*

So, if he does not save his default at the return of the grand distress; where process is by summons, attachment, and distress. *Vide Mod. Ca. 8.*

Default after appearance is, where the tenant or defendant does not appear at the day given by the court, or at any return of *mesne* process.

If he appears, and afterwards being demanded by the court the same day, will not appear, it will be a departure in despite of the court, upon which there shall be judgment against him immediately. *Mod. Ca. 8.*

So, if the demandant imparls generally, and the defendant does not appear at any time when he is demanded in the same term, it shall be a departure in despite of the court; for the whole term is but one day. *Sbo. 22. 66.*

So, if an imparlance be to a day certain in the same term, and the defendant does not appear at the day. *Mod. Ca. 8. Sbo. 66.*

So, if the tenant makes default at the return of the process, or day given by continuance to another term, in all *præcipe's quod reddat*, a *petit cape* goes, and if he does not then save his default there shall be judgment final. *Mod. Ca. 4.*

Or, the demandant may waive the default and proceed by other process. *Mod. Ca. 4. 1 Sal. 217.*

So, in a *præcipe quod faciat*, &c. there shall be a *distringas ad audiendum judicium*. *Mod. Ca. 8.*

So, in annuity; for tho' it be a personal, in the process it participates of the nature of a real action. *Mod. Ca. 8.*

But, in all personal actions, upon a default after declaration, before issue, there shall be final judgment against the defendant. *Mod. Ca. 8. Sbo. 65. 1 Sal. 216.*

So, after issue upon the second default, by the *st. Marl. 13.* and *W. 2. 27. R. 1 Sal. 216.*

(B 12.) *Of what effect it shall be.*] When a default shall be excused, *vide infra.*

When the default of one shall be the default of another, when the nonsuit of one shall be the nonsuit of another, *vide post. (X 5.)*

When the plaintiff shall be nonsuited upon his default, *vide post. (X 1, &c.)*

When an inquest shall be taken by default, *vide Enquest (E).*

When judgment shall be on default, *vide post. (Y 1.)* for judgment on default in personal actions: and *vide ante, (B 11.)* for judgment in real actions and in process.

The tenant may save his default by waging his law of non-summons. *De quo vide Abatement, (H 53.—I 26.)*

Or, by excuse, that he was in prison.

By tempest, inundation of water, or bridge broken.

But, in personal actions the defendant can never save his default. *1 Sal. 217.*



## (C) Count.

(C 1.) To whom a Declaration shall be delivered.

**T**HE first act, after the appearance of the parties, &c. is, that the party suing shall count. *Tb. D. l. 10. f. 5.*

In *B. R.* the course is, that the plaintiff's attorney delivers his declaration to the defendant's attorney, who makes a copy of it, and then re-delivers it, when his answer is required. *Comp. Att.*

314.

In *C. B.* the plaintiff's attorney makes a copy of the declaration, and delivers this to the defendant or his attorney. (*Vide Comp. Att.*

314.)

And, if he does not know where the attorney or clerk of the defendant may be found, he may deliver it in the prothonotary's office.

2 *Mod. Ca.* 379.

[It is not sufficient to stick up a notice of declaration in the office, if the defendant's last place of abode is known, for it ought to be served there. *Holsten v. Culliford*, *C. P. H.* 38 *Geo. 3.* 1 *Bos. & Pull. Rep.* 214.]

Or, if the defendant's attorney refuses to pay for the declaration, a delivery in the office with notice to the attorney, is sufficient. *Ibid.*

[In *B. R.*, on special or common bail filed, and notice given, plaintiff's attorney shall deliver declaration to defendant's attorney, who shall pay for it; if he refuses to pay, or his habitation is not known, plaintiff's attorney may leave it in the office with the clerk of the declarations, and give notice: and such delivery is good from the notice. *General Rule of Trin.* 11 *G.* 2 *Ld. Raym.* 1407.]

[It is irregular to file a declaration in the office when the defendant's place of residence is known to the plaintiff. *Oldham v. Burrell*, *B. R. M.* 37 *Geo. 3.* 7 *T. R.* 26.]

[Plaintiff cannot sign judgment for the defendant's refusing to pay 4*d.* for the warrant of attorney when the copy of the declaration is delivered to him. *O'Neale v. Price*, *B. R. T.* 31 *Geo. 3.* 4 *T. R.* 376.]

[Notice of a declaration left in the office must specify the nature of the action in technical terms; if not, judgment shall be set aside. *Graves v. Wife*, *T.* 31 *G. 2.* 2 *Wils.* 84.]

[It is well delivered only from the time of notice. *Barnes*, 227.]

[If a declaration *de bene esse* be left in the office, in a case where special bail is not required, *personal* notice is necessary; but in bailable cases notice to defendant's attorney is sufficient. 2 *Bl.* 725.]

And by the *st.* 4 & 5 *W. & M.* 21. if the defendant be detained in prison for want of sureties for his appearance, the plaintiff may cause a copy of the declaration to be delivered to the prisoner, or to the gaoler in whose custody he is, &c.

So, by the *st.* 8 & 9 *W.* 3. 27. if the defendant be a prisoner in the *Fleet*, the plaintiff, after filing or entering a declaration with the proper officer, may deliver a copy of such declaration to the defendant in any personal action, or to the turnkey or porter of the *Fleet* prison, &c.

So, if the defendant be *in custodia marshalli*, the plaintiff may file a bill, and then deliver a declaration to the turnkey. 1 *Sal.* 345.

[16

[If defendant served with process whilst at large, becomes afterwards prisoner, the declaration must be delivered to the turnkey. *Barnes*, 392.]

[The original declaration; and not a copy, must be left at the prison. *Barnes*, 434.]

[If the declaration is not delivered to the turnkey, (defendant being in prison,) a *superfedeas* shall be granted, tho' the declaration was left in the office. *Greenhouse v. Cleever*, M. 8 G. Str. 474.]

[But the declaration need not be delivered to a prisoner personally, or to the gaoler, unless where he is in custody at the suit of the *same* plaintiff for the *same* cause of action on which he was arrested. 1 T. R. 191.]

[A defendant who has surrendered on the fugitive-act cannot be charged with declaration. *Barnes*, 380.]

[Defendant is arrested by plaintiff, as executor, who finds his action wrong, makes a new affidavit for bail, and charges defendant with new declaration in his own right; proceedings shall be set aside. *Barnes*, 391.]

If it be in the vacation, he ought also to make an entry in the marshal's book at his office. 1 Sal. 345.

If the copy of the declaration delivered varies materially from the original, that shall not be to the prejudice of the defendant, but of the plaintiff; for his attorney was paid for it. C. Att. 298.

If, after imparlance, the plaintiff delivers a new declaration variant and more correct than the first; that does not avail: for the judgment shall be on the first. R. Cro. El. 507.

[On process by husband, declaration by the bye cannot be delivered at the suit of husband and wife. *Barnes*, 337.]

#### (C 2.) At what Time.

A declaration cannot be delivered, till the defendant appears, or is in custody. *Vide ante*, (B 1.)

[But a declaration may be delivered *de bene esse*, on the return day of the writ, to enable the plaintiff to expedite his cause; tho', if delivered before the *appearance day*, it is not effectual to charge the defendant with the *costs* of the declaration, if he pay the debt and costs of the writ *before* that time. 2 Bl. 749.]

[If the plaintiff wait till after the expiration of the defendant's time for appearance, he must bring the defendant into court before he can declare at all. 2 T. R. 720. *Baker v. Cooper*, B. R. H. 36 Geo. 3. 6 T. R. 548.]

So, a declaration shall not be received, or delivered to the attorney, before his appearance is entered with the filazer. *By Rule*, P. 24 Car. 2. C. B. (*Vide Rules and Orders of C. B.* 59.)

After appearance the plaintiff ought to declare.

If the defendant comes in upon *habeas corpus*, the plaintiff ought to declare in two terms, otherwise the defendant shall be discharged on common bail. *Mod. Ca.* 21.

[If there is a treaty between plaintiff and defendant, he is not obliged to declare within the two terms. *Walter v. Stewart*, T. 13 G. 3. 3 Wils. 455.]

And if he gives bail, after the return of the process, and not upon the



the return, he cannot by rule oblige the plaintiff to declare before. *Mod. Ca. 21.*

So, if a prisoner escapes, and be afterwards committed on the *ft. 1 Ann. sess. 2. 6.* the plaintiff may declare against him in two terms, otherwise the defendant shall be discharged. *Mod. Ca. 22. 2 Mod. Ca. 306.*

[A plaintiff need not declare against a prisoner until the end of the term next after the return of the writ, even tho' there was time in the term in which the writ was sued out to have made the writ returnable in that term, and it be not in fact made returnable until the next term. *Richardson v. Richardson, B. R. H. 36 Geo. 3. 6 T. R. 547.*]

But if a rule be given, and the plaintiff does not declare the same term, the defendant, after demand of a declaration, may enter a nonsuit when the rule expires. *Vide Rules and Orders of C. B. 23.*

[If defendant brings *habeas corpus*, and puts in bail in *Trin.* term, and plaintiff does not deliver declaration till *Hil.* following, defendant's attorney is not bound to accept it. *Hutton v. Stourbridge, T. 11 G. Str. 631.*]

[Declaration by the bye cannot regularly be delivered after the term in which the writ is returnable. *Barnes, 346.*]

[If after a plea in abatement the plaintiff enter on the roll *quod billa cassetur et defendens eat sine die*, he may at any time during the same term in which the writ is returnable deliver a declaration by the bye against the defendant. *Milles v. Andrews, B. R. E. 34 Geo. 3. 5 T. R. 634.*]

[A plaintiff in a *qui tam* action cannot declare by the bye before he has declared in chief. *Delves v. Strange, B. R. H. 35 Geo. 3. 6 T. R. 158.*]

[A plaintiff cannot declare by the bye before he has declared in chief. *Tetherington v. Golding, B. R. M. 37 Geo. 3. 7 T. R. 80.*]

[Declaration against prisoner in county-goal may be filed any time before rule to plead. *Barnes, 372.*]

[Delivery in prison on *Sunday* is good. *Barnes, 387.*]

[Defendant is supersedable for want of declaration, plaintiff discontinues, charges defendant still in custody with new writ on the old cause of action, he shall have *supersedeas* on common appearance. *Barnes, 396.*]

[If defendant, supersedable, has applied for one, and after summons served, plaintiff delivers declaration, signs judgment, and charges defendant in execution, all shall be set aside. *Barnes, 400.*]

[Two defendants, one in prison, the other absconds, and proceedings to outlawry are going on, the court will grant time to declare. *Barnes, 401.*]

[A declaration cannot be delivered against one of two defendants till both appear, or one appear and the other be outlawed. *2 Bl. 759.*]

[The delivery of a declaration in *B. R.* to a prisoner in the *Fleet*, does not prevent a *supersedeas*. *Barnes, 402.*]

(C 3.) *In B. R.*] *In B. R.*, if the defendant appears in person, the plaintiff ought to declare within three days after appearance. *C. Att. 318. C. Sol. 303. Han. Int. 2.*

By the *ft. 8 El. 2.* if the defendant was arrested, or appeared on the

the return of the *latitat*, *alias*, or *pluries capias* out of *B. R.*, and put in bail according to the course of the court, the plaintiff not declaring in three days after, the judges at discretion, as they see default in the plaintiff, shall award costs to the defendant, to be recovered *at infra*.

And by the *same stat.* if arrested or attached on a suit in the *Marshalsea*, courts of *London*, or other city, borough, &c. in any personal action, the plaintiff shall put in a declaration in three days after bail or appearance, if the court have continuance *de die in diem*; if not, at the next court (unless further day be given by the court); otherwise the court shall award costs to the defendant to be recovered by action of debt, &c. in any court of record.

If the defendant appears, and the plaintiff does not declare, he shall be nonsuited. *Bro. Default*, 13.

By the *st.* 13 *Car.* 2. 2. *sess.* 2. if the plaintiff declares not against the defendant (arrested on process out of *B. R.*, wherein the cause of action is not particularly expressed, and where the defendant is bailable by the *st.* 23 *H.* 6. 9.) in some personal action or in ejectment, before the end of the term next after the defendant's appearance, a nonsuit shall be entered against the plaintiff, and the defendant shall have judgment to recover costs, to be taxed and levied, as costs by the *st.* 23 *H.* 8. 15.

[This statute extends to all cases. *Oldham v. Burrell*, *B. R. M.* 37 *Geo.* 3. 7 *T. R.* 26.]

So, where the cause of action is expressed, and special bail given. *Semb. Vide Introd.* 2.

So, in all cases. *C. Sol.* 69. *Per Coke*, 3 *Bul.* 214.

So, if the defendant appears upon process, and gives bail; tho' he never was arrested. *Sal.* 455.

And by rule in *B. R.*, if the defendant be committed to the *Marshalsea* by any process out of *B. R.*, and gives rule to declare, and the plaintiff does not declare before the end of the next term after the commitment inclusive, the defendant shall be discharged on common bail. *C. Att.* 356.

[If on a writ taken out in *Easter* term, returnable the last of *Trinity*, defendant is taken before the end of *Easter* term, and continues in custody of the sheriff till after the end of *Trinity* term, without being charged with a declaration, he shall be discharged on common bail. *Pullen v. White*, *M.* 4 *G.* 3. 3 *B. M.* 1448.]

[The rule for defendant's being discharged on common bail, extends to defendant not taken, but surrendering himself in discharge of bail; and the time runs from notice of his being in custody. *Russel v. Stewart*, 6 *G.* 3. 3 *B. M.* 1787.]

So, if the defendant be committed to any other prison, and affidavit be made of such rule given to declare. *C. Att.* 356.

And by the *st.* 4 & 5 *W. & M.* 21. the time allowed for delivery of a declaration to a prisoner or gaoler, &c. is only before the end of the next term after the writ or process is returnable.

If the defendant appears at the suit of *A.*, and a stranger declares against him upon the common or special bail given to such suit, (as may be in *B. R.*), he ought to declare within the same term in which bail was filed. *C. Att.* 313.

Yet *A.* may declare at any time before the end of the next term. *C. Att.* 313.

But,



But, tho' the time for the delivery of a declaration be expired, the defendant shall not have a nonsuit signed, if his attorney has not demanded a declaration, and given a rule; for in all actions (except *replevin*) the defendant shall not enter a *non. proff.* till the plaintiff or his clerk, if they may be found, be asked for a declaration. *By rule, 1654. (Vide Rules and Orders of C. B. 23.)*

[By the general rules of law a plaintiff must declare within twelve months after the return of the writ; but by the rules of this court, if he do not deliver his declaration within two terms, the defendant may sign judgment of *non pros*: yet, unless he take advantage of the plaintiff's neglect, the latter may still deliver his declaration within the year. 2 *T. R.* 112. 3 *T. R.* 123. *Vide infra, (X 3.)*

[By bill if defendant is in actual custody or has appeared, any other plaintiff may deliver declaration by the bye in the same term in which bill returnable. *Sulyard v. Harris, H. 8 G. 3. 4 B. M. 2180.*]

[Common bail, filed by plaintiff's attorney, does not warrant delivering a declaration by the bye. *Wallis v. Smith, H. 9 Geo. 2. Str. 1027. B. R. H. 207.*]

[Tho' there are several defendants, there must be but one judgment of *non-pros* signed against plaintiff. *Pryce v. Foulkes, P. 9 G. 3. 4 B. M. 2418.*]

(C 4.) *In C. B.* In *C. B.*, if the defendant appears in person, the plaintiff ought to declare. *Vide ante, (C 2, 3.)*

If he appears on the exigent by *supersedeas quia improvide*, the plaintiff, if he does not declare within six or eight days, a rule being given, shall be nonsuited, and the defendant shall have his cost taxed by the prothonotary. *C. Att. 29.*

By the *st. 13 Car. 2. 2. sess. 2.* if the plaintiff declare not against the defendant, (arrested in process out of *C. B.*, where the cause of action is not particularly expressed, and the defendant is bailable by the *st. 23 H. 6. 9.*) before the end of the next term after appearance, a nonsuit shall be entred as in *B. R.* *Ante, (C 3.)*

So, in all cases, where the defendant appears at the return of the process, the plaintiff ought to declare before the end of the next term after the term in which the process was returnable; otherwise the defendant, upon a rule given in the office of the plaintiff's attorney, shall enter a nonsuit, and shall have execution for his costs. *C. Sol. 69. Compl. Att. 293.*

[But where the defendant does not give a rule to declare, the plaintiff has until the effoign day of the third term to deliver or file his declaration. *Pract. Reg. C. B. 121. cited H. Black. 87.*]

So, tho' no rule be given by the defendant, but a continuance entred by *dies datus*. *Compl. Att. 293.*

By rule *H. 14 & 15 Car. 2.* if the defendant be committed to the Fleet in Hilary term, or the vacation after, if the plaintiff does not bring him to the bar by *habeas corpus*, and declare against him within six days after the beginning of Trinity term, he shall be discharged of course by *supersedeas* out of the prothonotary's office, where his commitment was entred, if he enters his appearance, and brings a certificate under the hand of the warden of the Fleet that no proceeding by *habeas corpus* was against him within the time aforesaid. *C. Att. 277. (Vide Rules and Orders of C. B. 43.)*—But now, by the *st. 4 & 5 W. & M. 21.* there is no necessity for a *habeas corpus*. [Prisoner

[Prisoner by process of *B. R.* removed to the *Fleet*, must apply to *C. B.* for *superfedeas*, if plaintiff does not declare in time: *Barnes*, 384.]

So, if he was committed in *Easter* term, or in the vacation after, and the plaintiff does not bring him in by *habeas corpus*, and declare within six days after the beginning of *Mich.* term. *C. Att.* 278. (*Vide Rules and Orders of C. B.* 44.)

So, if he was committed in *Trinity* term, or in the vacation after, and the plaintiff does not bring him to the bar, and declare before the end of *Mich.* term. *Ibid.*

So, if he was committed in *Mich.* term, or in the vacation after, and the plaintiff does not bring him to the bar, and declare within six days after the beginning of *Easter* term. *Ibid.*

And the plaintiff may declare within the next term after such appearance, or *superfedeas*; otherwise the defendant's attorney may refuse the declaration. *C. Att.* 278. (*Vide Rules and Orders of C. B.* 45.)

So, if the defendant be in the custody of the sheriff, or other gaoler, and the plaintiff does not bring him by *habeas corpus* to the *Fleet*, he shall be discharged *ut supra* at the end of the third term after the arrest; and the plaintiff ought to declare within the next term after such appearance, and not afterwards. *C. Att.* 278. 2 *Vent.* 143. (*Vide Rules and Orders of C. B.* 45.)

Or, if the prisoner enters his appearance by attorney before, and gives notice of it to the plaintiff or his attorney, and makes *affidavit* of it in court, he shall be discharged, unless the plaintiff declares against him in the next term after such appearance, upon *affidavit* by the defendant's attorney, that no declaration was delivered to him. *C. Att.* 278, 9. (*Vide Rules and Orders of C. B.* 45.)

And by the *st.* 4 & 5 *W. & M.* 21. if the plaintiff delivers a declaration to the prisoner, or gaoler, &c. he ought to do it before the end of the next term after the writ or process is returnable, and after a declaration filed in the office. 2 *Mod. Ca.* 227.

And by a rule of the judges hereupon, if a declaration be not entered in the office, before the end of the next term after the process, upon which the defendant is arrested, was returnable, and *affidavit* of it be filed within ten days after *Easter* term, or within twenty days after any other term, the prisoner shall be discharged by *superfedeas* upon entering his appearance according to the antient practice of the court. (*Vide Rules and Orders of C. B.* 116.)

But if the declaration be not delivered to the prisoner till after the third term, if he does not attempt his discharge before *ut supra*, a delivery and judgment upon it are good, and the first bail are liable to it. *R.* 2 *Vent.* 143.

So, a copy of a declaration ought not to be delivered to the prisoner, before the process upon which he was taken is returnable.

Nor shall there be any rule for a defendant in custody to plead to the declaration delivered, before *affidavit* filed with the proper secondary, of the delivery of a copy of the declaration, and when, and to whom delivered. *Vide post.* (E. 40, &c.)

So, if the defendant be outlawed, and he reverses the outlawry and gives bail (as he ought); if the plaintiff does not declare within two terms after the outlawry reversed, the declaration may be refused, but



the plaintiff shall not be nonsuited. *C. Att.* 30. because the defendant was not taken on a common writ. *Ibid.*

And if the defendant appears, and gives a rule to declare, and demands a declaration, the plaintiff ought to declare four days or more before the essoign day of the next term, otherwise he shall be nonsuit. *Vide C. Att.* 295.

Tho' the writ was returnable the last return of the preceding term. *Semb. C. Att.* 295.

But in all actions (except in *replevin*) a nonsuit for want of a declaration shall not be entered, tho' the rules to declare are expired, 'till a declaration be demanded of the attorney or clerk of the plaintiff, if their dwelling is known. *R. C. Att.* 294, 5.

[But where the plaintiff has had time to declare beyond the two terms, and has not declared within that time, the defendant may sign judgment of non-pros without giving a rule to declare. *Towers v. Powell, C. P. M. 29 Geo. 3. 1 H. Bl.* 87.]

And if an attorney delivers a declaration, without shewing a deed, will, letters of administration, &c. therein mentioned, and agrees that the defendant shall not be obliged to plead till the shewing of them; there shall be no nonsuit for want of a declaration, if such deed, &c. be shewn before the end of the next term. *C. Att.* 295.

And no rule to declare shall be given after three days exclusive after the end of any term. *C. Att.* 294.

And such rule shall be expiring at four days inclusive of the day, in which it was given. *C. Att.* 294.

#### (C 5.) How the Declaration shall be entred.

When a declaration is delivered in *B. R.* the plaintiff's attorney ingrosses it on a roll, which is called the imparlance roll, upon which the continuances are indorsed, from the term, in which the declaration was made, till issue is joined, or the action is confessed, &c. and then it is filed with the clerk of the declarations.

But it is not usually ingrossed till the defendant has pleaded.

And by the course of *B. R.* no continuance is entred till after demurrer, or issue joined, and then indorsed before judgment. *1 Rol.* 485. *l.* 15.

The imparlance roll is a warrant for the plea roll, and the second declaration shall be amended by the first. *R. 2 Cro.* 105. *Vide Amendment, (L. 2.)*

Or, if there be a material variance in the second from the first declaration, it will be bad. *R. 2 Cro.* 415. 498. 537.

When a declaration is delivered in *C. B.* it ought to be entred on a roll in the prothonotary's office, and put in the dogget of the same office, with the number of the roll.

And it ought to be entred in the same term, in which it is delivered. *C. Sol.* 68.

But if the entry of the imparlance be in the office of one prothonotary, and the nonsuit in another, it is well; for the whole is one record, and the court does not take notice of the distinction of offices. *R. 2 Cro.* 39.

But, in an appeal, if the defendant be arraigned at the bar, and pleads *instantly*,

*instante*, not guilty, there is no occasion for the declaration to be filed. *R. Cro. Car. 532.*

Otherwise, if the defendant pleads any other plea than *not guilty*, by which there is a continuance till another term; for then the declaration ought to be filed by the course of the court. *Cro. Car. 532.*

(C 6.) How it shall be amended.

After the declaration is delivered, the plaintiff, in the same term and before plea, may amend as he pleases. *Vide Amendment, (L 1, 2.)*

But after plea, he cannot amend it, without leave of the court, *Pr. Reg. 17.*

After plea, he cannot amend his bill upon the file in *B. R.* without leave: otherwise before plea. *Pr. Reg. 18.*

And, by leave of the court, so long as all remains in paper, the court may allow an amendment at discretion. 1 *Sal. 47. Vide Amendment passim.*

But in *B. R.* in the next term, or after plea, the plaintiff cannot insert a new count, as *indebitatus assumpsit*, &c. *C. Att. 315. Sti. Pr. Reg. 141.*

Yet after the general issue pleaded, when nothing is entred, but all remains in paper, he may amend matter of form, without costs, or giving an imparlance. *C. Att. 315.*

[When the declaration is intituled of the wrong term, the court on application will order it to be amended accordingly. *Smith v. Muller, B. R. E. 30 Geo. 3. 3 T. R. 624.*]

And matter of substance, paying costs, or giving imparlance, at his election. *C. Att. 315.*

So, after declaration entred, he may, by order of the court or of a judge, amend a small matter which does not deface the roll, paying costs, or giving an imparlance, at his election. *C. Att. 357.*

This is said to be at the election of the defendant.

If the plaintiff pays costs, the defendant shall plead, without a new rule. *Sal. 517.* if the plaintiff amends the same term the defendant pleads. *Sal. 520.*

Otherwise, if he gives an imparlance. *Sal. 517, 518.*

But after a special plea, the plaintiff, if he amends in substance, shall pay costs, and has not his election to give an imparlance. *C. Att. 315.*

So, when the declaration is upon record, or ingrossed, it shall not be amended beyond what is allowed by the statute of jeofails. 1 *Sal. 47.*

So, in *C. B.* before declaration entred, the plaintiff, by order of a judge or prothonotary, may amend, paying costs, or giving an imparlance at his election. *C. Att. 297. Mills, 27.*

So, after declaration entred, before issue or demurrer entred. *C. Att. 217.* If the amendment be a small matter, which does not deface the roll, it may be amended by the court, on payment of costs, and giving liberty to plead with a new imparlance. *Ibid.*

[In *quare impedit*, after oyer of original craved, plea pleaded, and variance shewn between the writ and the count, the declaration may be amended on motion, and payment of costs, and declaration shall plead *de novo*. *Reppington v. Tamworth school, P. 33 G. 2. 2 Wils. 118.*]



And tho' the declaration was delivered many years back, if nothing be on record, it may be amended, paying costs, or giving an imparlance to the defendant, at his election. *Pr. Reg.* 20.

[*Latitat* against *A.* and *B.*; *A.* only served, declaration delivered to him as against both, of that term; *alias capias* against both; *B.* served; declaration delivered as of the same term; the proceedings shall not be set aside for delivering declaration as against two, when only one served, but declaration amended, by intitling it of the term after both were served. *Stork v. Herbert*, *H.* 22 *G.* 2. 1 *Wils.* 242.]

So, after the record is made up for trial. *Per Holt*, 1 *Sal.* 47. *R.* where the action would otherwise be lost. 3 *Lev.* 347. *F.* g. 193.

Or, after demurrer joined, if the whole be in paper. *Mod. Ca.* 38. *Vide* 1 *Ld Raym.* 669. 679.

So, after error brought, upon payment of costs. 3 *Mod.* 113.

So, an information may be amended without costs or imparlance, in a matter of form. 1 *Sal.* 50.

So, an information may be amended after plea, when the whole is in paper. 1 *Sal.* 47.

So, a plea to an indictment, after a replication to it is delivered; tho' the plea was filed, but not entred on record. *R.* 1 *Sal.* 47.

Yet the king, or the prosecutor, shall pay costs for an amendment, where a common person ought. 1 *Sal.* 193.

But, generally, after issue joined, and notice of trial, no amendment shall be allowed. *R.* 2 *Mod.* 144.

[In a *qui tam* action, to which the general issue is pleaded, and the cause is carried down by proviso, but postponed for length, the declaration may be amended on motion, but the defendant shall have liberty to plead *de novo*. *French v. Whitfield*, *T.* 10 & 11 *G.* 2. *Andr.* 13.]

[The court will not give leave to amend declaration after the term next after the term it was delivered, and after defendant has pleaded; especially if defendant is in custody. *Autheer v. Barker*, *M.* 20 *G.* 2. *Wils.* 149. *Owens v. Dubois*, *B. R. T.* 38 *Geo.* 3. 7 *T. R.* 698. *cont.*

And if a declaration be delivered, materially varying from the original declaration, the prejudice shall not be to the defendant, but to the plaintiff, because his attorney was paid for the copy delivered. *Per Rule*, 1654, *Mills*, 28. *Vide C. Att.* 298.

In ejectment, the time of the demise, (which is not yet come by a mistake of the year,) shall not be amended after verdict. *R.* 1 *Sal.* 48.

Otherwise, in a judgment on a warrant of attorney; for else the agreement of the parties would be defeated. 1 *Sal.* 48.

So, after a demurrer entred upon the roll, no amendment of the declaration shall be allowed. *R.* 1 *Sal.* 50.

[After demurrer to a declaration of two counts against two defendants, because one of them was not named in the last count, plaintiff cannot enter a *noli prosequi* on that count, and proceed on the other. *Drummond v. Durant*, *B. R. T.* 31 *Geo.* 3. 3 *T. R.* 360.]

[After judgment is arrested, declaration cannot be amended, tho' on payment of costs. *Semb. sed qu.* *Collins v. Gibbs*, *M.* 33 *G.* 2. 2 *B. M.* 899.]

[If plaintiff moves to add a count, to make his declaration good from the delivery, so to prevent *superfedeas*; court will not grant it, unless he agrees to a *superfedeas* six days after term. *Barnes*, 500.]

When

When a declaration may be altered upon payment of the debt by the defendant, *vide post.* (C 10.)

When a declaration shall be amended upon the statutes of jeofails, *vide Amendment*, (L 1, 2.)—When a plea, *vide post.* (E 39.)—*Amendment* (M).

(C 7.) The Form of a Count, or Declaration.

The count or declaration is an exposition of the writ, and adds time, place, and other circumstances, so that it may be tried: *Co. L.* 303. *b.* 17. *a.*

But this is to be understood of personal actions; for, in real and mixt actions, it is not usual to count of the year, day, and place. *Bro. Count*, 59.

[In debt for goods sold and delivered, "an allegation that the defendant, at *Westminster in the county of Middlesex*, was indebted to the plaintiff in a certain sum for goods sold and delivered," without an allegation of an express contract, and place where such contract was made; on special demurrer for these causes, the contract and *venire* well laid. 2 *T. R.* 28.]

The declaration, regularly, shall be delivered of the same county where the original was sued.

But if it be in another county, it is good as to the defendant, tho' his bail will thereby be discharged. *R. 3 Lev.* 235.

[The true day of filing bill shall be inserted in the declaration. *Barnes*, 343.]

[Defendant has a right to call on plaintiff to intitle his declaration agreeable to the true time of delivering it. *Thompson v. Marshal*, *T.* 24 & 25 *G. 2.* 1 *Wilf.* 304. *Wilkes v. Earl Halifax*, *M.* 5 *G. 3.* 2 *Wilf.* 256.]

[A declaration intituled generally of the term, relates to the first day of the term; and the premises and breach being laid on the first day of the term, may be presumed to have been made before the delivery of the declaration; because, by a reference to the ancient practice of declaring *ore tenus*, the declaration cannot be supposed to have been delivered 'till the sitting of the court on that day. 1 *T. R.* 116.]

[A declaration must be intituled of the term in which the writ is returnable, tho' in certain cases, according to the practice of the court, it need not actually be filed 'till the next term. 3 *T. R.* 624.]

[Superfluous counts may be struck out, with or without costs, according to circumstances. *Barnes*, 335. 341. 344.]

[The omission of "and thereupon the said *J. J.* complains," in the beginning of a declaration of trespass on the case, is no cause of special demurrer. *Dobson v. Herne*, *C. P. H.* 39 *Geo. 3.* 1 *Bos. & Pull. Rep.* 366.]

[A declaration may be referred for scandal and impertinence, (as, if a surgeon declares for curing defendant of the *soul disease*), the words struck out, and exemplary costs given; the rule for referring scandal, &c. ought to be the same at law as in equity. *Per Cur. Anon.* *H.* 28 *G. 2.* 2 *Wilf.* 20. *Cowp.* 665. 727. *Dougl.* 194. 667.]

(C 8.) In B. R., ought to be in custod. mar. Mar.] The plaintiff cannot



cannot declare against one in *B. R.*, but in *custodia marescalli*. *Cro. El.* 223.

Except where the defendant has privilege. 2 *Sand.* 415.

Or, the action is brought in *Middlesex*. *Dy.* 118. a.

*Mar. Mar. nostra* shall be intended, marshal of *B. R.* *Sal.* 602.

And now, by the *st.* 4 & 5 *W. & M.* 21. if a defendant taken on a process out of *B. R.* be detained for want of surety for appearance, the plaintiff may deliver a declaration to the prisoner, or the gaoler in whose custody he is, and in the declaration allege, in the custody of what sheriff, bailiff, &c. the prisoner is at the time of the declaration delivered, which shall be as effectual as if alleged in the custody of the marshal of the *Marshalsea*.

If he be in actual custody of the marshal of the *Marshalsea*, it is sufficient in term to file a bill against them, and deliver a declaration to the turnkey. 2 *Sal.* 213.

In vacation it ought also to be entred in the book of the marshal's office, *quod remaneat in custod. ad sect.* A. B. *Ibid.*

And therefore, before the plaintiff can declare, there ought to be a *committitur* of the party, or bail put in by him in *B. R.* 1 *Rol.* 581. l. 10. *Poph.* 145.

And before the *st.* 4 & 5 *W. & M.* 21. if he was arrested in the country, and there detained, he must have been removed by *habeas corpus* to *B. R.* before the plaintiff could declare.

And tho' the bill relates to the first day of the term, the action shall not be said to be depending till bail is filed. *R.* 1 *Vent.* 135. 264.

But if a man was committed to the marshal of the *Marshalsea* for a contempt, the plaintiff cannot declare against him there without leave of the court. *R.* *Ray.* 58.

So, if he was committed for any other misdemeanor. *R.* 1 *Sid.* 154.

So, if a man attainted be pardoned, he shall not be charged with an action in *custod. marescalli*. *R.* *Sal.* 500.

Yet if the plaintiff declares against a man in *custodia marescalli*, when committed for a misdemeanor; *quod fieri non debuit, factum valet.* *Ray.* 58. 1 *Sid.* 90.

So, if the plaintiff declares against him there, and he is afterwards removed to the *Fleet*, the plaintiff may proceed in *B. R.*, and after judgment remand him by *habeas corpus* to the marshal. *D.* 1 *Sid.* 100.

If the defendant be in *B. R.*, in *custod. mar.*, at the suit of any one, the same plaintiff may declare against him in another action, in the same or a subsequent term.

So, a stranger may declare against him in the same term. *R.* *Poph.* 145, 6. *Adm.* 1 *Sal.* 2.

But, in an appeal, if the sheriff returns *cepi corpus*, the plaintiff cannot declare against him in *B. R.* but upon the original, on which the *cepi corpus* was returned; for there is no reason to commit the defendant to prison, when he is ready to answer the writ on which he was taken. *R.* 1 *Rol.* 581. l. 15.

So, a man, not in actual custody, but upon bail, is not liable to all other actions. 1 *Sal.* 1.

So, if he is not in actual custody, he may plead the privilege of *C. R.*, tho' he be arrested by process of *B. R.*, and is thereby supposed to be in *custodia marescalli*. *R.* 1 *Sal.* 1. [A de-

[A declaration against a defendant as a prisoner, must mention at whose suit.]

[But if it is in debt, and says the *latitat* was *de placito quod reddat* to the plaintiff, it is sufficient; for it must be understood it was at his suit. *Morris v. Watkins*, P. 10 G. 2 *Ld. Raym.* 1362.]

[And if it does not mention at whose suit, defendant may demur generally. *Williams v. Wills*, H. 19 G. 2. *Wilson*, 119.]

(C 9.) *Addition not necessary, nor recital of a plaint.*] In B. R. the defendant's addition is not necessary, for the declaration is not founded on an original, and therefore is not within the *st.* 1 H. 5. 5.

So, a recital of the plaint is not necessary.

Nor, a recital of the original at large, where the suit is there by original. *R. Carth.* 108.

But in account and debt the usual form is to say, *A. queritur de B. in cust. mar. &c. de placito quod reddat ei 10 lb. &c. pro eo videlicet quod cum, &c.*

In covenant, *de placito conven. fract.* 2 *Sand.* 361.

In case and ejectment, *A. queritur de B. in cust. mar. &c. pro eo videlicet quod cum, &c.*

Yet the bill or plaint ought to be filed. 2 *Cro.* 186.

And if the bill be filed before cause of action, it is error. *Vide Action (E).*

So, if there be a material variance between the bill and declaration. *R. Latch*, 58. 2 *Cro.* 294. *Vide Variance between Original and Declaration, post.* (C 13, 14, 15.)

When it may be amended, *vide Amendment*, (D 7, 8.)

So, a new bill may be filed by leave of the court, where the old one may have been lost. *R.* 2 *Cro.* 186.

So, a declaration upon a bond, indenture, or other deed, does not conclude with a *proferat in cur.* &c. but after mention of the deed is added *curiaque dict. domini regis nunc hic ostens.*

If the plaintiff declares by such a one, his attorney omitting his christian name, it is error. *R.* 1 *Rol.* 336. *Vide Attorney*, (B 7.)

[Payment of money into court is an admission of only a legal demand. *Ribbans v. Crickett*, C. P. E. 38 *Geo.* 3. 1 *Bos. & Pull. Rep.* 264.]

(C 10.) *When money may be brought into court.*—[The first motion to bring money into court was in *Kelyng's* time, and introduced to avoid the hazard and difficulty of pleading a tender. *Str.* 787.]

If the declaration be for a large sum of money, where only a small sum is due, on motion of the defendant, and payment into court of the sum due and costs to the time of the motion, the plaintiff shall proceed for the residue at his peril.

And in B. R., if the defendant produces the rule at the trial, and the jury do not give damages above the sum paid into court, the plaintiff will be nonsuited, and must pay costs to the defendant.

So, in C. B.

And the plaintiff shall have the money brought into court; tho' he be nonsuit. *Sal.* 597.

[Payment of money into court under a rule for that purpose, is a payment of record, and therefore the defendant can never recover it



back again, tho' it afterwards appear that he paid it wrongfully. 2 T. R. 648.]

[Wherever the sum demanded is certain, or may be ascertained by computation, without any other discretion left to the jury, (as money due for freight and demorage,) it may be paid into court. *Hallet v. East-India Company*, H. 1 G. 3. 2 B. M. 1120.]

[So, in covenant, where the breach assigned is a sum certain. *Barnes*, 284.]

And this is allowed in all personal actions, where the debt demanded is certain: as, in debt. 1 Vent. 356. Sal. 597.

[On bond to secure annuity. *Barnes*, 288.]

[It may on debt for rent, and *nil debet* pleaded; so, in covenant for non-payment of rent. *Barnes*, 280.]

[In debt for killing a hare, defendant may bring penalty and costs into court, (if no other count). *Webb v. Punter*, M. 18 G. 2. Str. 1217.]

[If the court see reason to suspect that a *qui tam* action is prosecuted merely for the issue-money, they will, on motion, permit it to be paid into court to abide the event of the suit. 3 T. R. 137.]

In *indebitatus assumpsit*. 1 Vent. 356.

So, in *indebitatus assumpsit* and *quantum meruit*; tho' the *quantum meruit* is uncertain. *Dub. per Holt*, but afterwards agreed. Sal. 597.

So, in covenant, for non-payment of rent. R. Sal. 596. Per C. B. 3 Geo.

So, in covenant to find diet or pay 10 l. 2 Mod. Ca. 305.

In replevin where the defendant avows for rent. Sal. 597. 2 Mod. Ca. 379. [*Vernon v. Wynne*, C. P. T. 28 Geo. 3. 1 H. Bl. 24.]

[But the court will not stay proceedings, unless upon payment of the rent in arrear, together with all costs, tho' the arrears were ten, dred before replevin with costs up to that time. *Hopkins v. Shrole*, C. P. H. 39 Geo. 3. 1 Bos. & Pull. Rep. 382.]

[In trover for money, he shall bring the whole money declared for into court. *Anon.* H. 5 G. Str. 142.]

In ejectment where the entry was for non-payment of rent. Sal. 597. Per C. B. 3 Geo.

And now, by the st. 4 G. 2. 28. if the tenant at any time before trial in ejectment pay to the lessor or his attorney, or into court, all the rent due and costs, all proceedings in the ejectment shall cease.

So, after judgment, execution shall be stayed. 2 Mod. Ca. 345.

[On bond with penalty, conditioned to pay money by instalments, and action brought on failure of one payment, proceedings shall not be stayed on paying the sum then due, and costs. *Land v. Harris*, P. 8 G. Str. 515. *Contra*, *Bridges v. Williamson*, M. 2 G. 2. Str. 814. *Mayne v. Somner*, H. 4 G. 2. *Ibid.*]

[In debt on bond with condition to account for money to be received, the court will not stay proceedings upon paying the penalty into court, because damages may be recovered beyond that amount, *Lonsdale v. Church*, B. R. E. 28 Geo. 3. 2 T. R. 388.]

[In debt on bond to pay money by instalments, on failure of the first payment plaintiff shall have judgment; but shall not take out execution, but as the payment becomes due. *Darby v. Wilkins*, M. 7 G. 2. Str. 957.]

[Paying all the past instalments, with interest and costs, is sufficient;

cient; and, if more money is brought into court, it may be ordered out of court to the party who brought it in. *Lucas v. London, M. 11 G. 2. Str. 958.*]

[On bond to pay a gross sum at a day certain, defeazanced afterwards by articles to pay by instalments at days therein mentioned, provided he pays punctually, and lives till all the days are past, otherwise defeazance to be void; obligor makes default, the gross sum must be paid; and on action against him, he cannot pay in the money due on instalments only, even tho' the obligee, after the default, received interest on all remaining due. *Bonafous v. Rybot, P. 3 G. 3. 3 B. M. 1370.*]

[If plaintiff in a bill in equity offers to pay money (an insurance-premium) to defendant, and an issue is directed wherein he is defendant, this offer is the same as if the money had been actually brought into court. *Wilson v. Duckett, M. 3 G. 3. 3 B. M. 1361.*]

But where the action is only for damages, defendant shall not be allowed to pay any sum into court upon motion: as, in covenant. *R. 1 Vent. 356.* if it be for not repairing. *Sal. 596.*

[In an action against an attorney, for negligence in his client's business. *1 T. R. 710.*]

[So, in an action for immoderately driving a hired chaise. *White v. Woodhouse, M. 1 G. 2. Str. 787.*]

[In debt for a fine in a manor-court, money cannot be brought into court. *Gold v. Freame, H. 1722, Bunb. 124.*]

In trover for goods certain, he shall not be allowed to bring the goods into court. *Sal. 597.*

[In trover for a special chattel of certain value, which must be the sole measure of damages, the thing demanded may be brought into court, or ordered to be delivered to plaintiff. *Fisher v. Prince, M. 3 G. 3. 3 B. M. 1363.*]

[But where quantity or quality is uncertain, or *tort* may enhance damages above *real* value, and no rule to estimate additional value, it shall not. *Ibid.*]

[And tho' court orders the goods to be delivered to plaintiff, he may still proceed for damages at peril of costs. *Ibid.*]

[Under certain circumstances the court will stay the proceedings in an action of trespass for seizing goods, on the defendant's restoring the goods, or paying the full value of them with the costs of action. *Pickering v. Truste, B. R. M. 37 Geo. 3. 7 T. R. 53.*]

[The court will not permit a defendant to pay money into court in an action against the sheriff for a false return to a *fieri facias*. *Bowles v. Fuller, B. R. T. 37 Geo. 3. 7 T. R. 335.*]

[A laced head for which *trover* is brought, cannot be brought into court. *Bowington v. Parry, H. 2 G. 2. Str. 822.*]

[Nor, pictures. *Olivant v. Perineau, T. 16 G. 2. Str. 1191. Willf. 23.*]

[But the court may make rule to shew why the goods and costs should not be accepted. *Barnes, 281.*]

[But the court will not do this, if the goods have been altered. *Barnes, 284.*]

[Money cannot be brought into court in debt *sur emisset*, for goods sold. *Leapidge v. Pengilliane, H. 4 G. 2. Str. 890.*]

[It



[It cannot be brought on a bond from bailiff for his good behaviour, and payment of money to the sheriff's use. *Barnes*, 285.]

[Nor, in debt on bond for performance of covenants in lease. *Barnes*, 286.]

[Nor, for the penalty of a charter party. *Barnes*, 285.]

[Nor, in an action for dilapidations. *Squire v. Archer*, T. 5 G. 2. Str. 906. *Salt v. Salt*, B. R. M. 39 Geo. 3. 8 T. R. 47.]

[Money cannot be brought into court in debt for rent, but the court will refer it to the master, to compute what is due, on defendant's undertaking to pay. *Lee v. Irish*, M. 9 G. 2. B. R. H. 173.]

[In an action upon a bond, dated in 1775, for 2400*l.* proclamation money of *North Carolina*, wherein the plaintiff averred that it was of a certain value, the court would not permit the defendant to pay the "2400*l.* proclamation money," into court; because, first, it was foreign money, and the master could not ascertain the value; and secondly, because its value was considerably diminished since the time the debt accrued. *Cuning v. Monro*, B. R. M. 33 Geo. 3. 5 T. R. 87.]

[Nor, on covenant, if defendant is to render best beast for heriot, or money, at plaintiff's election. *Barnes*, 289.]

[Nor, on debt on bill penal, with count added on a *mutuatus*, but after verdict the court will not set it aside. *Barnes*, 283.]

[It cannot in an action of trespass for the mesne profits, against tenant in possession, after judgment in ejectment against the casual ejector, for this action is for a *tortious* occupation. *Holdfast v. Morris*, H. 33 G. 2. 2 Wilf. 115.]

In replevin where he avows for *damage-feasant*. 2 Mod. Ca. 379.

[In replevin, after declaration and before avowry, proceedings may be staid, on payment of rent distrained for and costs. *Barnes*, 429.]

[Yet, tho' paying money into court, where the demand is for unliquidated damages be irregular, if the plaintiff take the money out, he thereby waives the irregularity, and cannot afterwards have the advantage of a verdict, unless he recover more than the sum paid in. 1 T. R. 710.]

Yet, by the *st.* 4 & 5 Ann. 16. in an action on a bond with a penalty, if the defendant brings into the court, where the action depends, all the principal and interest due, and all costs expended in any suit in law or equity upon such bond, the money brought in shall be taken in full satisfaction of such bond, and the court may give judgment to discharge the defendant of and from the same.

[Proceedings on a single bond, stayed by the court on payment by the obligor of principal and costs without interest. *Hogan v. Page*, C. P. M. 39 Geo. 3. 1 Bos. & Pull. 337.]

[Plaintiff brought debt on bond against defendant administrator, filed a bill for discovery of assets, and instituted a suit for an inventory; judgment for plaintiff reversed on error; new action brought; and defendant moves to stay proceedings, on 4 & 5 Ann. on payment of principal, interest and costs; and the court directed costs only of that second suit, tho' the words of the act are, *all costs in any suit in law or equity on such bond*. *Sifney v. Nevins*, P. 12 G. Str. 699.]

[If defendant moves to stay proceedings in debt on bond, on payment

ment of principal, interest and costs, and there is a suit in equity for the same matter, he shall pay the costs there also. *Lock v Shermer, P. 8 G. 2. B. R. H. 116. Vide Sifney v. Nevins, ante, contra.*]

So, before this statute, if the penalty of the bond was brought into court by rule, it was referred to the master or prothonotary to tax the principal, interest and costs, for the plaintiff, and the residue was returned to the defendant. *Mod. Ca. 101. Sal. 597.*

And the court will not oblige to the payment of another debt in conscience, before relief. *Mod. Ca. 101.*

So, in covenant, if the breach is assigned for non-payment of rent or a sum certain. *Per King, Ch. J. Hil. 3 Geo.*

So, in ejectment upon a condition broken for non-payment of rent. *Per King Ch. J. Hil. 3 Geo. (Vide 2 Str. 900.)*

But a proffer after notice of trial shall not be allowed, if the payment be not so ready as not to delay the trial. *Mod. Ca. 25.*

So, it shall not be allowed in debt on a judgment. *Mod. Ca. 60.*

[If the money is not paid into court when defendant has pleaded tender with a *proferit in cur.* it is no plea, and plaintiff may sign judgment. *Pether v. Shelton, M. 12 G. Str. 638.*]

[It may be paid in at any time before plea pleaded. *Barnes, 279. 281.*]

[The court will not allow money to be paid in after plea pleaded. *Thornton v. Gibson, H. 20 G. 2. 1 Wilf. 157. Barnes, 286. 349.*]

[But now, even after plea, it is perpetually done, by obtaining a judge's order. *1 T. R. 711.*]

[Nor, after judgment for want of plea. *Barnes, 281. 285.*]

[After issue joined, it cannot be increased. *Barnes, 282. 286.*]

[After general issue pleaded, the court will give leave to withdraw it, in order to bring money into court, and replead it. *Tarlton v. Wragg, T. 21 G. 2. Str. 1271.*]

[Or, to withdraw plea, pay in money, and plead general issue on terms. *Barnes, 362.*]

[Or, to withdraw, pay money, and plead the same plea. *Barnes, 289.*]

[The court will give leave to pay money as to some counts, and to the rest to plead general issue, statute of limitations, and set off bankruptcy, but not to demur. *Barnes, 286. 350.*]

[And to plead general issue, and *plene administravit.* *Barnes, 286. Vide infra, (E 13.)*]

(C. 11.) *In C. B. must be upon an original, &c.*] But all declarations in *C. B.* are founded on an original writ, original bill, or upon an attachment of privilege. *Lut. 228.*

And therefore, if the declaration there begins with a *queritur*, as in *B. R.*, it is error. *R. Lut. 228.*

The antient course in *C. B.* was, that the plaintiff declared upon the appearance, and after imparlance made a declaration *de novo.* *2 Cro. 89.*

But the first declaration was the foundation and warrant for the second. *Ibid.*

And if there was no original, it was error at the common law.

So, if there was no writ of privilege filed, where the suit is by attachment of privilege. *R. 2 Cro. 418.*

So,



So, if the plaintiff declared twice on the same original, and one declaration varied from the other. *R. Cro. El.* 416.

But the want of an original is aided after verdict by the *ft.* 18 *El.* 14. *Vide Amendment*, (D 6.)

And now, by the *ft.* 4 & 5 *Ann.* 16. after judgment by confession, *nil dicit, non sum inform.*, or after a writ of inquiry executed, all defects are aided, as after verdict, so as there be a writ, original, or bill duly filed.

[An original writ of the term in which final judgment is given, will not warrant that judgment, if it appear on the same record that there have been proceedings of a preceding term. *Dyke v. Sweeting*, *H.* 21 *G.* 2. & *Wilf.* 181.]

[The memorandum need not set out in what plea, for the original being recited *verbatim*, shews itself. *Barnes*, 331. 333. 336.]

[If the original is returnable the second return of the term, tho' the *placita* are entred generally of the same term, it is well enough; for the whole term may be considered as one day; and in *C. B.* there are no special *placita*. *Philipps v. Philipps*, *T.* 11 & 12 *G.* 2. *Andr.* 248.]

[But in *B. R.* where a debt accrues in term time, and in the same term the party comes and complains, he must have a special memorandum to shew that the cause of action precedes the bringing it. *Ibid.*]

[And after verdict, any default of this nature would be cured by *ft.* 5 *G. c.* 13. in which penal actions are not excepted. *Ibid.*]

(*C.* 12.) *How the original shall be recited.*] And when the suit is upon an original, the original shall be recited in the declaration shortly.

As in account, annuity, covenant, debt, detinue, and replevin, (in which actions the original is a summons,) the declaration shall be *A. &c. sum, fuit ad respondendum q. de placito, &c.*

And in actions on the case, ejectment, trespass, &c. (where the original is an attachment,) the declaration shall be *A. &c. attach. fuit ad respondendum q. de placito.*

And in actions upon the case, &c. where the writ contains the case at large, the writ antiently was recited at large in the declaration. [*Vide 2 Wilf.* 394.]

But now, by rule of court, the declaration ought not to recite all the original, but it is sufficient to mention the nature of the action, as *A. attach. fuit ad respondendum q. de placito transgressionis super casum.* *C. Att.* 296.

So, in personal actions on a general statute, except in debt, *C. Att.* 296. *Per Rule* 1654, *Mills*, 26.

So, in actions upon the case, or a general statute by original in *B. R.* *C. Att.* 357.

The original recited is part of the declaration, and therefore in trespass; if the writ be recited to be *vi & armis*, it is sufficient, tho' that be afterwards omitted. *R. Lut.* 1509. *Vide post.* (3 *M* 7.—*C* 86.)

If the writ for taking of goods says *pretii* or *ad valentiam*, &c. it is sufficient, tho' it be omitted in the declaration. *R.* 1 *Sid.* 150. 2 *Cro.* 654.

If the writ says *bona & catalla sua*, and the declaration omits *sua*, *R.* 1 *Sid.* 187. *R. Lut.* 1509.

But a vicious recital of an original does not hurt the declaration, if the writ itself, upon *oyer*, be not bad: as, in *replevin de capt. averiarum* for *averiorum*. *R. Sal.* 701.

(C 13.) *Must be conformable to the original.*] And the declaration ought to be conformable to the writ. *Co. Lit.* 303. a.

And for variance between the count and the writ the defendant may plead in *abatement*. *Vide Abatement*, (G 8.) *And see there for what variance a plea in abatement is good.*

So, a material variance between the count and the writ is error: as, if the count demands more, or less, than the writ, as where the writ is *quare clausum fregit*, the count *quare clausa*. *R. Cro. El.* 185. *Vide post*, (3 M. 6.)

[When the whole original writ was spread out on the roll, together with the count thereupon, if a variance appeared between the writ and count, the defendant might have taken advantage of it, either by motion in arrest of judgment, writ of error, plea in *abatement*, or *demurrer*. 2 *Wilf.* 394.]

[But afterwards, it was determined, that if the defendant would take advantage of a variance between the writ and count, he must demand *oyer* of the writ, and plead the variance. 2 *Wilf.* 85. 395.]

[And the court frequently permits the defendant to take advantage of a variance on motion. *Turing v. Jones*, *B. R. M.* 34 *Geo.* 3. 5 *T. R.* 402.]

[The court will not, on motion, permit a defendant to take advantage of a variance between the sum mentioned in the *ac etiam* part of the *latitat* and the declaration. *Ibid.*]

[The court will not set aside the proceedings for irregularity for a variance between the original writ and the declaration. *Spalding v. Mure*, *B. R. T.* 35 *Geo.* 3. 6 *T. R.* 363.]

[The defendant must take advantage of an irregularity in the writ before appearance. *Fox v. Money*, *C. P. E.* 38 *Geo.* 3. 1 *Bos. & Pull. Rep.* 250.]

So, if the writ be *quare clausum fregit et herbam ibidem conculcavit*, and the count omits *fregit*; for then the count omits the trespass for the entry into the close, which was in the writ. *R. per two J. Ventris cont.* because the treading down the grass in the close imports an entry into it. 2 *Vent.* 153.

So, a writ in *replevin de avariis*, &c. a count *de equo*. *R. Cro. El.* 330. 7 *Ed.* 4. 31. b. *R. Lut.* 1181.

So, in forger of false deeds, a writ of divers false deeds, and a count of a deed of feoffment. 35 *H.* 6. 37.

If a writ in trespass be *contra pacem nuper regis*, and the declaration *contra pacem regis nunc*. 11 *H.* 4. 15. 2 *Ed.* 4. 24. b.

So, a writ for goods *ad valentiam* 20*l.* declaration *ad valentiam* 40*l.* *R. Cro. El.* 308.

So, in an action on the case for a nuisance, if the writ be *for raising a yard* and the declaration adds *digging a gutter*. *R. Cro. El.* 829.

So, in debt, if the writ be *in placito debiti* 10*l.* and the plaintiff declares for 20*l.* *R. Cro. El.* 434.

So, if a writ of waste be against the defendant *ex dimissione A.* and the count shews a feoffment to *B.* who ought by recovery to declare the use to the defendant, it is bad; for it ought to have been (as appears by the declaration) *ex dimissione B.* *R. Cro. El.* 722.



If the writ be on the demise of the predecessor, and the count on the demise of himself, or *è contra*. R. 1 Rol. 432.

(C 14.) *When a variance shall be aided.*] And a material variance is not aided by verdict. R. Cro. El. 185. 829. 330. 722. R. 2 Vent. 153. Per Powell acc. but Treby cont. Lut. 1181. Vide Amendment, (D 18.)

But misprision of one original for another, as *summoned* for attached, is only form, and aided by verdict. Semb. 2 Cro. 108. Cro. Car. 91, 4 Mod. 246.

[In an action on the case, if the writ is recited *summonit.* instead of *attach.* it is well. *Brown v. Morgan*, M. 4 G. 2. Fort. 341.]

[So, on debate, in the case of a member of parliament. *Lockyer v. Chetwynd*, in C. B. Fort. 341.]

So, if the original be certified in one county, where the action was in another, it shall not be intended the original in the same cause, but rather that there was no original, and this is aided by the statute. R. 2 Cro. 655. 674. Vide amendment, (D 8.)

Or, of another term, or between other parties. R. Cro. Car. 327. R. 3 Mod. 136.

[Special original in L. plaintiff declares in M.; defendant takes the declaration out of the office; plaintiff sues out new original in M.; proceedings shall not be set aside. *Barnes*, 415.]

So, if the original recited in trespass be only for one day, the declaration for trespass on several days. R. 4 Mod. 246.

If the original certified was such as the defendant was outlawed upon; for then the plaintiff may declare upon that or upon a new original. R. Jon. 442, 3.

So, if, upon no original being assigned for error, diminution be alleged, whereupon the *custos brevium* certifies an original of the term in which the *placita* is entred, which is a variance; it may be suggested that there is another original in the same, or a precedent term, and there shall be another *certiorari* for it. R. 1 Sal. 267.

So, on a *certiorari* for an original, the continuances ought not to be returned. 1 Sal. 269.

Otherwise, if it be only a misprision or small variance in the name of the party, or in the time, between the original certified and the declaration. Vide Amendment, (D 8, 9.)

[In action for a false return, if declaration sets forth a *feri facias*, and a warrant to levy so much which he had recovered against A., and the warrant is, to levy of the goods of A. so much as he had recovered against ———, (omitting the name,) it is good, the *feri facias* being right. *King v. Morris*, T. 5 G. 2. Str. 909.]

(C 15.) *What variance is not fatal.* Special count upon a general writ.] So, a special count on a general writ is good. Vide Abatement, (G 8.)

As, in assize de *libero tenemento*, if the plaint is made de *quatuor acris saliceti commun. eslovenior.*, and of several rents. R. 8 Co. 47, 8.

In assize of *frequent distress*, if the plaint is, that he was so often distrained that he could not manure. 8 Co. 50. b.

[If a *capias* be generally at the suit of the plaintiff, and the declaration *qui tam*, it is well enough. 2 Bl. 722.]

In *quare impedit* for the king *presentare ad ecclesiam que ad nostram spectat donationem* generally, count may be special, *que spectat ratione prerogative sue regie*. R. and off. in parl. on a special demurrer for that cause. Ca. Parl. 164.

In *quare imp. presentare ad ecclesiam* generally, the count may shew that he has only two turns, &c. 5 Co. 102. b.

So, a variance, by the addition of a thing not material, is not fatal: as, in trespass for an assault and battery, the plaintiff declares that the defendant struck the horse on which the plaintiff rode, *per quod* the plaintiff fell; the variance between the writ which speaks only of the battery of himself, and the count which speaks also of the battery of the horse, is not material; for the stroke to the horse is only inducement to the battery of the plaintiff himself, and not alleged as the ground of the action. R. Mar. Pl. 107.

So, a variance as to damages between the writ and the declaration is not material. R. 2 Cro. 128. 629. Vide post. (C 84.)

[*Quare clausum fregit* against two, and a declaration against one, holden regular. *Spencer v. Scott*, C. P. E. 37 Geo. 3. 1 Bos. & Pull. Rep. 19.]

[In process notailable, if the writ be joint and the declaration several, it is regular: *secus*, inailable process. Ibid. p. 49.]

[If process be sued out in the name of two plaintiffs, and declaration be delivered in the name of one only, it is bad. *Rogers v. Jenkins*, C. P. H. 39 Geo. 3. Ibid. 383.]

[Writ sued by plaintiffs as executors, and declaration by them in their own right, held a sufficient variance for discharging the defendant out of custody on filing common bail. *Douglas v. Irlam*, B. R. M. 40 Geo. 3. 8 T. R. 416.]

#### (C 16.) Pledges found upon a Declaration.

The plaintiff in B. R. or C. B. ought to find pledges *de prosequendo*: for if he be nonsuit he shall be amerced. 2 Cro. 414.

And he must find them on a bill, where the clause *si fecerit te secur.* &c. is not inserted, as well as upon an original.

So, an attorney ought to find them, tho' he sues by attachment of privilege, where such clause is not inserted. R. Dy. 288. a. R. Cro. Car. 92. Hut. 92. R. 2 Lev. 39.

When pledges shall be found in replevin, vide post. (3 K 5.)

The nature of pledges. Vide Bail (A—C).

They shall be found in debt *qui tam*. 1 Lev. 123.

But the king or an infant doth not find pledges; for they ought not to be amerced. 8 Co. 61. b. R. Cro. Car. 161. 4 Inst. 180. 2 Leo. 185.

So, they are not found on an information. R. 1 Lev. 123. [But the st. 4 & 5 W. & M. 18. requires security to be given for costs.]

And the pledges shall be found on the purchase of the writ in Chancery. R. 2 Cro. 414. 3 Bulstr. 279.

Or, before the sheriff, who may refuse to execute the writ, and return *no pledges found*. 2 Cro. 414.

Yet he may execute the writ before pledges found, if he pleases. 2 Cro. 414.

For it is sufficient if they are found at any time pending the plea. 2 Crq. 414. Mar. 46. 4 Inst. 180. Jon. 177. At



At any time before judgment, tho' it be in appeal. *R. 2 Jon. 154. Cont. in appeal. 2 Sho. 159.*

And after judgment and error brought, want of pledges may be amended by the sheriff. *R. 3 Lev. 345.*

The pledges are usually entred on the bill or declaration at the end of the count. *Dy. 288. a. 4 Inst. 180.*

And, if no pledges were found, it was error by the common law. *R. 2 Cro. 414. R. Dy. 288. a. R. 3 Bul. 61. R. Mar. pl. 40. Cro. Car. 594.*

And the omission was not aided by the *st. 18 El. 13. 2 Cro. 414. 3 Bul. 278. R. Cro. Car. 92. But Hut. 92. makes a quare. Acc. 1 Sid. 84. Per two J. Windb. cont. Ray. 51. R. Dy. 288. a. in marg. Jon. 177.*

The omission is substance. *R. 3 Lev. 39.*

But, if there be no original, that is aided, and the pledges are to be entred on the original; and therefore want of pledges is no error when there is an original wanting. *R. 1 Sid. 84. R. Jon. 177.*

And by the *st. 16 & 17 Car. 2. 8.* after verdict no judgment shall be stayed or reversed in the courts of *Westminster*, county-palatine, or grand sessions of *Wales*, because no pledges, or but one, are returned on the original.

And by the *st. 4 & 5 Ann. 16.* no exception shall be taken for default of entering pledges on the bill or declaration, unless it be specially shewn for cause of demurrer.

[On demurrer, and for cause that no pledges are on the writ, or mentioned in the declaration, judgment *pro quer.*, for he may enter pledges at any time before judgment. *Mansfield v. Richman, P. 2 G. 2. Fort. 330. Barnes, 163.*]

[On special demurrer, for that declaration is without pledges, if the paper book with pledges added is delivered to defendant, and he does not take notice of it, it is a waiver of the irregularity, and he is too late when it is set down for argument. *Umfreville v. Lock, M. 10 G. 2. B. R. H. 315.*]

[On special demurrer, on action by bill, and for cause, *no pledges*; plaintiff may have leave to amend, and add pledges. *Watson v. Richardson, T. 21 & 22 G. 2. 1 Wils. 226.*]

So, if pledges are omitted, after error brought for it and assigned, the court will permit pledges to be entred. *R. 3 Lev. 361.*

[Want of pledges cannot be taken advantage of in error, tho' the judgment was by default. *How v. Denin, T. 2 G. 3. 2 Wils. 142.*]

So, if an infant attains his full age before judgment, and no pledges appear to be entred, it is not error; for if pledges were necessary when he came of age, they might have been entred before his age on the writ. *R. Jon. 177.*

#### (C 17.) Count or Declaration must have Certainty.

And the count in every court ought to have certainty and truth. *Co. Lit. 303. a. Pl. Com. 84. 122.*

And the certainty ought to be such, that the court may give judgment upon it, the defendant answer to it, and a good issue be joined thereon. (*Vide Co. Lit. 303. a. Pl. Com. 84.*)

[And there are three kinds of certainties: 1. certainty to a certain intent

intent in general: 2. Certainty to a common intent: 3. Certainty to a certain intent in every particular. The *last* is rejected in all cases, as partaking of too much subtlety. The second is sufficient in defence; and the first is required in a charge or accusation. *Cowp.* 682. *Doug.* 158.]

[The third kind of certainty is required in estoppels. *Doug.* 159.]

(C 18.) *Certainty of parties.*] And therefore the parties, demandant or plaintiff, tenant or defendant, ought to be well named.

[If the plaintiff sue the defendant by a wrong christian name, and the defendant appear by his right name, the plaintiff may declare against him by such right name, otherwise if the plaintiff file common bail for him, according to the statute, by his right name. 3 T. R. 611.]

What shall be a misnomer of the plaintiff or defendant, *vide Abatement*, (E 18, 19.—F 17, 18, &c.)

When the omission or mistake of the name of a party vitiates the count or not, *vide Action on the Case*, (H 2.)

[Any variation in the name of a corporation is fatal; as, *Austrialia* for *Australia*. *Turvil v. Aynsworth*, M. 1 G. 2. Str. 787. *Ld. Raym.* 1515.]

If a declaration by *A. B.* shews a title *cuidam A. B.*, it cannot be intended to be the plaintiff. *R. 2 Lev.* 207.

If it charges *quod prædict.* *A. B. deposuit*, where two of the same name are mentioned before, it shall not be intended to be the defendant. *R. Cro. El.* 267.

But where there is mention of a manor or name before expressed, it shall be intended the same, tho' *prædict.* is omitted. *R. 2 Cro.* 192.

[If plaintiff and defendant have the same name, if it appears on the record which is which, as an *oyer* of a bond from *A. B.* of *C.* to *A. B.* of *D.*, and the declaration begins *A. B.* of *C.* was summoned, &c. it is sufficient, tho' the addition is not repeated again. *Connor v. Connor*, T. 8 G. 3. 2 *Wils.* 386.]

\* [The *alias dict.* must be in the same language as in the deed. *Barnes*, 241.]

(C 19.) *Certainty of time.*] So, the time of a matter charged in the declaration ought to be certainly alleged; and therefore in *assumpsit*, if the plaintiff omits the day when the promise was made, it is bad. *Yel.* 94.

So, in trover, if he omits the time of the conversion. *Cro. El.* 97.

If he declares on a lease for years made to him, he ought to shew the day when the lease was made. *Pl. Com.* 24. a.

So, in all cases where the day or time is issuable. *Pl. Com.* 24.

So, the time of every fact, material to maintain the declaration, ought to be alleged: as, in trover, the time of the conversion as well as the time of the possession by the plaintiff, and of the finding by the defendant, ought to be alleged. *R.* for the conversion is material and traversable. *Cro. El.* 97, 98.

In *rescous* of a distress for rent, the days of payment of the rent ought to be alleged. *Kitt.* 227. a.

In trespass for detaining his servant, the plaintiff ought to shew the time of his retainer. *Pl. Com.* 24. a.



[“That the defendant, on the 6th of May, and on *divers other days and times between* that day and the commencement of the suit, assaulted the plaintiff,” is bad. *Corwp.* 828.]

If the defendant pleads a release, he ought to shew the day of the making of it. *Pl. Com.* 31. a.

So, if no time be alleged but after a (*viz.*), and the time there mentioned be repugnant, by reason of which the *viz.* shall be rejected, then the declaration is bad for want of time. *Lut.* 201. *Vide infra.*

If the defendant pleads a fact, which is traversable, but not local, he ought to allege it to be at the time and place mentioned in the declaration. *R. Lut.* 14.

[If the declaration state a corrupt contract made the 21st December 1774, giving day of payment to the 23d of December 1776, and issue be joined on it; evidence of a contract on the 23d of December 1774, for two years, will not support the issue. *Corwp.* 671.]

But it is sufficient if the time be in the declaration, tho’ it be not in the writ recited by the declaration. *Vide ante*, (C 12.)

Or, if a thing may be coupled to a time before alleged: as, in trespass *quare clausum fregit et adtunc et ibidem insult. fecit et cistam cepit*, it is good, tho’ no time is repeated for the taking of the chest. *R. 2 Cro.* 443.

[On information in debt for duties of goods imported in May, evidence may be given of several importations at several times. *Att. Gen. v. Hatton*, *H.* 1728, *Bunb.* 262.]

[On information in debt for non-payment of duties, evidence may be given of an importation several years before the time laid; but the court will, on application, confine the evidence to a certain time. *Att. Gen. v. Weeks*, *M.* 1726, *Bunb.* 223.]

In *assumpsit*, if it be alleged that *A.* determined *quod pradiet.* 100 guineas *fuer. valoris*, &c. *viz. apud B. R.* *Lut.* 487.

Or, if time be alleged to a thing tantamount: as, in trover, if the plaintiff shews a time of request and refusal to deliver, tho’ no day of conversion be alleged, it is sufficient; for a refusal to deliver on request amounts to a conversion. *R. Cro. Car.* 262.

So, to a negative matter no time need be alleged. *Pl. Com.* 24. a.

So, in real actions, no certain time is necessary, for *tempore pacis*, *tempore dom. reg. nunc*, or *nuper reg.* is sufficient. *R. Sal.* 561.

So, in *quare impedit.* *Ibid.*

And, if a more certain time is mentioned, it is not material or traversable. *Ibid.*

So, it is sufficient, tho’ it be imperfectly alleged: as, in trover, if the plaintiff says that he was possessed 9 *Maii* of goods and lost them, and the defendant found them, and *postea, scil.* 1 *Maii*, converted them, it is good, tho’ the conversion is alleged to be before the loss; for *postea* is sufficient, and the day shall be rejected, being after the *scil.* and repugnant. *R. 2 Cro.* 428.

[So, in covenant, if plaintiff declares on articles, dated 30th September, 5 G. (which is 1718,) and then says, *postea, scil.* 1st May 1718; this *scil.* shall be rected, as inconsistent, and then it will stand that he covenanted the 30th September, and *postea* committed the breach. *Hayman v. Rogers*, *M.* 6 G. *Str.* 232.]

[If plaintiff declares against the parson, that he left his tithes on his

his field, *per quod* he lost the use of that part under the cocks, from 20th *August*, the time of cutting, to 20th *December*, it is well enough, tho' the parson was not obliged to carry them away on the 20th *August*; for the jury may apportion the time, or the plaintiff release it. *South v. Jones*, M. 6 G. Str. 245.]

[Or, in trespass in *Michaelmas* term, for an assault 18th *October*, and imprisonment for 25 weeks, which is long after action depending, *Webb v. Turner*, T. 11 G. 2. Str. 1095. Andr. 250.]

[Debt on bond for not performing award; plea that arbitrators did not make award on or before 21st *May*. Replication, that arbitrators, after making bond, and before exhibiting plaintiff's bill, *to wit*, on 21st *May*, did make award; this is a sufficient allegation. R. on special demurrer. *Biffex v. Biffex*, T. 5 G. 3. 3 B. M. 1729.]

So, in ejectment, if the plaintiff declares on a lease 3 *Maii*, *virtute cuius* he entred and was possessed, till the defendant *postea*, *scil.* 1 *Maii*, ejected him; the day after the *scil.* is repugnant, and shall be rejected; for it is sufficient that he entred *virtute dimissionis et postea* was ejected. R. 2 Cro. 96. But this judgment was disapproved by the Ch. J. 1 Sid. 8. R. acc. 2 Cro. 136. 662. 154. R. 2 Bul. 29.

So, if there was a blank for the day. R. 2 Cro. 312.

So, if a man pleads that before the obligation, *scil.* 1 *Oct.* and the day mentioned is after the obligation, it shall be rejected as repugnant, after a demurrer, as well as after verdict. R. 1 Lev. 194.

But, if by the rejection of a day impossible or repugnant, no time appears when the fact was done, it is bad: as in *assumpsit*, if the plaintiff declares on an *indeb. assumpsit* and then adds another count, which begins *cumq; etiam deft. postea*, *scil.* 1 *Maii*, (which day is before the time alleged in the first count,) this is bad; for, if the day after the *scil.* is rejected, no time appears for the promise in the 2d count. R. after verdict, Yel. 94.

So, if the jury find a lease made 1 *Maii* *habend. a die dat.*, *virtute cuius* plaintiff *eodem* 1 *Maii* was possessed *quousq;* defendant *postea*, (*viz.*) *eodem* 1 *Maii*, ejected him, it is bad; for if the day after the *postea* is rejected, no time appears when the ejectment could be, for *postea* does not import that the ejectment was after the lease commenced, which did not commence till the 2d *May*. R. after verdict, 1 Sid. 8.

So, by the st. 16 & 17 Car. 2. 8. after verdict judgment shall not be stayed, or reversed, for a mistake of the day, month, or year in any declaration, &c. where the right day, month, or year in the same, or any preceding writ, plaint, roll or record, is once truly alleged. *Vide Amendment*, (K 1, 2.)

So, if the day alleged be impossible, or after the trial, it shall be aided after verdict. R. 8 W. 3. *Wall v. Duke*, (*Vide Ca. B. R.* 105.) R. M. 8 W. 3. B. R. *Blackall v. Heall*, (*Com.* 12. *Carth.* 389. 5 Mod. 286. *Ca. B. R.* 102.) *Vide post.* (3 M 5.)

But before, the omission of time to a material fact was not aided by a verdict. R. ut dicitur Cro. El. 97, 98. *Per two J.* but three cont. Cro. El. 377.

(C 20.) *Certainty of place.*] So, in a declaration a certain place ought to be alleged, where every fact material and traversable was done. *Vide Kit.* 226. *Vide ante*, (C 19.)



In what county an action shall be alleged, *vide Action*, (N 1, 2, 3.)

As, in trover, a place of conversion ought to be alleged. *R. Cro. El. 78. 97.*

[So, in ejectment the place is material. *Boddy v. Smith, T. 10 G. Str. 595.*]

So, in trespass for taking of corn, if the defendant justifies for the toll of grain brought to market to be sold, and sold, the place of sale ought to be alleged, and it shall not be intended sold in the market, unless it be so said. *R. Lut. 1501.*

In debt on a bond, the plaintiff ought to count where the bond was made, tho' it be without a date.

[In debt, the description of the place is not material, in trespass it is. *Oats v. Machin, T. 10 G. Str. 595.*]

So, in an action on the case, that the defendant holds land in A. *ratione cuius* he ought *mundare fossas*, he must shew in what place the ditches are. *Kit. 226.*

So, if in debt on an obligation against an heir the defendant pleads *riens per discent*, and the plaintiff replies *assets*, if he does not allege a place where the assets are, it is error. *R. 2 Cro. 503.*

So, in an action on the case for abusing a horse in a journey, which was hired of S. at P., he ought to allege the place where he was abused. *Semb. Ray. 187.*

So, in covenant, if the plaintiff alleges a breach by sentence in the spiritual court, he ought to allege the place where the spiritual court was held, and if the place of the spiritual court when the proceedings commenced, be mentioned, it is not sufficient; for it shall not be intended to have continuance in the same place, if it is not alleged. *R. Lut. 305.*

So, in an action on *assumpsit*, a place of the performance of the fact, averred to have been done as the consideration of the promise, ought to be alleged. *R. Sho. 50. Sal. 22.*

As, if the consideration be, that he consents to, and does not hinder a marriage; he ought to allege a place of consent. *R. 2 Lev. 227.*

So, in a plea, there ought to be alleged a place for every fact, which is triable and traversable. *Lut. 1466.*

And therefore, if the defendant pleads a release, he ought to allege a place where it was made. *R. Lut. 1142. 1501. R. Cro. El. 66. 78. 98. R. H. 4 Ann. in C. B., Barker v. Palmer. (Com. 141.)*

So, in a replication; for if the defendant pleads, that being an attorney of C. B. he ought not to be sued elsewhere without his consent, if the plaintiff replies that he did consent, and does not allege a place for a *venue*, it will be bad. *R. Sal. 4.*

And there ought to be a certain place alleged, where the fact was traversable, tho' the issue be on another point. *2 Leo. 22.*

And if there be not, it is error; for it prevents the defendant's taking issue on it. *Ibid.*

But no place is necessary for a thing which is only inducement. *R. Pl. Com. 190. b.*

So, two places for the same fact is bad. *R. Dal. 106.*

The

The place alleged ought to be the county and the parish, hamlet, or other known place in the same county. (*Cro. El.* 260.)

It is sufficient, if the county be in the margin, and the declaration only mentions the county aforesaid. *Vide infra.*

But, a fact alleged in a hundred only, is bad. *Cro. El.* 260.

Or, in a ward only; for it is in the nature of a hundred. *R. Cro. El.* 260.

Or, in a county only, without naming a parish, vill, hamlet, or known place in the same county. *R. after verdict, Hob.* 89. *R.* 2 *Cro.* 150. *R.* 1 *Sid.* 178.

Or, the manor of *S.*, without saying in what county. *R.* 2 *Cro.* 27.

Or, at *Whitehall, Tower-Hill, &c.* *Semb.* 1 *Vent.* 119.

So, if the county be in the margin, and the declaration alleges a fact at *H.* in the county aforesaid, it is sufficient; for it shall be referred to the county in the margin. 2 *Cro.* 96. *R.* 2 *Cro.* 618.

Tho' another county be mentioned, by way of recital, in the declaration before. *R.* *Cro. El.* 436. *Cont. Cro. El.* 311. 101. *R. Cro. acc. El.* 465.

[So, *Norfolk* to wit, declaration against *A.* of *M.*, in the county of *Wilts.* for that at *Catton* in the county aforesaid, is good for *Norfolk.* *Sutton v. Fenn, M.* 13 *G.* 3. 3 *Willf.* 339.]

So, it is sufficient, if the declaration says, that the house demised is situate in *§ super acclivitat. de H.* *R. per three J.* 2 *Vent.* 272.

But, in an inferior court, if the taking be alleged at *A.*, it shall not be intended to be within the jurisdiction, tho' the court be in the margin. *R.* 2 *Cro.* 96.

So, if an addition be of the parish of *A.*, without saying in what county, it is not good, tho' the county be in the margin. *R.* 2 *Cro.* 167.

If it be coupled with a place alleged before, or after: as in debt for non-payment of 100 guineas, pursuant to the judgment of *A.*, and that the aforesaid 100 guineas are of such a value, viz. *apud N.*, tho' no place is alleged where the judgment of *A.* was given, it is good, being coupled with the value of the guineas. *R. Lut.* 487.

So, in trespass, *quare warren. fregit, et cuniculos fugavit*, without saying, *ibidem*, is good.

So, in an indictment, *quod intravit et diffisivit*, without saying, *ad-tunc et ibidem.* *R.* 2 *Cro.* 41.

In trover, *quod navem diripuit, nec non bona asportavit et convertit.* *R. Sho.* 180.

In debt on a bond to pay, if *A.* dies before the first of *May*, without issue then living; if it is alleged that *A.* died, having *B.* his son in plena vita *apud D.*, it is sufficient, tho' he does not say where he had issue; for it shall be tried at *D.* where the issue was living. *Per three J. Dy.* 15.

So, if the plaintiff, in debt for non-performance of a contract in the embroidery of a gown, alleges a retainer at such a place, and the time of embroidering it, but does not allege any place where the embroidery was to be done, and it is traversable, whether the defendant embroidered or not, yet it is good; for it shall be intended at the same place where the retainer was. *R. Cro. El.* 880.

So, if the plaintiff alleges, that he was seised of the parsonage of *M.*, in *M.* aforesaid, and of the parsonage-house, and prescribes for



a way from the said house to *A*, but does not say in what place the house is, yet it is good; for it shall be intended to be in *M*. *R. Cro. El. 898.*

In trespass the plaintiff alleged that the defendant put filth so near his house in *L.*, and permitted the water in the defendant's yard to flow, *per quod* the walls of the plaintiff's house were damaged, without saying where he put the filth or permitted the water. *R. good, Hard. 61.*

In debt on a bond, the defendant pleads a pardon; the plaintiff replies, that the bond was to the use of a receiver; no *venue*, where the bond was made, is necessary in the replication; for it is admitted by the plea that there was such a bond. *R. Hard. 187.*

In *assumpsit* to convey land, if the defendant pleads performance, it is not necessary to say in what place he conveyed it; for it shall be intended on the land. *R. Mar. pl. 51.*

If the plaintiff alleges seisin in the defendant of a mill in *D.*, and a nuisance by raising the mill-banks, without saying where the banks were. *R. 2 Cro. 555. 557.*

If the plaintiff alleges a demise at *H.*, and a distress in parcel demised, without saying where it was; for it shall be intended in *H*.

If he alleges an assignment by the sheriff of a term for years extended by him, without saying where; for it shall be intended where the land lies. *R. 2 Mod. 304.*

If the fact is, in its nature, local.

So, in a plea to the person of the plaintiff, as *misnomer*, bad addition, alien, &c. a place for the *venue* is not necessary; for it shall be tried where the action is brought. *R. 1 Sal. 2. 6.*

So, if judgment be by default, after a writ of enquiry, it is not material, tho' no place be alleged where the promise was made; for the enquiry ought to be of nothing but damages, and this may be by any jurors of the county. *R. Lut. 239.*

So, if the fact, to which no *venue* is alleged, be admitted by the bar, it is good. *Vide post. (C 85.)*

Or, the issue does not require a *venue* of that place. *R. Noy. 9.*

So, by the *st. 16 & 17 Car. 2. 8.* after verdict, the things there mentioned, or any other of the like nature, not being against the right of the suit, or whereby the issue or trial are altered, shall be amended.

But before, the omission of a place, when it was material to be alleged, was not aided by verdict. *R. Cro. El. 78. 98. Per two J. but three cont. Cro. El. 377. Adm. Cro. Car. 525.*

From what place a jury shall come, *vide Amendment, (H 1, 2.)*

(C 21.) *Certainty of the thing demanded.*] So, a declaration ought to have certainty of the thing demanded: and therefore, in trespass for taking his fish, the declaration is bad, if it does not shew the number and the kinds of fish in certain. *R. 5 Ca. 35.*

So, in trespass, *quare in seipsum piscar. sua piscat. fuit, et pisces cepit*, without mentioning the quantity or species. *R. 1 Vent. 272. Dub. 1 Vent. 329.*

In debt *pro 40 quarteriis frumenti*, without saying of what species, the declaration is bad. *Cro. El. 837.*

Or, *pro 40 ulnis pann.*, without saying of wool, or what other materials. *Ibid.*

In

In an action upon the case for disturbing him in his pasture, if the plaintiff says, *quod ipse cum quibusdam aliis tenen. per copiam, &c.* have the sole pasture, without saying with whom in particular. R. 2 Lev. 178.

So, in trespass, *quare duas acras terra fodit et asportavit*, not shewing the quantity of the land taken away, is bad. R. after verdict, 2 Vent. 174. Vide post. (3 M. 5.)

So, if it be, *quare diversas pecias maheremii asportavit*, it is bad for uncertainty. R. 2 Vent. 262.

*Quare cistas cepit & vestimenta in cistâ prædictâ*, without saying in which of them. Al. 9.

*Quare clausum fregit et diversa onera equina terræ asportavit, per quod viam amisit.* R. 2 Vent. 73.

*Quare cepit quandam parcellam lanæ.* R. 2 Lev. 195.

[*Assumpsit pro diversis rebus* is ill. Semb. Spark v. Jobber, M. 13 G. Ld. Raym. 1450.]

[Trespass for taking away *diversa bona et catalla*, judgment arrested for uncertainty. Wyatt v. Effington, M. 12 G. Fort. 377. Str. 637. 2 Ld. Raym. 1410.]

So, in an action against the hundred, the declaration is bad, if it does not shew the goods stolen in particular. Adm. 2 Sand. 379.

So, in debt for an amerciamen, the declaration ought to shew the certain sum at which the defendant was amerced; and it is not sufficient to say to what sum it was assessed. R. 3 Lev. 206.

And want of certainty in the declaration is not aided by verdict. R. 5 Co. 35. b. R. Cro. El. 817.

Nor, shall be aided by the st. 16 & 17 Car. 2. 8. which says, that judgment shall not be arrested for any other matter that doth not alter the nature of the action or trial. R. 1 Vent. 272.

[In debt for freight on a charter-party; if the breach assigned is, that defendant has not paid for freight 200 l. with average according to charter-party, it is good, tho' it does not say to what the average amounts. Dodd v. Atkinson, M. 10 G. 2. B. R. H. 342.]

[*Assumpsit* for a bond of the lord viscount Gave, whereas it was Gage, and so called throughout afterwards Gave; only surplusage. Alcorn v. Westbrook, M. 19 G. 2. Wils. 115.]

[Trespass for taking *divers quantities of china-ware*, sufficient. Barnes, 276.]

(C 22.) *Certainty in other circumstances.* It ought to shew plainly and certainly all circumstances material for the maintenance of the action; for if there are two intendments, it shall be taken most strongly against the plaintiff. Pl. Com. 202. b.

[Thus the exceptions in the enacting clause of a statute, which creates an offence and gives a penalty, must be negatived in the declaration; but where these exceptions are contained in a subsequent proviso, that is not necessary. 1 T. R. 141.]

As, in debt upon a contract to pay 20 s. upon waste done, and plaintiff shews that defendant committed waste; it is not sufficient, without shewing how the waste was done.

In rescous on a distress for rent, he ought to shew on what days the rent was payable. Kit. 227. a.

In an action upon the case by a parson, who entitles himself by the



resignation of *B.* for dilapidations, he ought to shew how the resignation was made. *R. Lut.* 116.

In an action upon the case for overloading his horse, he ought to shew how or with what weight he overloaded him. *R. 2 Leo.* 104.

In prohibition upon a discharge of tithes by unity at the time of the dissolution, he ought to shew such an unity, by which he may be discharged. *R. Hob.* 296, &c.

[If a custom is alleged, that such a one has a right to his freedom, paying a *reasonable* fine, and the evidence is, that he should pay 6*s.* 8*d.* it is well enough laid. *Moor v. Hastings*, *H.* 10 *G.* 2. *Str.* 1070. *B. R. H.* 353.]

(C 23.) *Declaration must be sensible.*] So, if the declaration be repugnant or insensible, it will be bad: as, in trespass for taking away timber *jacen. erga confectionem domus nuper adificat.*; for it cannot be for the building of a house which is already built. *R. 1 Sal.* 213. 458.

So, in covenant, and a breach assigned, *quod durante tempore quo servivit* he departed from his service. *R. 1 Sal.* 213.

So, in an action upon the statute of usury, that *A.* lent to *B.*, and *pro dando* to *A.* such a day of payment, he agreed. *R. semb. con.* 1 *Sal.* 325. *Vide post.* (C 25.)

So, if the declaration has a blank for a day or place, or other material thing, whereby it is insensible, it will be bad. *R. 2 Cro.* 498.

(C 24.) *But certainty to a general intent is sufficient. What certainty is required in a bar,* *vide post.* (E 5, 6, &c.)

But in a count a certain intent in general is sufficient. *Co. Lit.* 303. *Vide Action upon the Case upon Assumpsit*, (A 3, 4.)

As, in *assumpsit* to pay so much *if he marries the daughter of the defendant at his request*, if he says that he did marry her, without saying *at the defendant's request*, it is good; for it shall be intended. *R. Cro. Car.* 194, 5.

In account as receiver, till the feast of *S. Mich.*, without saying what *S. Mich.* viz. *S. Mich. in Tumbá*, or *S. Mich. Arch.*, yet it is good; for it shall be intended *S. Mich. Arch.*, which is the most known and notorious.

In debt on an indenture, which contains an agreement for a marriage between him and *A.*, *if the ecclesiastical law permits*, if he counts of a request to marry, and that *A.* refused, it is sufficient, without saying he requested to marry at a canonical time.

In an action on a statute, which gives to all subjects, &c. if the plaintiff alleges, that he is *nado subditus*, it shall be intended that he was so at all times. *R. 1 Lev.* 121.

[That the defendant used a gun, *being an engine to kill and destroy the game*, is good after verdict; "to kill," &c. shall be referred to "being an engine," and not to "used a gun." *Cowp.* 825.]

In *assumpsit* to satisfy for goods, if he says, that so much is *minus satis* to satisfy him, it is sufficient; for if the plaintiff does not demand more, he must be content with so much. *R. 2 Cro.* 552.

[In *detinue*, the values of the several parcels need not be laid separately in the declaration. 2 *Bl.* 853.]

[In action for maliciously holding to bail in an inferior court for thirty

thirty shillings, it is not necessary to set forth for what sum the court can hold to bail; for by 12 G. 2. no court can hold to bail for less than forty shillings. *Smith v. Cattel*, P. 8 G. 3. 2 *Wils.* 376.]

[Declaration against the defendant *only*, stating that *he* and *another* made their promissory note, by which they *jointly or severally* promised to pay, is good. *Cowp.* 832.]

[In an action for consequential damage from slander, imputing incontinence to the plaintiff, it is enough to state that he was employed to preach to a dissenting congregation at a certain licensed chapel situated at *A.*; that he derived considerable profit from his preaching; and that by reason of the scandal, "persons frequenting the chapel" had refused to permit him to preach there, and had discontinued "giving him the profits which they usually had, and otherwise" would have given," without stating who those persons were, or by what authority they excluded him, or that he was a preacher duly qualified according to the *stat.* 10 Ann. c. 2. *Hartley v. Herring*, B. R. H. 39 Geo. 3. 8 T. R. 130.]

[So, in an action against the sheriff for taking goods without leaving a year's rent, the declaration need not state all the particulars of the demise; but if it does, and they are not proved as stated, there shall be a nonsuit. *Bristow v. Wright*, B. R. E. 21 Geo. 3. *Dougl.* 665.]

[An averment in a declaration on the *stat.* 11 Geo. 2. c. 19. s. 3. to recover double the value of goods removed, in order to prevent a distress, that a *certain sum was due for rent* before the goods were removed, need not be precisely proved as laid. *Gwinnet v. Phillips*, B. R. E. 30 Geo. 3. 3 T. R. 643.]

[The notice of distress, which alleged a *different sum* to be due, was held immaterial. *Ibid.*]

[So, if in an action for bribery at an election the declaration set forth the precept from the sheriff to the portreeve of a borough, and the word "*if*" is improperly inserted in such precept, it is not a fatal variance, but will be rejected as surplusage. *Rex v. Pippet*, E. 26 Geo. 3. 1 T. R. 235. *Vide Shuttleworth v. Pilkington*, B. R. T. 14 Geo. 2. 2 Str. 1155.]

[Proof that the defendant's boat run down the plaintiff's in the half-way reach in the *Thames*, will support an allegation that the boat was run down in the *Thames*, near the half-way reach, in an action on the case for negligence. *Drewry v. Twiss*, B. R. H. 32 Geo. 3. 4 T. R. 558.]

[In an action for an amercement in a court-leet, if the declaration state the court to have been holden before the *steward* of the manor, and the evidence proves it to have been holden before the *deputy-steward*, it is a *material variance*. *Wyvill v. Shepherd*, C. P. H. 29 Geo. 3. 1 H. Bl. 162.]

[In an action for bribery on the *stat.* 2 Geo. 2. c. 24. it is not a material variance if the declaration state the precept to have issued to the bailiffs of the borough; but the precept produced in evidence is directed to the bailiff. *Wavor v. Harbin*, C. P. T. 32 Geo. 3. 2 H. Bl. 113. *Vide Action upon Statute* (I).]

[Declaration for 52 l. 10 s. for run-money; evidence for 52 l. 10 s. for run-money, with an additional stipulation written after signature of the note, for a pint of rum *per* day; and holden no variance. *Baptiste v. Cobbold*, C. P. E. 37 Geo. 3. 1 Bos. & Pull. Rep. 7.]



(C 25.) *And the words shall have a reasonable intendment.*] And words shall have a reasonable intendment and construction. *Vide Action upon the Case upon Assumpsit, (A 5.)*

And therefore in assize, if a man complains that the king seised of such a park granted *officium parci sui*, without saying (*prædict.*) yet it is good; for it shall be intended the park before mentioned, *prædict.* being mentioned before and after. 8 Co. 57.

If the plaintiff alleges a demise to *A.*, *virtute cuius* he entred, it shall be intended that he entred immediately. R. Lut. 108.

If a *cap. utlagat.* or other judicial writ be pleaded, as issued such a day, and it is not said to have issued in term-time, it is good; for it shall be intended, when no cause to the contrary appears. R. Lut.

333.

If it be pleaded that *A.* was seised, that *he* died seised, without saying *who*, it shall be intended that *A.* died seised, it being said before that he was seised. R. Lut. 1172.

If an usurious agreement be alleged between *A.* and *B.*, and that *A.* the lender *pro dando diem solution.* to *A. haberet* so much, it shall be intended that it was *pro dando B. diem solutionis A.* 1 Sal. 325.

If the declaration says *quod def. prosecut. fuit et adhuc prosequit.* fuit, it shall be intended at the time when the action was commenced. R. 3 Mod. 103. 4 Mod. 152.

[In case on promissory note, set out to be made 2d November, to pay on the 31st December next: next shall be intended next after the date of the note, not next after the action brought. *Carbonel v. Davis, M. 7 G. Str. 394.*]

If a declaration in waste be *quod A. feoffavit B.* to the use of *C.* and his heirs, it is sufficient without saying *quod feoffavit B. and his heirs.* R. Mo. 871.

So, if an action be several in its nature, such precise certainty is not necessary: as, in an action on the *st. 2 & 3 Ed. 6.* as rector of the churches of *D.* and *S.* for not setting out his tithes on 400 acres of land in *D.* and *S.*, it is sufficient, without saying how much land in *D.* and how much in *S.*, for it is in the nature of trespass. R. 2 Lev. 1.

(C 26.) *And general words are sufficient where the certainty lies within the defendant's notice.*] And general words are sufficient where the certainty lies within the defendant's notice. 1 Lev. 190.

So, if the words ascertain the lands which are in demand, it is sufficient to plead a conveyance of them *inter al.* Lut. 1007.

[In an action on the case for not repairing a private road leading through the defendant's close, it is sufficient for the plaintiff to allege that the defendant *as occupier* of the close is bound to repair. 3 T. R. 766.]

[But a defendant, who prescribes in right of his own estate, must set forth the estate in right of which he claims the privilege. *Ibid.*]

[In covenant, which runs with the land, evidence that the defendant is in *as heir*, will support a declaration charging him *as assignee.* *Derisley v. Cusance, B. R. M. 31 Geo. 3. 4 T. R. 75.*]

(C 27.) *Where they are ascertained by other circumstances.*] So, general words are sufficient, where they are ascertained by other circumstances:

cumstances: as, intrespafs, *quare cistam fregit et diversa vestimenta in cista predicta. existen. cepit*, is good, without saying what vestments. *R. Al. 9.*

*Quare domum fregit et separales claves pro aperiend. ostia domus predicta. cepit.* *R. Saf. 643.*

*Quare clausum fregit et spinas suas ad valent. so much succidit.* *R. 2 Cro. 435.*

So, debt for twenty *par. calligar.* without saying of wool, silk, &c. is sufficient; for when a thing is converted to another species, a declaration by the name of that species is good. *R. Cro. El. 837.*

Or, for so many *par. calceorum.* *Ibid.*

Or, for so many loaves *panis*, without saying of what grain. *Cro. El. 837.*

[A declaration in a *scire facias* by the assignees of a bankrupt stating, "that he became a bankrupt within the meaning of the statutes, &c. and that his goods and effects were afterwards in due manner assigned to the plaintiffs," is sufficiently certain without alleging that the party was declared a bankrupt, or that his effects were assigned by deed. *2 T. R. 45.*]

If a man prescribes to inclose lands lying together in a common field, if he says that he inclosed, this imports that they did lie together. *R. 2 Mod. 104.*

(C 28.) *And surplufage does not hurt.*] And surplufage shall not hurt: and therefore, if a man in a declaration makes an imperfect mention of a thing which need not be mentioned, it is not prejudicial: as, in a *warrantia chartæ* if the plaintiff says that he requested the defendant to warrant the land to him, or give him a plea in bar, when the vouchee might plead in abatement as well as in bar, yet it is sufficient; for the request to warrant was sufficient, and the request to give a plea was surplufage, and need not have been mentioned. *Hob. 23. Vide post. (E 12.)*

If he mentions a condition subsequent, and does not allege a certain performance, it shall not hurt; for the whole was surplufage. *Pl. Com. 30. a. 32. b.*

If a trespass *temp. Eliz.* be alleged to be *contra pacem nup. regina et regis nunc*, it is not bad, for *regis nunc* shall be surplufage. *R. 2 Cro. 377. 3 Bul. 82.*

[If by statute the action is given to the informer only, and the declaration says the action accrued to the king, the poor of the parish, and the informer, it is only surplufage. *French v. Wiltshire, M. 11 G. 2. Andr. 67.*]

If the plaintiff declares *quod cum ipsi idem def. &c.* for *ipsi* is surplufage. *2 Mod. Ca. 377.*

So, if by the omission of any words, tho' not repugnant to the precedent words, that which was insensible may be made sensible, they shall be rejected as surplufage. *Dub. 1 Sal. 325.*

So, if by the words after a *viz.* or *scilicet* a thing be alleged, impossible, or repugnant to the plaintiff's title, the words shall be rejected as surplufage as in ejectment, if the entry or ouster be alleged *postea, viz.* such a day, which is a day before the demise. (*Vide Sal. 325.*)

So, in trespass.

So, in debt for rent, if a devise of the reversion to the plaintiff be alleged, and that *postea, viz.* such a day, the deviser died, which was a day before the lease. *R. Hard. 4.*

(C 29.)



(C 29.) *Except where it defeats the action*] Yet, if a man by the allegation of a thing not necessary shews that he had no cause of action, this, tho' surplusage, shall hurt; as, in assise, if the plaintiff makes a title, which he need not, and the title is not good, the whole shall abate. *Pl. Com. 84. b. 202. b.*

So, if a man misrecites a statute in a material place, when it need not have been recited, it is fatal. *Pl. Com. 84. b. Vide Action upon Stat. (1).*

So, in an action against a disturber, where possession is a sufficient title for the plaintiff, yet if the plaintiff shews a title, and this appears insufficient, the declaration is bad. *R. after verdict, M. 9 W. 3. Dorne v. Cashford, 1 Sal. 363. 365. (Vide 1 Ld. Ray. 266. Com. 44.)*

So, in a debt for a sum awarded, if the plaintiff shews a bad award. *Vide Arbitrament, (1 2.)*

So, in partition, if the plaintiff shews that he and the defendant hold both in fee, where the defendant was seised in tail, if this be shewn by verdict, the writ shall abate, tho' it was not necessary to shew the defendant's title. *R. Cro. El. 760.*

(C 30.) *So, less certainty is wanting for a collateral matter.*] So, precise certainty is not necessary for a thing collateral to the action: as, in an action upon the case for putting in his close carriage which died of the murrain, *per quod diversa averia* died, it is sufficient, without saying what or how many beasts, for the action is not for the beasts, or the value of them. *R. Al. 22.*

If the plaintiff alleges *quod quadam pars domus fuit in decasu*, and in consideration that the plaintiff would repair, the defendant *assumpsit*, &c. he need not say what part of the house was decayed. *R. 2 Leo. 53.*

[In trespass for breaking and entering plaintiff's house, wrenching open closet-doors, chests, &c. and tossing goods about; it is not necessary to specify the closets, chests, good, &c. *Chamberlain v. Greenfield, P. 12 G. 3. 3 Wilf. 292.*]

(C 31.) *And little certainty is wanting for inducement.*] So, exact certainty is not necessary when a thing is alleged only as an inducement: as, if a man claims a thing appurtenant to an office, and not the office itself, it is sufficient to say that it is *antiquum officium*, and it is not necessary to prescribe for it. *R. 10 Co. 59. b. Vide post. (C 43.—E 10. 18.)*

So, if he claims a thing by custom in such a vill, it is sufficient to say *quod est antiqua villa*. *10 Co. 59. b.*

If an *assumpsit* be brought on a promise to give so much with his daughter, as he agreed to give with A., it is sufficient to say he agreed to give so much with A., without shewing how or with whom he agreed. *Dub. Yel. 17.*

So, in an action on the case against a bailiff for not taking sufficient pledges, it is sufficient to say that he gave him the usual fees, without saying how much he gave; for the demand is not for the fees. *Latch, 159.*

In an action on the case for diverting a water-course, if he alleges seisin for life, it is sufficient, without saying for his life or the life of another. *R. Cro. El. 112, 3.*

In an action for slander of his title, if he says that he was seised, &c. it is sufficient, without saying of what estate. In

In an action on the case, if he recites a recovery in an inferior court, it is sufficient, without shewing by what authority. *R. Cro. El.* 218.

In an action for disturbance of common, it is good, tho' the precise common be not alleged. *R. 2 Cro.* 630.

Or, for throwing down his hurdles, it is sufficient to prescribe for erecting in *aperta platea* and taking *diversas denar. summas*, without describing the place, or ascertaining the money more exactly. *R. 1 Leo.* 108.

Action on the case by a lessee for disturbing him in his toll, there is no need to say what estate the lessor had when he demised. *R. Ow.* 109.

In a *formedon* in *reverter*, or *remainder*, there is no need to shew the death of the particular tenant. *R. Pl. Com.* 32. *b.*

In debt on a recognizance removed by error out of *C. B.* into *B. R.* there is no need to mention its being reversed or affirmed. *R. 2 Cro.* 98.

(C 32.) So, if it be certain in part and uncertain for other part, judgment shall be for the plaintiff as to the certain part. *Vide post.* (E. 36.—F. 25.)

What plea or replication bad in part, is bad in the whole.

So, if a declaration, in which damages are demanded, be certain for part, and uncertain for the residue; if there be a demurrer to the whole declaration, the plaintiff shall have judgment for that part which is good, and shall release his damages for the other part: as, in an action on the *statute of Winton* against a hundred on a robbery of his money, and of goods in his custody, and does not say what, if the defendant demurs to the whole, the plaintiff shall have judgment for the money, but not for the goods. *R. 2 Sand.* 379. *Vide post.* (Q. 3.—2 V. 3.)

So, in debt on the statute of usury on a corrupt agreement for 40*l.* and on another for 20*l.* but does not say that this was corrupt, if the defendant demurs to the whole, the plaintiff shall have judgment for the 40*l.* *R. 2 Cro.* 104. *1 Sand.* 286.

So, if the defendant pleads to the whole. *R. 2 Cro.* 104.

So, in debt against an executor on a bond and on simple contract, it is good for the bond. *2 Cro.* 104, 5.

So, in covenant against *A.* on a covenant in law on a demise by him and *B.* if the plaintiff assigns several breaches, one that *D.* was seised, upon which the action ought to be against *A.* and *B.* the other that *A.* entred upon him; it shall be good for the last. *R. 1 Sal.* 137. *Acc. 2 Sand.* 380. *Vide post.* (2 V. 3.)

In replevin, if the defendant avows for so much rent, part of which is not due, it shall be good for the residue. *1 Sand.* 286. *11 Co.* 45. *b.* *R. Mo.* 281. *Vide post.* (3 K. 14.)

(C 33.) Declaration must not be double. *Vide post.* Duplicity in bar, (E 2.)

So, a declaration ought to be single, for duplicity vitiates it. *Hob.* 295.

When several matters may be contained in the same declaration or not, *vide Abatement*, (G 4.)—*Action*, (G).

As in a *quare impedit* if the plaintiff alleges several presentments in his ancestors, it is double.

Or,



Or, a presentment by a feoffor, and another also by the feoffee.

So, in debt on a bond to pay several sums at several days, if the plaintiff declares that the defendant did not pay the said several sums nor any of them, it is double; for non-payment of any sum is a forfeiture of the bond. *Semb. 2 Vent. 198. 1 Rol. 112.*

But, if a declaration be with an express *assumpsit* and a *quant. meruit* for the same goods, &c. without saying *alia*, it shall be good. *R. after verdict. 1 Sal. 213.*

So, a declaration in covenant may assign several breaches.

And duplicity in a declaration is aided by the defendant's plea. *R. 2 Vent. 222.*

So, it is aided upon a general demurrer. *Ibid.*

[If two counts in a declaration are so much the same, that no evidence could be produced to prove one which would not prove the other, the court will oblige plaintiff to strike out one; but not if defendant has obtained time to plead. *Wilkins v Perry, T. 8 G. 2. B. R. H. 129.*]

(C 34.) Declaration ought to shew a Title.

The plaintiff or demandant in his count or declaration ought to intitle himself to the action; for he is to recover by the validity of his own title, and not by the weakness of the defendant's. *Vau. 8. 58.*

As, in a writ of partition between parceners, the plaintiff ought to shew that it was the inheritance of their ancestors and descended to them. *D. Cro. El. 64.*

So, in partition between joint-tenants. *Ibid.*

Otherwise between tenants in common; for they come in by several titles, and the title of one does not lie in the other's knowledge. *R. Cro. El. 65.*

So, in a *quem redditum reddit*, the plaintiff must shew a title, for which he demands attornment. *Cro. El. 64.*

In waste he ought to shew a title to the reversion *ex assignatione*, or that he demised to the defendant, &c. *Ibid.*

In a *formedon in descender*, he ought to shew the distinct gift by which he claims. *Jon. 453.*

In remainder, he ought to shew all the prior remainders (tho' expired) upon which his remainder depends. *8 Co. 88. a.*

In a writ of escheat, or *cessavit*, he ought to shew the tenure. *8 Co. 86. b.*

So, in a writ of ward, or of *mesne*. *Ibid.*

[Plaintiff claims an easement; if it appears in the declaration that it is out of defendant's soil, declaration must set out the title. *Vernon v. Goodrich, Str. 5.*]

[In debt on the 19 Geo. 2. 30. for the penalty of 50*l.* for impressing a mariner in the *West India* trade, the declaration must aver that he had not deserted from any of his majesty's ships of war. *1 T. R. 141.*]

[It is not necessary in a declaration on a bill of exchange to aver that the maker delivered it; it is sufficient to state that he made it. *Churchill v Gardner, B. R. E. 38 Geo. 3. 7 T. R. 596.*]

(C 35.) And how seised, &c.

If a man alleges in himself a title to the inheritance or freehold of lands

lands in possession, he ought regularly to say, *quod fuit seifitus*. Co. L. 17. a. [Rast. 274. F. N. B. 199. 1 T. R. 96.] *Vide post*. (C 43 —E 22.)

If he alleges possession of a term for years, or other chattel real, he shall say, *quod possessionatus fuit*. Ibid.

So, if he alleges seisin of things manurable, as of lands, tenements, rents, &c. he shall say, *quod fuit seifitus in dominico suo ut de feodo*. Lit. f. 10.

If of things not manurable, as of an advowson, &c. he shall say, *seifitus ut de feodo et jure*, omitting *in dominico suo*. Ibid.

So, if he alleges seisin of a reversion after an estate for life. Pl. Com. 191. a.

So, if the reversion be after a term for years, he may say, *seifitus ut de feodo et jure*, for he has not the occupation, tho' he may also say, *in dominico suo ut de feodo*; for he has the possession of the freehold, and may have an assise. R. Pl. Com. 191. a.

If he be seised in fee, he shall say, *in dominico suo ut de feodo*; if in tail, *ut de feodo talliato*.

If for life, *seifitus pro termino vite sue*. Co. L. 42. a.

If to husband and wife for life, and to the heirs of the wife, he shall say, *virtute cujus sunt seifiti sibi et heredibus uxoris, in jure uxoris*. 27 H. 8. 21. b.

But sometimes *seifitus* is used for *possessionatus*, and *è contra*. Co. L. 17. a.

Yet, *interessat*. of a term will be bad. R. Sho. 106.

(C 36.) Must shew a sufficient Estate in him from whom he derives Title.

So, if the plaintiff derives an estate from *A.*, he ought to shew that *A.* had such an estate as enabled him to make the estate to the plaintiff: as, if a man entitles himself to a rent by a grant from *B.*, he must shew what estate *B.* had, whereby it may appear that he could grant such rent. Mar. pl. 2.

So, if the defendant avows for rent on a lease for years, and says that the dean and chapter of *W.* seised *in jure collegii*, made the lease, it is bad, without saying of what estate they are seised. R. Lut. 121. 14.

In debt for rent by an executor on a lease for years by his testator, if he says, that the testator was possessed for years, and demised it to the defendant for a less term, he ought to shew the commencement of the testator's term, and that his lessor was seised of such an estate, that he could make such lease. R. 1 Brownl. 48. Cont. Sal. 562.

In ejectment, the plaintiff ought to shew a title in the lessor, and a demise to him. Dy. 366. a.

So, if he avows for rent in replevin on a demise by him, or his testator, to the defendant for years, he ought to shew such an estate in the lessor, that he could make such demise. R. Sal. 562.

But now, by the *st.* 11 G. 2. 19. *f.* 22. may avow generally.

(C 37.) Must plead a Conveyance as it operates.

So, if the plaintiff conveys to himself an estate by deed, he ought to plead the conveyance as it operates in law, and not according to the words of the deed. 1 Vent. 109. [And



[And it is only necessary to state enough of the deed to shew a title to the action. *Cowp.* 665. 725. *Doug.* 193. 667. 767.]

And therefore, if by the deed the words are, *I give, grant, release and confirm*, he must not say, that such a one *dedit, concessit, relaxavit et confirmavit*, but he ought to say, *quod concessit*, or *quod relaxavit*, &c. as the deed operates. 3 *Lev.* 292. *R.* 1 *Vent.* 78. *Ray.* 187. 1 *Sid.* 452. 2 *Sand.* 96.

So, if a deed operates as a covenant to stand seised, he cannot say, that for affection *concessit*, &c. *R.* 3 *Lev.* 292. 4 *Mod.* 150. *Skin.* 315.

And tho' he adds, *quæ quidem concessi operavit per viam conventionis stare seisit.*, &c. it is not good, for this is impertinent. *R.* 3 *Lev.* 292.

So, tho' he concludes *virtute cujus*, and of the statute of uses he was seised. *Cont. per three J. but Pollexfen acc. and the Judgment by the three J. was reversed in B. R.* 3 *Lev.* 292. 2 *Vent.* 149. 4 *Mod.* 149.

If there be a feoffment by a joint-tenant to his companion, it ought to be pleaded as a release, not as a feoffment or grant. 4 *Mod.* 150.

If tenant for life grants to him in reversion, it ought to be pleaded as a surrender. 4 *Mod.* 151.

But if a verdict finds, that *A. concessit*, &c. it shall be construed according to the import of the deed. 4 *Mod.* 151.

How a bargain and sale shall be pleaded, *vide Bargain and Sale*, (B 12.)—How a devise, *vide Devise* (P).—How a common recovery, *vide post.* (3. A 8.)

(C 38.) If he claims by Custom or Prescription, must prescribe, &c.

So, if the action be founded on a custom or prescription, the plaintiff in his declaration ought to shew a good custom or prescription: as, in an action upon the case for not keeping a common bull or boar within the parish, he ought to shew a custom or prescription to keep it. *R.* 4 *Mod.* 241. *Vide Prescription* (H).

Or, at least, that the defendant, being rector of the parish, ought to keep in consideration of his tithes. 4 *Mod.* 241.

If the plaintiff makes title to an office, he ought to prescribe for it. *R.* 10 *Co.* 59. *b.*

So, in an action upon the case for not repairing fences, he ought to shew a good prescription to repair; for it is a charge to do a thing against common right. *R.* 1 *Sal.* 335, 6.

In an action upon the case for enclosing his common. 1 *Sal.* 365. *Mod. Ca.* 19.

But where the plaintiff does not claim the office itself, &c. by prescription, but a thing incident or appurtenant to it, it is sufficient to say, *quod est antiquum officium.* *R.* 10 *Co.* 59. *b.*

So, if he shews that which is tantamount, it is sufficient, tho' he does not say *antiquum*: as, if he says, *quod divertit aquæ cursum ab antiquo cursu ad molendinum*, tho' he does not say, *quod est antiquum molendinum.* *R.* 3 *Lev.* 133. 3 *Mod.* 50. *Vide Prescription* (H).

So, if the plaintiff alleges that he was seised, and then prescribes, it is not good, if he does not allege that he was seised in fee; for otherwise he cannot prescribe. *R.* 2 *Mod.* 318.

So, it shall not be intended a seisin in fee, after verdict. *Ibid.*  
(C 39.)

## (C 39.) When Possession is sufficient.

But against a wrong doer, it is sufficient to say generally, that the plaintiff *habere debet* the thing demanded, without making title by grant or prescription; for possession is a sufficient title against him: as, in an action for disturbing him in his toll. *R. in B. R. and aff. in Exch. 2 Vent. 292. R. 2 Cro. 43. 123. R. Ow. 109.*

So, in an action for digging in his common, it is not necessary to shew a title to the common. *R. on demurrer in C. B. and aff. in B. R. T. 8 W. 3. Stroud v. Birt. (Com. 7.) 4 Mod. 423. R. 1 Vent. 319. R. after verdict. 4 Mod. 175. R. Skin. 213. 621.*

So, in an action for stopping his way, it is not necessary to shew a title to the way. *R. and aff. in Error. 1 Vent. 275, St. John v. Moody. And on demurrer Elockley v. Slater, H. 4 & 5 W. & M. Rot. 1771. R. 3 Lev. 266. Lutw. 120. 2 Lev. 148.*

Tho' the way appears to be in the defendant's close. *R. Lut. 120.*

Or, for diverting his watercourse, *quæ ad terram* of the plaintiff *currere consuevit*, it is not necessary to shew any other title. *R. Cro. Car. 500. 575. R. 3 Lev. 133. 3 Mod. 49. Dub. Sho. 64. R. Carth. 85.*

So, if he says, *quæ currere debuit et debet*. *R. Skin. 316.*

[In an action by an owner of an antient ferry against a person who erects a new ferry near to his, the plaintiff may declare on his possession; and he need not set forth in his declaration that he keeps boats and ferrymen sufficient to carry passengers over. *Blissett v. Hart, C. P. M. 18 Geo. 2. Willes, 508.*

So, in debt upon the *ft. 2 Ed. 6. 13.* it is not necessary to shew a title, but only that he is rector or farmer. *Vide post. (2 S 16.)*

So, in an action for disturbing him in his seat in a church, it is not necessary to allege repair, or any other ground of enjoyment of his seat, but his possession; for this is sufficient against a wrong-doer. *R. 3 Lev. 73.*

[So, if a man is disturbed by a stranger in his right of sepulture in the chancel for which he ought to pay the churchwarden 2s. he need not set that out. *Waring v. Griffiths, H. 31 G. 2. 1 B. M. 44c.*]

So, in real actions, founded on a *tort*, there is no occasion to shew a title. *Semb. 8 Co. 87. b.*

So, in an action upon the case for not doing a thing which he ought to do of common right. *R. 1 Sal. 22. R. 1 Sal. 360. Mod. Ca. 311.*

So, in an action upon the case against a sheriff for entering into his franchise; tho' he must have it by grant, and the sheriff of common right hath the return and execution of writs. *R. Sho. 18.*

So, in trespass, the plaintiff need not to make a title. *R. 2 Bul. 288.*

Tho' it be for a refusal of toll. *2 Bul. 288.*

And if he makes a title, it will be surplusage, and he may give any other title in evidence. *R. 2 Bul. 288.*

Yet, it is necessary that the plaintiff should shew the common or way, &c. to be his own, otherwise it may be the common, &c. of the defendant. *R. after verdict. 2 Cro. 158, 9.*



## (C 40.) When a Title shall be shewn in the Replication.

And if the defendant justifies, the plaintiff ought to shew a title in his replication. *R. in B. R. T. 8 W. 3. int. Stroud and Birt. 4 Mod. 424.*

## (C 41.) When in the Bar.

So, in trespass, if the defendant justifies for damage feasant it is not sufficient to say that he was possessed, without shewing by what title. *R. on a special demurrer. 4 Mod. 419. Vide post. (E 21, 22.)*

So, if the defendant justifies as servant to *A.* he ought to shew what title *A.* had; and it is not sufficient to say that he was possessed. *R. on a special demurrer. 4 Mod. 419. 1 Rol. 393. 4.*

So, if he justifies by *molliter manus imposuit* in defence of the possession of *B.* *R. Mo. 846. Semb. Lut. 1497.*

So, if he justifies damage feasant. *R. cont. 2 Mod. 70. 3 Mod. 132. R. acc. Lutw. 1492. R. acc.* Where the trespass is *quare clausum fregit*; for the plaintiff pretends title to the soil. *Sal. 643.*

But where the defendant justifies the taking damage feasant, where trespass is brought for taking goods only, it is sufficient without shewing a title to the possession; for this could not be in debate. *R. Sal. 643.*

[In pleading a public highway, it is sufficient for the defendant to allege that it is a common public highway, without shewing how it became so, or that it has been such time immemorial. *3 T. R. 265.*]

And if the plaintiff shews a title, and fails in it, the declaration is bad. *Vide ante, (C 29. 39.)*

## (C 42.) But a Title in the defendant is sufficient to be alleged generally.

So, if the plaintiff alleges a title in the defendant, he need not shew it precisely; but it is sufficient in general terms: as, in a *scire facias* against the donee of a statute, who has purchased part of the lands of the donor, and sued an extent against the plaintiff, who is the purchaser of the other part, it is sufficient to say, that the defendant *perquisivit sibi et heredibus, virtute cujus, &c. fuit possessionatus*, without shewing that the deed was enrolled. *R. Mar. pl. 97. 108.*

## (C 43.) So, if it be alleged by Way of Inducement.

So, if a title be only conveyance or inducement to the action, it need not be alleged precisely. *Vide ante, (C 31.)—Post. (E 10.)*

As, in an action upon the case for a nuisance, if the plaintiff alleges that he was possessed for a term of years, it is sufficient, without shewing the commencement of the term; for the title is only inducement to the action. *2 Mod. 71.*

So, if he says that he was possessed, it is sufficient without saying for years. *Lut. 120.*

So, in covenant, it is sufficient to say, that by indenture he demised, without shewing by what title he was seised.

Or, that being possessed for years he demised, without saying by what title, or for what term possessed. *R. Carth. 30.*

So,

So, in debt against a sheriff for money levied on a *fieri facias* out of *B. R.* on a judgment in *C. B.*, it is sufficient to say that the record was duly removed into *B. R.*, without saying how, by writ of error or otherwise. *R. Cro. Car.* 539.

(C 44.) When a Declaration shall shew a Breach.

The declaration ought to shew a breach of the covenant, promise, &c. on which the action is founded.

And if a good breach be not assigned, the defendant may demur generally. *Win. Ent.* 120. *Vide post.* (C 47, 8, 9.)

(C 45.) How a Breach shall be assigned.

(C 45.) *In the words of the covenant.*] And it is sufficient that the breach be assigned in the words of the covenant, promise, &c.; as, if a covenant, promise, or condition of an obligation be to shew a sufficient record, it is sufficient to say that he did not shew a sufficient record, tho' issue cannot be joined upon it; for the sufficiency of a record does not lie in the mouth of *laygens*, but the defendant on such breach assigned may say that he shewed such a record, and recite it; and, upon demurrer, the court shall judge whether it is sufficient. *R. Yel.* 39, 40.

If the covenant be not to permit an escape without a warrant from the sheriff, it is sufficient to say that the defendant permitted the escape of *A.* without a warrant, without alleging how *A.* was arrested. *R. 1 Sid.* 30.

Covenant to do any act for further assurance; it is sufficient to say that he did not make a conveyance on request, without shewing any particular conveyance refused; for the covenant was to do any act, &c. *R. Yel.* 45.

Covenant that he was seised of an indefeazible estate; it is sufficient to say that he was not seised of an indefeazible estate, without alleging what estate he was seised of, tho' the writings of the estate are in the hands of the covenantee. *R. Ray.* 14, 15. *Win. Ent.* 134. *acc. Vide post.* (C 49.)

*Assumpsit* that *firmam faceret*, Ang. would make good such a portion to *A.* on marriage; breach *quod non solvit nec aliquo modo firmam fecit*, &c. is sufficient. *R. 2 Rol.* 738. l. 30.

So, where there are mutual agreements and promises, breach, *quod non performavit agreementum suum* is sufficient. *R. 3 Lev.* 319. 4 *Mod.* 188.

Covenant by an apprentice, for not finding victuals *et alia necessaria* in the words of the covenant, is sufficient. *R. 3 Mod.* 69. 3 *Lev.* 170.

Breach for want of repairs in the words of the covenant, is sufficient. *R. Lut.* 329.

Covenant that he will deliver up the house well repaired at the end of the term, breach that he did not deliver it up, well repaired, is sufficient; for if the defendant pleads that he delivered it up, well repaired, the plaintiff shall assign a particular breach. *R. 2 Cro.* 170, 171.

Covenant to permit the removal of trees; breach, *quod non permisit sed obstruxit et obstupavit*, is sufficient. *R. Sho.* 252.

Breach, that he did not surrender a copyhold, is sufficient, tho' he does not shew a court held. *R. 2 Cro.* 102.



In debt on a bond, that the defendant will not waste goods, and that defendant pleads that he did not waste, if the plaintiff replies that he did waste goods to the value of 100 *l.*, without saying what goods, it is sufficient. *R. 1 Lev. 94.*

Debt on an obligation with a condition to make a good title to such an estate, after performance pleaded, the plaintiff may assign a breach *quod non monstravit bonum titulum*, &c. *R. Carth. 125.*

Covenant to pay so much to *A.* to the use of *B.*, breach, that he did not pay to *A.* for the use of *B.*, is good. *R. 2 Mpd. 138.*

If the promise or covenant be in the disjunctive, the breach ought to be assigned, that he did not do the one nor the other. *R. 1 Sid. 440. 1 Vent. 64.*

So, if a covenant be that *A.*, his executors and assigns, shall repair, &c. breach for not repairing ought to be, that *A.*, his executors or assigns, *non reparaverunt*; for if it be assigned in the conjunctive it will be bad on a general demurrer. *R. Cro. El. 348.*

But where the act is to be done to *A.* or his assigns, it is sufficient to say that he did not do it to *A.*, for an assignment shall not be intended, if it be not shewn on the other side. *R. 1 Sal. 139.*

[So, in covenant against the original lessee, that he did not perform, is sufficient, without saying, nor his assigns. *Qui facit per alium, facit per se*; therefore if his assigns have done it, the breach is false. *Gyse v. Ellis, M. 6 G. Str. 228.*]

[So, in covenant to pay, or *cause to be paid, to them or one of them*, the breach in general that he did not pay, is sufficient. *Aleberry v. Walby, M. 6 G. Str. 229.*]

If a covenant be to deliver corn into a barge to be brought by the plaintiff, *super vel ante 1 M.*, breach that he did not deliver *super 1 M.*, is sufficient without saying *super vel ante*; for the delivery was to be into the barge brought by the plaintiff, and therefore could not bind the plaintiff to any time before the last day. *R. 1 Sal. 140. (Com. 89. 1 Ld. Ray. 620.)*

[In debt on a bye-law, for not paying 2 *s. per annum*, quarterly, the breach need not assign the days of payment. *Innholder's Case, M. 24 G. 2. 1 Wils. 281.*]

(C 46.) *According of the intent of the covenant, &c.*] So, if a breach be assigned in words which contain the sense and substance of the covenant, &c. tho' they are not the precise words of the covenant, it is sufficient: as, if a promise be that *warrantizaret* the debt of *A.*, and the plaintiff assigns a breach *quod non solvit*, &c. it is well; for that is the intent of the promise. *R. 1 Sid. 178. R. 2 Rol. 738. l. 15.*

[So, if a policy insures a ship against the *barratry* of the master, and the breach is assigned, that the ship was lost by the *fraud and neglect* of the master, it is well assigned. *Knight v. Cambridge, P. 10 G. 2 Ld. Raym. 1349. Str. 581.*]

If a covenant be to shew a sufficient record, and he says that he did not shew any record. *Adm. Yel. 40.*

If the covenant be that the plaintiff and his wife shall enjoy; breach, that the plaintiff was ousted, is sufficient; for the husband had the entire possession. *R. 2 Cro. 383.*

[Lease from *A.* and *B.* his wife to *C.* for seven, fourteen, or twenty-

twenty-one years, at C.'s election, who covenants to pay A. and B. their executors, &c. said rent during said term; C. enters and continues in possession; A. dies; B. marries D.; rent is in arrear; D. and B. bring action of covenant in the first seven years, and assign for breach that C. has not paid to D. and B., the breach is well assigned. *Ferguson v. Cornish*, T. 33 & 34 G. 2. 2 B. M. 1032.]

[Plaintiff covenanted to build two houses for 500 l. by a certain day, and averred in an action of covenant for the money that the houses were built in the time; evidence that the time had been enlarged by parol agreement, and the houses finished within the enlarged time, did not support the declaration. *Little v. Holland*, B. R. E. 30 Geo. 3. 3 T. R. 590.]

If an *assumpsit* be to make good a portion of 500 l., if the plaintiff says that the defendant did not pay, it is sufficient. *R. Jones*, 228, 9.

If an award be that A. shall pay, or procure a stranger to be bound for the payment, and the defendant pleads performance; it is sufficient for the plaintiff to assign a breach, that A. did not pay, without adding *nec procuravit* the stranger to be bound for it; for the award is void as to that. *Dan.* 557.

If a promise be to deliver goods *super vel ante* 19 Jan., breach that he did not deliver *super* 19 Jan., is good; for delivery at a day precedent will not be good without notice: at least after verdict it is good. *R. Harman v. Ouden*, B. R. T. 12 W. 3. *Vide* 1 Sal. 140. (Com. 89.) 1 *Ld. Ray.* 620. *Cont.* where an award was to pay money *ad vel ante*. *R.* 3 *Lev.* 293.

(C 47.) When it is not well assigned.

(C 47.) *If it does not comprehend the effect of the covenant.*] But if a breach assigned be not in the words of the covenant, but shorter or larger than the covenant, &c. it is bad: as, a covenant for enjoyment, without lawful disturbance; breach, that he was disturbed, is bad; for it should be, that he was *legitimo modo* disturbed, in the precise words of the covenant, or otherwise he should shew by whom he was disturbed, and how. *R. Crp. El.* 914. *Yel.* 30. *Vide post.* (C 49.)

Promise to deliver a horse in good plight; breach that he did not deliver it, is bad. *R.* 1 *Vent.* 64.

Covenant to repair a fence, except *in parte occidentali*; breach, that he did not repair, and does not say that the want of repair was in other than the west side, and therefore bad. *R.* 2 *Jon.* 125.

Promise to pay a bill of costs, when taxed by two attornies to be chosen between the parties; breach, that he did not produce any bill, is not good. *R.* 2 *Sand.* 107.

Covenant to pay so much *per ton*; breach, that he has not paid for so many tons and one hogthead, is bad; for it was not *sec. ratam*, and therefore non-payment for the hogthead is not within the covenant. *R.* 2 *Lev.* 124.

Covenant *quod super requisitionem manuteneat*, any action in his name; it is not good, if he shews an action brought in his name which abated, if he does not say that it was upon request. *R.* 1 *Leo.* 169.

Covenant to pay 5 s. *per day*, after notice that he would not act any more, proviso, that no notice shall be given but in an acting week;



week; breach, that he gave notice *sec. formam articulorum*, is not sufficient, but he ought to say expressly that it was in an acting week. *R. Sal. 574.* for the proviso is part of the covenant itself.

In *assumpsit* to deliver goods, or pay 20*l.* breach, that he did not deliver, is not sufficient, without saying, nor paid 20*l.* *R. Hard. 320.*

So, if a breach be in these words, *that he was not seised of a well*, when the demise was of a messuage, with liberty to have water there, and he covenanted that he was seised of the premises; but he ought to say, *that the lessor had not power to grant such liberty.* *R. Lut. 608.*

So, if a breach be in the words of the covenant, &c. where the words are in part void, or surplusage, and do not contain the effect of the covenant, it is bad; as, if an award be, that *A.* and a stranger shall give a bond; breach, that *A.* and the stranger did not give it, will be bad; for if *A.* only gives it, it is sufficient, the award being void as to the stranger. *Dan. 557.*

If *A.* assigns his office, and the fees belonging to it, and engages that *B.* to whom he assigned shall receive them; it is not a good breach, that *B.* did not receive them, but he ought to shew that *A.* prevented him. *Per two J. 4. Mod. 44.*

If the breach does not shew a disturbance after the plaintiff's title, it is bad; as, on a covenant to enjoy without the interruption of *B.* if the plaintiff says that he entered 3d Nov. and that *B.* had a lease, upon which he entered 1st Oct. it is not good. *R. Al. 19.*

[But if lessor covenant for quiet enjoyment against the *lawful* let, suit, entry, &c. of himself, his heirs and assigns, the declaration for breach of this covenant need not expressly allege that he entered *claiming title*, if the disturbance complained of be such as clearly appears to be an assertion of right. 1 T. R. 671.]

(C 48.) *If it be not certain.*] So, if a breach is not certain and express, it is bad.

If a covenant be, that an apprentice shall not waste goods; breach, that he wasted divers goods, is not good, without saying what. *R. 1 Lev. 94.*

If the breach is, that the messuage was not repaired, and does not say in what the defect was. *Bendl. pl. 110. Skin. 344.*

Yet, a general breach is sufficient in covenant; and therefore, *that he sold to A. and others, at several times between such a day and such a day*, is sufficient. *R. 1 Sal. 139.*

If a covenant be, that the plaintiff may enter and enjoy without let or demand of the defendant; breach, that he did not enter and enjoy by reason of the let or demand of the defendant, is bad. *Semb. Hard. 132.*

If a covenant be, to find meat, drink, and other necessaries, and the breach be in the same words, without saying what necessaries, it is bad. *R. 2 Cro. 486.*

If a breach be, *non performavit agreementum*, without saying, in what particular, it is bad. *Skin. 344.*

But a breach badly assigned shall be aided after a verdict which finds for the plaintiff. *R. 2 Jon. 125. R. Skin. 344.*

So, in covenant, if one breach be well assigned, and another ill, the plaintiff, on an entire demurrer to the whole declaration, shall have judgment

judgment for the breach well assigned, and shall be barred for the residue. 2 Sand. 380. *Vide ante*, (C 32.)

(C 49.) *If it does not shew an interruption by title.*] So, a breach assigned in the words of the covenant, &c. where the words do not import any such breach, is not good: as, if the lessor covenants that the lessee shall enjoy during his term; breach, *quod non gavisus fuit*, is not sufficient, for the covenant is not broke but by disturbance by a lawful title. R. Vau. 121. R. Hob. 25. Win. Ent. 120. *Vide post*. (E 25, 6.)

So, in covenant for quiet enjoyment of 20 tons of copperas; breach, *quod non potuit gaudere*, &c. is not good, without shewing a lawful disturbance. R. Cro. El. 914. Yel. 30.

So, in *assumpsit* for quiet enjoyment; breach, that he did not quietly enjoy, is not good. R. Cont. Dy. 328. a. R. acc. 2 Cro. 425.

In *assumpsit* to enjoy without disturbance, breach, that a stranger made a distress upon him, is not good, without saying that the distress was upon an elder charge. R. 2 Cro. 444.

So, in debt on a bond for quiet enjoyment; breach, that he was ousted, without saying by an elder title, is bad. R. Dy. 328. a. in marg. R. Cro. Car. 5.

A condition or covenant, that the lessee shall not oust the tenants, inhabiting within the manor, of their tenements, if they do duty according to the custom; breach, that he ousted B. a tenant inhabiting his tenement, parcel of the manor, is not good; for perhaps B. was only a tenant at will. R. 1 Leo. 246.

So, in covenant, if the plaintiff for breach assigns, that A. *habens legal. titulum* entred, it is not good, without shewing what title A. had. R. 2 Sand. 180. 1 Sid. 466. R. 3 Mod. 135. R. cont. 2 Lev. 37. R. acc. 1 Lev. 301. 1 Mod. 294.

[It is sufficient in such an action if the plaintiff allege that at the time of the demise to him A. B. had lawful right and title to the premises, and having such lawful right and title, entred, &c. and evicted him, &c. without shewing what title A. B. had, or that he evicted the plaintiff by legal process. *Foster v. Pierson*, B. R. E. 32 Geo. 3. 4 T. R. 617.]

[In an action of covenant for quiet enjoyment, the plaintiff may state generally that A. B. lawfully claiming title under the defendant, entred by virtue of such title on the plaintiff, without setting forth the particulars of A. B.'s title. *Hodgson v. East India Comp.* B. R. T. 39 Geo. 3. 8 T. R. 278.]

So, if A. as attorney to another, makes a demise, and covenants that the lessee shall enjoy; if the lessee in covenant shews a recovery against him in trespass, without shewing the title, it is not good. R. *per two J.* 2 Vent. 62.

So, if in debt on a bond for enjoyment of land without eviction, the defendant pleads conditions performed, and the plaintiff assigns for breach, a recovery against him, it is not good, without saying it was by an elder title. R. 2 Cro. 315. R. 1 Lev. 83.

And tho' the defendant rejoins, that the recovery was by *covin*, and it be found for the plaintiff; yet the breach is not aided by the verdict. R. and judgment cont. reversed. 2 Cro. 315.

So, if it be for the enjoyment of a way till A. is of full age, and



he says that *A.* obstructed him, without saying by title. *R. 3 Lev. 305.*

So, in covenant for enjoying, without the interruption of *B.* and all claiming under him, and he says that he was interrupted by *A.* who claims under *B.* without saying how, or by what title. *R. cont.* and afterwards reversed by all the justices and barons. *Cro. El. 823.*

In covenant to save harmless from arrears of rent; breach, that he did not pay, is not sufficient, without damnification. *Skin. 397.*

But the breach is well assigned, that *A. habens legal. titulum virtute dimiss. fact.* before the covenant to the plaintiff, tho' it does not shew what title *A.* had. *R. 3 Lev. 325.*

If there are several covenants, one, that *A.* shall well serve, the other, that if he embezzles, &c. *B.* upon notice shall make satisfaction; if the breach be, that *A.* embezzled, without saying that he gave notice, it will be a good breach on the first covenant. *R. Cro. El. 831.*

So, where the matter lies properly in the knowledge of the covenantor, a breach in the words of the covenant is sufficient: as, if a lessor covenants that he has full power to make the demise, it is sufficient to say, that he had not power, without shewing in whom the estate was; for this lies more in the notice of the lessor. *R. 9 Co. 61. a. Cont. Win. Ent. 122. Vide ante, (C 45.)*

So, where the covenant is against interruption by the covenantor himself, breach, that he himself entred, &c. is sufficient, without shewing by what title. *R. 2 Cro. 383. R. Cro. El. 544.*

So, if a covenant or promise goes only to the possession, eviction is sufficient, without shewing the title. *R. 2 Lev. 194. R. Dy. 328. a. Vide ibid. in marg. Semb. cont. per two J. 2 Vent. 62.*

So, if a covenant be against the act of a particular person, interruption is sufficient, without saying by what title. *R. Cro. El. 213. Adm. 2 Vent. 62. R. 2 Lev. 37.*

#### (C 50.) Averment in a Declaration.

(C 50.) *When necessary.*] The plaintiff in his declaration ought to aver all that is necessary for the maintenance of his action.

[If a declaration in assault and battery begins with *quod cum*, it is bad, for want of averment, (in *B. R.*, not in *C. B.*, where they proceed by original,) and judgment shall be arrested. *Smith v. Reynolds, T. 10 & 11 G. 2. Andr. 21.*]

[In an action for a malicious prosecution for felony, the declaration must state that the prosecution is at an end: and alleging that the plaintiff was discharged from his imprisonment is not sufficient. *2 T. R. 225.*]

But, if it be alleged that he was acquitted, that is sufficient, for the word *acquitted* has a legal definite meaning, and must be understood in its legal sense, namely, by a jury on the trial. *Id. 231.*

[So, if it had been alleged that the plaintiff had been discharged by the grand jury's not finding the bill; that would have shewn a legal end to the prosecution. *Id. 232.*]

[An allegation in a declaration, (for a malicious prosecution,) that the plaintiff "by a jury of the said county, &c. was duly and in a lawful

lawful manner acquitted," is proved by the production of the record, by which it appeared *that the jury found the plaintiff not guilty, and upon that judgment was entered that the plaintiff should go thereof acquitted.* *Hunter v. French, C. P. M. 18 Geo. 2. Willes, 517.]*

In an action for a malicious prosecution in charging the plaintiff with conspiring with others to defraud the defendant of the interest of an *East India* bond, the declaration stated that the bond bore interest "as therein is (not was) mentioned," and held good. *Jackson v. Sharp, C. P. H. 18 Geo. 2. Willes, 525.*

[In an action for inducing the plaintiff's wife to continue absent, it is sufficient to state, that "the defendant unlawfully and unjustly persuaded, procured, and enticed the wife to continue absent, &c. by means of which persuasion, &c. she did continue absent, &c. whereby the plaintiff lost the comfort and society of his wife:" without setting forth the means, &c. used by the defendant. *Winfmore v. Greenbank, C. P. T. 18 & 19 Geo. 2. Willes, 577.]*

[In covenant on a charter-party, by which it was agreed to employ a ship of which the plaintiff was the captor, as soon as sentence of condemnation should have passed; the sentence must be taken to mean a legal sentence; and the party suing for the freight must aver that the ship was condemned by a court having competent jurisdiction. 1 *T. R. 674.]*

But the plaintiff need not aver his count, by *hoc parat. est verificare.* *Pl. Com. 342. a. Co. L. 303. Vide post. (E 33.)*

[By a navigation act it was enacted that on a certain day the first general meeting of the proprietors should be holden, at which the company should execute deeds, under their common seal, for each distinct share, "which deeds should respectively vest a certain share in each proprietor;" the plaintiff declared in *assumpsit* against the defendant, for not completing a contract for the purchase of some shares, that on a day prior to the first general meeting "he was lawfully entitled to so many shares:" this was holden a material averment, and the ground of a nonsuit, as it could not be proved, tho' there was another clause in the act, by which certain persons (of whom the plaintiff was one) were made a corporation for the purposes of the act, and the money to be subscribed was to be divided into so many equal shares, "which were thereby vested in the persons so subscribing," &c. *Latham v. Barber, B. R. M. 35 Geo. 3. 6 T. R. 67.]*

[In an action against a person farming the post-horse duties under the *stat. 27 Geo. 3. c. 26.* for a neglect of duty it is necessary to aver that he is the farmer appointed under and by virtue of that act. *Short v. Pruett, B. R. H. 35 Geo. 3. 6 T. R. 163.]*

[Averring that he is the collector of the rates and duties recited in that act is insufficient. *Ibid. Vide infra, (C 76.)*]

[In escape against the sheriff, if the plaintiff aver in his declaration that J. S. was arrested, "under a writ indorsed for bail by virtue of an affidavit now on record," he must produce the affidavit in evidence, tho' the latter part of the averment was unnecessary. *Webb v. Herne, C. P. T. 38 Geo. 3. 1 Bos. & Pull. Rep. 281.]*

(C 51.) *Performance, when it shall be averred. Condition precedent.]*  
And therefore, in all cases where the estate or interest commences  
on



on a condition precedent, be the condition or act in the affirmative or negative, and to be performed by the plaintiff, the defendant, or any other, the plaintiff ought, in his count, to aver performance. *R. 7 Co. 16. a. Ughtred.*

As, if a man grants an annuity to another, when he is promoted to such a benefice, &c. the plaintiff in annuity ought to aver that he is promoted, &c. *Pl. Com. 25. b.*

If a man devises, that, if his goods are not sufficient to pay his debts, his land shall be sold; he who avows under the vendee ought to aver precisely that the personal estate was not sufficient. *R. Jon. 328.*

If a man promises to surrender land on payment of so much money, in *assumpsit* the plaintiff ought to allege payment, or a tender and refusal. *R. Cro. El. 889.*

[If in consideration that *A.*, at the special request of *B.*, would execute a general release, (to bear date before this agreement,) *B.* will pay, &c. *A.* must aver, that he gave or tendred the release. *Collins v. Gibbs, M. 33 G. 2. 2 B. M. 899.*]

So, if a man promises as a surety or *fidejussor* for another, in *assumpsit* against him for non-performance of the promise, the plaintiff ought to aver, that he for whom he was surety has not performed. *R. 2 Cro. 500.*

If bail be bound in recognizance that the defendant shall appear in eight days after warning, and if he be condemned shall render himself or pay, &c. the plaintiff ought to shew that he was warned; for it is a condition precedent. *R. 2 Cro. 46.*

If the defendant justifies an arrest 10 *Off. virtute warranti* of the quarter sessions, 9 *Off.* he ought to aver that the sessions continued till the arrest. *2 Lev. 229.*

[Tender of stock must be on the very day, notwithstanding the custom of the *Alley* to allow a day or two. *Per Pratt Ch. J. Bullock v. Noke, H. 10 G. Str. 579. N. B. King Ch. J. in a like case left it to the jury, who found it a good tender.*]

[Tender of stock must be at the last part of the day that it can be accepted. *Rutland v. Hodgson, T. 13 G. Str. 777.*]

[The buyer of stock must be called at the books, to make it a good tender. *Thornton v. Moulton, M. 9 G. Str. 533.*]

[If stock and dividends are to be transferred, the declaration must shew what the dividends were, and that they were all tendred. *Bowles v. Bridges, P. 2 G. 2. Str. 832.*]

[On a contract for sale of stock, tender of the stock by a third person appointed by the seller is not sufficient; for the purchaser is not obliged to accept it from a third person. *Rhodes v. Lovit, in Sc. H. 1720, Bumb. 70. Vide Merrit v. Rane, Str. 458.* where a third person attending by purchaser's appointment to pay for and accept stock was held good.]

[If tender of stock was to have been on a non-transfer day, it must be shewn, that leave to transfer was actually obtained. *Clerk v. Tyson, H. 8 G. Str. 504.*

(C 52.) *The cause or consideration of the duty demanded.*] So, if the thing demanded is granted for such a cause or consideration, this ought to be averred to have been performed; for it is in the nature of

of a condition precedent: as, if I promise 20*l.* to *A.* for his going with me to *Rome*, he ought to aver his going to *Rome*; for upon that the duty commences. 7 *Co.* 10. *b.*

Or, for his service for a year, he ought to aver his service. *Hob.* 106.

Or, in consideration of his forbearance for a week, he ought to aver his forbearance. *R. Cro. El.* 272

So, the cause or consideration of a patent, if it be executory or the suggestion of the party, ought to be averred. *Vide post.* (C 62, 3, 4, 5.)

(C 53.) Tho' there are mutual agreements, if the thing to be done for such a consideration is by agreement to be done at a day subsequent to the performance of the condition.

So, where there are mutual agreements, and the one agrees to give a hawk at such a day, and the other agrees for the hawk to deliver a horse at a subsequent day: in an action for the horse, the delivery of the hawk must be averred; for that was the consideration of the promise. *Lut.* 251. 1 *Salk.* 171.

[If *A.* and *B.* agree to exchange horses, and *B.* give a sum of money to *A.* to bind the bargain, *A.* may maintain an action against *B.* for not delivering his horse, without alleging any delivery of, or offer to deliver, his own to *B.*; for the payment of earnest money vests the property of *A.*'s horse in *B.* *Bach v. Owen*, *B. R. M.* 34 *Geo.* 3. 5 *T. R.* 409.]

If *A.* agrees to build a house, and *B.* agrees to pay 10*l.* *pro labore suo*, and there are mutual promises, in an action by *A.* for the money, he must aver performance of the work. *R. Per two J. Twissd. cont.* 2 *Sand.* 351. 2 *Lev.* 23.

So, if *A.* agrees to assign a lease to *B.*, and *B.* agrees to pay *proinde* 250*l.*, and there are mutual promises, if *A.* sues for the 250*l.* he must aver an assignment of the lease. *R. Cont. Ellis dub.* 2 *Mod.* 34.

This resolution denied to be law. *Sal.* 172.

If *A.* agrees to pay 10*l.* to *B.* within six months, *B.* transferring so much stock to him, and *B.* gives a note to *A.* to transfer so much stock to him, paying 10*l.*; if *B.* sues for the 10*l.* he must aver that he has transferred, or offered to do it; and if *A.* sues for not transferring, he ought to aver and prove payment or a tender of the 10*l.*; for they are conditions precedent, tho' there are mutual promises. *Per Holt*, 1 *Sal.* 112.

So, if mutual agreements are to be performed reciprocally on a precedent act by the other; as, if *A.* covenants to transfer stock to *B.*, on payment of so much, and *B.* covenants to accept such transfer, and then to pay; in covenant, &c. for non-payment, *A.* ought to aver a transfer or a tender. *R. Per C. B. But reversed per three J. in B. R. But affirmed in parliament.* 2 *Mod. Ca.* 68. 381.

So, if there are mutual agreements, and one agrees to do his part at an indefinite time, and the other in consideration thereof to pay, &c. *R. 2 Mod. Ca.* 40.

[*A.* agreed to sell *B.* his estate for a certain sum before a particular day, in consideration whereof *B.* agreed to pay that sum on the day, and on failure to pay 21*l.*; it was holden that they were dependent covenants; and that *A.* could not recover the 21*l.* without shewing a conveyance



conveyance on his part, or a tender and refusal of one. *Goodisson v. Nunn*, B. R. T. 32 Geo. 3. 4 T. R. 761.]

[By the conditions of a sale by auction of a copyhold estate, it was stipulated that the purchaser should lay down a deposit, and sign an agreement for payment of the remainder of the purchase-money at a certain time, *on having a good title*, and that he *should have a proper surrender* of the estate, on payment of the remainder of the purchase-money. In an action brought by the seller, for the non-performance of the conditions on the part of the purchaser, it was not sufficient to state that the seller *had been always ready and willing, and frequently offered to make a good title to the said estate, and to make a proper surrender on payment of the purchase-money*: but the declaration ought to have averred that the seller actually made a good title, and surrendered the estate to the purchaser, or a tender and refusal, and also to have shewn what title the seller had. *Phillips v. Fielding*, C. P. M. 38 Geo. 3. 2 H. Bl. 123.]

[In an action for the non-delivery of corn at S., pursuant to an agreement whereby the defendant, in consideration that the plaintiff had bought of him a certain quantity at a fixed price, undertook to deliver it to the plaintiff at S. within one month from the time of the sale, the plaintiff must aver a tender of the price, or what is equivalent; for the delivery of the corn and the payment of the price were concurrent acts to be done by the parties respectively at the same time, and each must aver performance, or an offer to perform on his part, before he can maintain an action against the other. *Morton v. Lamb*, B. R. H. 37 Geo. 3. 7 T. R. 125.]

[In an action on a covenant against a lessee for not repairing, (the covenant adding, "the lessor allowing and assigning timber for the repairs,") it is necessary to aver that the lessor did allow and assign timber, it being a condition precedent. *Thomas v. Cadwallader*, C. P. M. 18 Geo. 2. Willes, 496.]

[Plaintiff covenanted to sell to the defendant a school-house, &c. and to convey the same to him on or before the 1st August 1797, and to deliver up the possession to him on 24th June 1796: and in consideration thereof defendant covenanted to pay the plaintiff 120*l.* on or before said 1st August 1797. It was holden that the covenant to convey, and that for the payment of the money, were dependent covenants; and that the plaintiff could not maintain an action for the 120*l.* without averring that he had conveyed, or tendred a conveyance to the defendant. *Glazebrook v. Woodrow*, B. R. M. 40 Geo. 3. 8 T. R. 366.]

(C 54.) *When performance need not be averred. Where there are mutual agreements.*] But where there are mutual promises, generally, performance need not be averred. 7 Co. 11. a. *Adm. Lut.* 250. *R. Mar. pl.* 114. *R. Lut.* 224. *Cro. El.* 889.

As, if a man promises to deliver a cow, and the other promises payment of 20*l.* in an action for the money, the delivery of the cow need not be averred. *R. Hob.* 88. *Agreed per Holt, Lut.* 250. *Dan.* 72.

[A covenant to pay upon transferring stock, is mutual. *Wyvil v. Stapleton*, M. 11 G. Str. 615. *Dawson v. Myer*, T. 12 G. Str. 712.]

If a man promises to deliver so many tons of iron, and the other promises payment, the plaintiff need not aver the delivery of the iron. *R. Tel.* 133.

If there be an agreement that *A.* shall pay so much on such a day, if *B.* will promise to maintain an infant for so many years, and there are mutual promises thereon; in *assumpsit* for the money, *B.* need not aver that he promised, &c. *R. Lut.* 223, 4.

If *A.* promises to take an apprentice, and *B.* in consideration thereof to pay so much. *R. 1 Lev.* 87.

Or, to provide soldiers to be transported, and *B.* to provide ships to transport them. *R. Sti.* 186, 7. *2 Mod.* 75.

If *A.* covenants to account, and *B.* to allow on such account such a thing. *R. 2 Mod.* 76.

So, where there are mutual covenants, the plaintiff need not allege in covenant that he has performed the covenants on his part. *R. 1 Rol.* 414. *l.* 40. 55. [*Dougl.* 690. *Corup.* 56.]

So, where the plaintiff alleges an agreement and mutual promises to perform, performance by the plaintiff need not be alleged, tho' they ought to be performed. *R. Hard.* 103.

If *A.* in consideration that *B.* undertook not to sue a bail bond against him, and to give him the benefit of an outlawry, assumes to pay *B.* 400 *l.*, averment that *A.* had the benefit of the outlawry, without saying that he did not sue the bail bond, is sufficient. *R. 1 Lev.* 20.

And in case of mutual promises, the plaintiff need not allege performance of all on his part to be performed. *Adm. Lut.* 223, 4.

[If plaintiff declares, that in consideration he had agreed to deliver cloth to defendant, defendant agreed to pay him money in case *A.*'s horse beat *B.*'s, which he avers he did, he need not aver delivery of the cloth; but if it is, that in consideration plaintiff would deliver cloth, defendant would pay, then the delivery must be averred. *Martindale v. Fisher*, *P.* 18 *G.* 2. *Wilf.* 88.]

(*C* 55.) *Tho' one thing is to be done in consideration of another, if it be agreed to be done at a day precedent.*] So, where there are mutual agreements, and the thing on the one part is in consideration of a thing on the other part, but to be performed at a day before the thing on the other part, there such consideration need not be averred to be performed. *Lut.* 250. *1 Sal.* 171.

As, if a man agrees to serve another in war, and the other agrees to pay him so much for his service at a day before the war began, an action lies for the money without an averment of the service. *R. Lut.* 250.

If a man, in consideration of 10 *l.* to be paid after a new lease granted, promises to obtain a new lease; in *assumpsit* for not obtaining it, the plaintiff need not allege that he is ready to pay the 10 *l.* *R. Cro. El.* 249.

If a man covenants to assure land to *A.* for the consideration *after mentioned*, and *A.* covenants for the consideration *aforesaid* to pay so much; in covenant for the money it is not necessary to aver that he has assured. *R. 1 Rol.* 415. *l.* 5.

So, in debt on a bond for performing an award, if the award be, that one shall pay 10 *l.* and the other in consideration thereof shall release,



release, and a breach is assigned for not releasing, there is no need to aver payment, for he has a mutual remedy. *R. 1 Rol. 415. l. 29. Cro. Car. 384.*

In debt on a bond to pay 50*l.* on marriage, or on 1st *February* next, proviso, that the plaintiff justifies the truth of the declaration under his hand and seal given to defendant of the same date with the bond; plaintiff need not aver that he has justified the truth, &c. *Dub. Hard. 9.*

(C 56.) *Where there are mutual remedies.*] So, where there are mutual remedies: as, if a man promises to deliver metal made into pewter *capiendo inde* so much as he reasonably deserves, in *assumpsit* for not delivering it, there is no need to aver that he tendred so much as he deserved; for it is not a condition precedent, and the defendant may have debt for what he deserves, or may detain at his election, and then it will come on his part. *R. 1 Rol. 466. l. 40.*

If *A.* covenants to repair a house before *Mich.*, and *B.* covenants that, *ab et post tempus quale A. repararet*, he will repair; in covenant against *B.* for not repairing after *Mich.*, it is not necessary to aver that *A.* repaired before; for *post tempus*, &c. does not refer to the repair, but to the time when the lien upon *B.* to repair begins, and covenant lies against *A.* if he did not repair before *Mich.* *R. 1 Rol. 416. l. 40.*

If articles be, that *A.* gives to *B.* 500*l.* for his land; in debt for the 500*l.* there is no need to aver that he has conveyed the land; for there is a mutual remedy when both have sealed the deed. *R. 1 Sand. 320. R. Lut. 496.*

So, if *A.* covenants to transfer stock to *B.* *super vel ante 21 Sept.*, and *B.* covenants to pay so much to *A.* *super vel ante* the same day. *R. 2 Mad. Cas. 105, 6. 294.*

[*A.*, in consideration of 250*l.* paid by *B.*, and of the further sum of 250*l.* to be paid, &c. covenanted that he would, with all possible expedition, instruct *B.* in a certain mode of bleaching linen, (for which he had obtained a patent,) and *B.* covenanted that he would on or before the 25th *February* 1794, or sooner, if *A.* should before that time have instructed him, &c. pay the further sum of 250*l.*; it was holden that the covenants were independent, and that *A.* might sue *B.* for the 250*l.* without averring that he had taught *B.* the mode of bleaching linen, &c. *Campbell v. Jones, B. R. H. 36 Geo. 3. 6 T. R. 570.*]

[*A.* covenants to build an house for *B.*, and finish it on or before a certain day, in consideration of a sum of money which *B.* covenants to pay *A.* by instalments as the building shall proceed. The finishing of the house is not a condition precedent to the paying of the money, but the covenants are independent. *A.* therefore may maintain an action against *B.* for the whole sum, tho' the building be not finished at the time appointed. *Terry v. Duntze, C. P. H. 35 Geo. 3. 2 H. Bl. 389.*]

[On an indenture between two parties, there are mutual remedies, on a deed-poll there is not. *Lock v. Wright, T. 9 G. Str. 569.*]

(C 57.) *Matter ex post facto which defeats an estate or interest.*] So, where any estate or interest passes or vests immediately, and is to be defeated

defeated by a condition subsequent, or matter *ex post facto*, be it in the affirmative or negative, or to be performed by the plaintiff or the defendant, or any other; performance of that matter need not to be averred: as, if a man grants an annuity for the maintenance of six soldiers for the defence of a castle, the plaintiff in annuity need not aver that he has maintained, &c. *R. 7 Co. 10. a.*

If a grant be of annuity to *A.* till he be advanced to a benefice; *A.* in answer need not say that he is not yet advanced. *7 Co. 10. a. b. Pl. Com. 25. b. 30. a. 32. b.*

(C 58.) *Performance, how alleged according to the intent.*] And he ought to aver performance of the intent of the covenant, &c. for it is not sufficient to pursue the words, if the intent be not also performed. As, on a promise in consideration that he would cause *A.* to come to be bound to the defendant for 20 *l.*, it is not sufficient to aver that he caused *A.* to come to be bound, but he ought to say that he was bound. *R. Yel. 50. Vide Condition, (C 12.)*

On a promise to drain lands, *ita quod sint sicce in extremitate hiemis, viz. aliquo tempore inter All Saints and Candlemas*, it is not sufficient to say that *fuerunt sicce in extremitate hiemis, viz. aliquo tempore* between those feasts, but it should be said that *fuerunt sicce* for all that time, or that they did not overflow *aliquo tempore*, &c. for that was the import of the words. *R. 2 Rol. 246. l. 30.*

(C 59.) *Exact performance.*] And he ought to shew an exact performance: as, on a promise in consideration that he would procure 20 *l.* for one year, it is not sufficient to say that he procured 10 *l.* 23d April, and 10 *l.* 23d June; for he ought to procure the whole for a whole year. *R. Yel. 87. Vide Condition, (C 11.)*

So, if it be to procure 20 *l.* in gold, 10 guineas, and the residue in silver, is not sufficient. *Ibid.*

So, on a promise to an attorney in consideration that he will acknowledge satisfaction on record, &c. it is not sufficient to say that he *tanquam attorn.* acknowledged satisfaction; for perhaps his warrant was revoked. *R. 1 Rol. 366.*

So, on a promise in consideration of a lease of lands for 10 *l.* *per ann.* it is not sufficient to say that he made a lease of the said land, without saying it was for 10 *l.* *per ann.* *R. 3 Bul. 35.*

On a promise to pay before the next journey by the plaintiff to London, it is not sufficient to say that *incept iter* such a day, but it ought to be said that he made his next journey, &c. *R. Yel. 176.*

In consideration that he would repair on request; it is not sufficient to say *reparavit*, if he does not add *on request.* *R. 2 Leo. 53.*

[So, on note, "I promise to pay *A.* on his transferring," it is not enough that *B.*, his surviving partner, tenders. *Fowler v. Samwell, M. 12 G. Str. 653.*]

(C 60.) *Must shew to the court that it is well performed.*] And he ought to shew performance with such certainty, that the court may judge that the intent of the covenant is performed: as, on a promise in consideration that he would procure a sufficient man to be bound; it is not enough to say that he procured a sufficient man; but he ought to shew of what sufficiency he was, whereby the court may judge whether he was sufficient or not. *R. Yel. 49. Dan. 71.*

So, on a promise in consideration that he would execute an indenture,



indenture, &c. *per quam barganizaret*; it is not sufficient to say that he executed the indenture *aforesaid*, but he ought to shew that he executed such an indenture, *per quam barganizavit*, &c. *R. Yel. 111.*

But if the consideration was to execute such an indenture in certain, *that he executed the indenture aforesaid*, is sufficient. *Yel. 111.*

If a promise be to deliver 15 *todas lana* to be chosen by *A.* out of 17; in *assumpsit* for not delivering them, he ought to shew that *A.* chose 15 *todas*; for the election is the first act. *R. after verdict. Yel. 76.*

On *assumpsit* in consideration that he would abate 10 *l.*, part of a debt, it is not sufficient to say that he did abate, without shewing how. *R. Cro. El. 477.*

In consideration to acquit *A.* of a debt, it is not sufficient to say that he acquitted him, without shewing how. *R. 2 Cro. 503.*

If a declaration recites an agreement that *A.* would lease for years to *B.*, but that *B.* refused to seal the indenture, because a covenant was inserted for repair generally, and that the defendant, in consideration that *B.* would seal, and the plaintiff would give a bond for the performance of the covenants, assumed to repair during the term; it is not sufficient to say that *B.* sealed, without shewing a demise was made. *R. Yel. 18.*

If a devise be, that land shall be sold, if his goods are not sufficient to pay his debts; in avowry by the vendee, he ought to shew how much the debts, and how much the goods are, so that the court may judge whether the condition precedent to the devise be performed. *R. Jon. 328.*

If the consideration of an *assumpsit* be that he shall give a bond with sureties; it is not sufficient to say that he tendred a bond, if he does not say in what sum and what sureties. *R. Hob. 69.*

But to allege performance in words, which in evidence import it, is sufficient: as, if a promise be to receive *A.* and *B. ut hospites*, and to find necessaries; if he alleges that he received them and found necessaries, it is sufficient, without saying, *ut hospites*. *R. 1 Sal. 25.*

[So, if the consideration is to make sails worth 45 *l.*; *that he made the said sails* is sufficient. *Wallis v. Scott, E. 4 G. Str. 88.*]

If a promise be to discharge from arrest; if he alleges *quod exoneravit*, it is sufficient; for he need not say how, as in the discharge of a bond, or rent. *R. Cro. El. 914.*

If a promise be in consideration that he, at the request of the plaintiff, would procure a note of *B.*, it is sufficient to say that he procured a note, without saying at his request; for a subsequent request was not intended. *R. 2 Vent. 75.*

But after verdict it shall be aided, if the plaintiff alleges a performance, but does not shew how. *R. 2 Jon. 125.*

(C 61.) *But it is sufficient to shew a performance in general terms.* But if the plaintiff shews a certain and exact performance, it is sufficient in general terms, without alleging particularly how he performed: as, on a promise to pay *quant. dispenderet* for the officers of the army in such a suit; an averment, that he spent so much, is sufficient, without shewing for what officers in particular. *R. Ray. 9.*

On a promise in consideration that *renunciaret* the executorship, an averment that *renunciavit*, is sufficient, without saying before whom or how. *Ray. 400.*

That

That *conaret maritagium*; averment, that *conatus fuit* and it took effect, is sufficient, without saying how he endeavoured. *R. Ray.* 400. *Dan.* 72. *Mo.* 595.

That he would forbear a suit; averment, that he did forbear it, is sufficient, without saying in what court. *R. Ray.* 203.

That *monstraret compot.*; averment, that *monstravit quoddam compot.*, &c. without saying *compot. predict.*, is sufficient. *R. Ray.* 204.

That he would marry *A.* on request; averment, that he married *A.* is sufficient, without more. *R. 2 Cro.* 404. *Dan.* 73.

That he would pay as much as was agreed to be paid to *A.*, it is sufficient to say, that so much was agreed to be paid to *A.*, without saying by whom. *Dub. Yel.* 17.

That he would forbear a suit; it is sufficient to say that he did forbear generally, without saying *hucusque*. *R. 2 Mod.* 24.

Or, that he forbore from the time of the promise *hucusq.* is sufficient, tho' to be intended a total forbearance. *R. 2 Mod.* 24. *R. Hard.* 5.

That he would discharge from a promise of marriage; *quod exoneravit* is sufficient, without shewing that he was present, or had notice; for a full discharge shall be intended. *R. 1 Rol.* 470. *l. 5. Str.* 295. 303.

So, in *assumpsit* to pay, &c. if he disliked the land in 14 days, it is sufficient to say, that he disliked; for it shall be intended within the time, otherwise it ought to be shewn on the other part. *R. Cro. El.* 834.

So, if a promise be to pay in *Spanish* money; averment, that he gave a bill for so many dollars, is sufficient. *R. 2 Cro.* 7.

So, an averment, that the plaintiff has performed all on his part to be performed, is sufficient. *R. on demurrer, Lut.* 253.

Or, *quod cum* the plaintiff assumed to perform, &c. *Hard.* 103, 4.

So, a declaration on *assumpsit* to pay so much to cure his daughter, and another count to pay so much for the cure, tho' he does not aver that he has cured, it is sufficient; for by the 2d count it appears that she was cured; and if this appears by any part of the record, it is well. *R. after verdict.* 1 *Mod.* 14. *Dan.* 73.

[So, where something is covenanted or agreed to be performed by each of two parties at the same time, it is sufficient to say that he was ready and offered to perform his part, but that he was discharged by the other. *Doug.* 684.]

[So, if one covenant with another to do a certain act in consideration of an award, it is sufficient to aver that the other prevented the stipulated thing from being literally performed, and accepted an equivalent. *Doug.* 272. *Vide* 1 *T. R.* 638.]

Yet an averment, that *paratus fuit et obtulit* to perform, is not sufficient, if he does not say, that he was hindred by the defendant. 2 *Sand.* 352. *R. 1 Rol.* 465. *l. 30.*

Yet *parat. et obtulit*, will be sufficient after verdict. *R. 2 Sand.* 352. 2 *Lev.* 23.

So, *parat. et obtulit* is sufficient, where nothing is to be done on his part till the other has done a prior act: as, if *A.* being a bailiff, for 10*l.* assumes to arrest another at the suit of *B.* It is sufficient to aver that he was ready, but *B.* did not deliver him any warrant. *R. 1 Rol.* 465. *l. 40.*



(C 62.) *When the consideration of a patent shall be averred. When it is executory.*] When the consideration of the king's patent is executory, the plaintiff in pleading such a patent must aver that the thing is done: as, if the king grants *pro eo* that I shall find a lamp, release a debt, &c. it ought to be averred, that I have found the lamp, released, &c. 21 Ed. 4. 48. Pl. Com. 455. a. Hob. 231.

If a grant be *pro consilio impendendo*, he ought to aver that he was ready to give counsel. Jon. 294.

(C 63.) *Or the surmise of the party.*] So, if the consideration of a patent be the surmise of the patentee: as, if the king *pro eo* that the manor is escheated grants; it ought to be averred that the manor was escheated. 21 Ed. 4. 48, 49.

If the king grants an office with all fees, without naming any; in pleading, it ought to be averred that there are fees in certain, otherwise the grant is only a burthen and no interest, and therefore revocable at pleasure. R. Jon. 294.

(C 64.) *When not.*] But if the consideration of the patent be executed, it need not be averred: as, if the king grants for service done. R. Pl. Com. 455. a. Hob. 231.

(C 65.) *How it shall be alleged.*] And it is sufficient (when there ought to be an averment) to aver the consideration to be performed, without more: as, if the king, in consideration of the surrender of a lease, grants, it is sufficient to aver the surrender made, without saying that there was a lease; for the surrender is the consideration. R. 1 Co. 43. a.

(C 66.) *When the continuance of an estate shall be averred.*] If the plaintiff claims under one who has only a particular estate, as, for life, he must aver continuance of the estate. Pl. Com. 431. a. Cro. El. 18. Vide post. (E 19, 20, 1, 2, 3, 4.)

So, he who claims under a tenant *pur autre vie*, ought to aver the life of the *cestuy que vie*. Mo. 306. 335. Pl. Com. 31. a.

So, if the defendant avows for rent on a lease for years, *if three persons so long live*, he ought to aver that one of them is alive. R. 2 Mod. 93. 1 Mod. 217.

Or, for years, *if the lessee so long live*. R. Dal. 101.

(B 67.) *How it shall be averred.*] But implication that a life continues is sufficient; as, in ejectment for a rectory, if it be found that the rector *fuit et adhuc est seifit.*, it is a sufficient averment of his life. Dy. 304. a. R. 2 Jon. 227. Vide post. (C 77.)

So, in ejectment on a lease for years if the lessor live so long, *quod ejecit termino nondum finito*, is a sufficient averment of the life of the lessor; for the term would have been ended by his death. R. per three J. and off. in error. 2 Cro. 622.

So, in an avowry in right of a tenant for life, that the plaintiff *est, et tempore quo fuit, infra feodum*, is a sufficient averment of his life. R. 2 Cro. 637.

So, if the plaintiff, who claims by lease for a tenant for life, says,  
virtute

*virtute cuius fuit et adhuc est possessionat.* R. 2 Bul. 263. D. 1 Leo. 281.  
1 Brownl. 4.

In trespass for inclosing land 1 Maii, in which he has common, *per quod* he lost his common, (*per quod*) is a sufficient averment that the inclosure continued till the time of common. R. but Dod. doubted, because it is the conclusion of the declaration, if it was not after verdict. R. 2 Rol. 379.

So, in ejectment on the demise of B. if a special verdict finds that B. was alive, it shall be intended that he continued alive, if the contrary does not appear. R. 2 Cro. 146.

So, consuance as bailiff of husband and wife, seised in right of the wife, who was tenant for life, for rent *aretro existente*, is a sufficient averment of the life of the wife on a general demurrer. R. 2 Lev. 88. Lut. 1226.

So, on a special demurrer. *Per two J. but Hale doubted.* 2 Lev. 88.

And by the *st.* 21 *Ja.* 13. after verdict the want of an averment of a life shall be aided, if he be proved to be alive. *Vide Amendment (Q).*

So, by the *st.* 4 & 5 *Ann.* 16. after judgment by confession, *nil dicit*, *non sum inform.*, or writ of inquiry executed.

(C 68.) *When it shall not be averred.*] But the continuance of an estate of inheritance need not be averred, for it shall be intended, if the contrary does not appear; and therefore if a man claims under husband and wife, seised in fee in right of the wife, he need not aver the life of the wife. R. Pl. Com. 431. a.

So, if he pleads a conveyance by a tenant in fee. R. Lut. 357.

So, if he claims under a bishop, dean, &c. he need not aver the life of the bishop, dean, &c. Pl. Com. 431. a.

Tho' the lease by the bishop was not confirmed, and so determines by his death. *Per. Dy. Pl. Com.* 264. a.

So, if he claims by descent from tenant in fee, his estate shall be intended continuing till his death. R. Lut. 1172.

So, if he claims by a lease for years from husband and wife, who was tenant in tail, he need not aver the life of the wife; for she has the inheritance, and her husband is seised in her right. R. Pl. Com. 431. a. acc. Lut. 357. 1226. But it was R. That the verdict ought to find the life of the tenant in tail. Cro. El. 407.

So, if he claims by lease from husband and wife seised for their lives, and to the heirs of the husband. R. Cro. El. 112.

So, if a man makes title in assise to a rent-charge against the feoffee of tenant in tail, he need not aver the life of the tenant in tail; for the estate of the feoffee continues till the discontinuance is avoided. R. Cro. El. 226.

So, if he pleads that it was the freehold of A. who demised, &c. he need not aver the life of A. for he shall be intended to have the fee. R. Cro. El. 87.

So, if an estate be granted to A. and his heirs till B. attains such an age, he who claims under A. need not aver the life of B. for the estate of A. who has a base fee shall be intended to have continuance till the contrary appears. R. 1 Leo. 281.

If a lease be pleaded by A. tenant for life, and B. in reversion, there is no need to aver the life of A. R. 1 Leo. 177. Cro. El. 154.

So, if a man pleads an extent by *elegit*, he need not aver the continuance



tinuance of his estate ; for it shall be intended, where it does not appear by record that the extent may have been satisfied. *R. Hard. 80.*

If lessee for life assigns his estate to *A.* who leases at will ; in trespass by the lessee at will, he ought to aver the life of the lessee for life, but he need not aver the life of *A.* or the continuance of the will. *2 Leo. 95.*

So, where the continuance of the estate is not necessary to the action, it need not be averred : as, if a lease be for years, if *A.* so long live, and a covenant that he has power to lease, in covenant for a breach of it, the life of *A.* need not be averred ; for covenant lies tho' he be dead. *R. 9 Co. 60. b.*

(C 69.) *Averment of a request. When there shall be a special request.* So, the plaintiff in his declaration ought to aver a request.

And, if the action be for a collateral sum to be paid on request, the request is parcel of the agreement, and traversable, and ought to be specially alleged, with the time and place of the request. *Adm. Lut. 231. R. Cro. El. 85. R. Ow. 109. Cont. per two J. 1 Brownl. 10. R. acc. Jon. 56. 85. R. Sav. 72.*

Or, for a collateral matter to be done upon request. *Adm. Lut. 231.*

As in *assumpsit* to pay all sums expended for him. *R. Cro. El. 83, 4.*

To pay 6s. for every stone of wool delivered. *R. Cro. El. 91.*

To pay for victuals for him and his horse. *R. 2 Cro. 183.*

So, in covenant for not delivering timber for repairs, he ought to allege a special request. *1 Brownl. 23.*

And the want of a special request, when necessary, is not aided by verdict. *R. 3 Bul. 299.*

Nor, by pleading *non assumpsit* and a verdict thereon : for that is no waiver of the request. *R. Jon. 86.*

[Where it is agreed that *A.* should give *B.* a colt in exchange for *B.*'s mare, and should pay *B.* two guineas to boot, and that *A.* should keep the colt until the 29th day of September following ; in an action brought by *A.* he must allege a demand on *B.* for his mare, and stating that *B.* did not deliver, although often requested so to do, is insufficient, and may be taken advantage of on a general demurrer. *Bach v. Owen, B. R. M. 34 Geo. 3. 5 T. R. 409.*]

(C 70.) *When a general request is sufficient.* But in *assumpsit* for money lent, or a mere duty, *licet sapius requisit.* is sufficient. *R. Cro. El. 73, 4. Agr. 2 Cro. 183. Per Hought. 2 Cro. 523. R. Yel. 66. Hut. 2. per three J. Cro. Car. 35. Arg. 4 Leo. 2. R. Cro. El. 218. R. Win. 2.*

So, in *assumpsit* for a collateral sum, if it is not to be paid upon request. *R. Lut. 231. R. Ow. 109.*

So, in *assumpsit* to pay in consideration of marriage ; for it is in the nature of a debt. *R. Cro. El. 229.*

So, in *assumpsit* for repayment of money received for a horse. *R. 3 Lev. 364. Skin. 347.*

So, in *assumpsit* to pay, if he would procure a note from *B.* for it ; that he procured the note, *et requisivit solvere*, is sufficient. *R. 2 Vent. 74.*

[So, in case that if plaintiff made him a set of sails worth 15 l. defendant

defendant would pay so much for them *on request, sapius requisit.* is sufficient. *Wallis v. Scott, E. 4 G. Str. 88.*

So, in debt on a bill, &c. to be paid upon request, a general request is sufficient. *R. Cro. El. 548.*

And where a special request is necessary, if the plaintiff alleges a special request, but omits the day or time, and the defendant does not join issue on the request, but pleads *non assumpsit, &c.* it shall be aided. *R. Jon. 56.*

So, in annuity, obligation, &c. to pay upon request; no request is necessary. *R. Cro. El. 548. 721.*

So, if the request is executed, no averment is necessary: as, if *A.* promises to pay, &c. in consideration that *B.* at his request would be a knight. *R. 2 Lev. 198.*

(C 71.) *How request shall be made.*] And if a promise be by three, a special request to one is sufficient. *D. Noy, 135. Vide Condition, (L 11.)*

If an action be by an executor on a promise to pay to his testator on request, if he alleges a special request by the executor, and *licet requisit.* only by the testator, it is sufficient; for the action is founded upon a request by the executor. *R. Hard. 38.*

(C 72.) *How alleged.*] *Licet requisit.* is as well as *in facto requisit*; for *licet* is affirmative. *R. Yel. 121.*

And, if it be said that the plaintiff at such a day and place shewed the note, *et requisivit*, it is sufficient without saying *ad tunc et ibidem*; for the whole shall be intended to have been done at the same time. *R. 2 Vent. 75.*

So, if a special request be alleged in the first count, *similiter requisit.* is sufficient in the second count; for it refers to the first. *R. Cro. El. 240.*

(C 73.) *Averment of notice. When necessary.*] So, the plaintiff ought to aver notice given to the defendant, where the action does not lie without notice given: as, if the act, on which the plaintiff's demand arises, be secret, and lies only in the plaintiff's mouth: as, if a man promises, &c. to pay such a rate for wares as another paid him, the plaintiff ought to allege notice of the rate that another gave. *R. 2 Cro. 432. R. 1 Rol. 463. l. 25. Hob. 51. Hard. 42. Vide Condition, (L 8, 9.)*

To deliver so much corn, if the plaintiff approve of it, at the fair; the plaintiff ought to give notice if he approved of it. *R. Cro. El. 249, 250.*

To repay so much to *B.* if he disliked such lands. *R. cont. Cro. El. 834. 1 Rol. 464.*

To seal such an escrow as he or his counsel shall devise. *R. 1 Rol. 463. l. 5. 50.*

To account before auditors, whom the obligee shall assign. *R. 1 Rol. 462. l. 50.*

To pay plaintiff all his costs in such a suit. *Hard. 42.*

The damages which the plaintiff sustained by such a battery. *Hard. 42.*

[When rent is due to the landlord, notice of it must be given to



the plaintiff in execution, or to the officer, to maintain action against either of them respectively. *Palgrave v. Windham*, M. 6 G. Str. 212.]

(C 74.) *How it shall be alleged. How request shall be alleged.*— [When notice is necessary, it ought to appear that it was given in due time: as, if a man promises to pay as much as he disburses at such a fair, before the end of the fair, he ought to allege notice of his disbursements given before the end of the fair, otherwise it will be too late. R. 1 Rol. 469. l. 45. *Vide ante*, (C 72.)]

So, it ought to appear that it was given to a proper person: as, if a condition be to repair upon notice, notice ought to be alleged to him who had the entire interest, and not to an under-lessee. R. Yel. 37. 2 Cro. 9.

And to him in person. R. Yel. 37.

What payment shall be to the assignee of the whole estate, *vide Condition*, (G 2.)

So, where request shall be to the person, *vide Condition*, (L 11.)

But on a sale of *East India* stock, if demanded *ore tenus*, or by writing at the *East India* house, an averment, that he demanded *ore tenus*, and by writing at the *East India* house, is sufficient, without a personal demand; for the usage is such. R. *Skin*. 391.

(C 75.) *When not necessary.*] But if a man is bound, covenants, or assumes to pay money, to convey lands, &c. on the performance of an act by a stranger, notice need not be alleged; for it lies in the defendant's cognizance as well as the plaintiff's, and he ought to take notice at his peril: as, if he assumes to pay so much when *A.* marries. R. 1 Rol. 462. l. 10. *Vide Condition*, (L 9.)

When *A.* returns into the kingdom. R. 2 Cro. 462, 3. R. 1 Rol. 463. l. 6.

Or, performs such a journey. 1 Rol. 463. l. 13. R. 2 Cro. 137. 150.

So, if he assumes, &c. to pay so much as *A.* shall name, R. 2 Bul. 144. R. Cro. Car. 133. 1 Rol. 464. l. 5.

To pay if *A.* does not pay. R. 2 Cro. 684. R. 1 Rol. 462. l. 25. 463. l. 45.

To pay so much for every acre above 20, when *A.* measures them, R. 1 Rol. 462. l. 35.

To make such assurance as *A.* shall advise. D. 1 Leo. 105.

Or, as his counsel shall advise. *Per Gawdy*, 1 Rol. 464. l. 2.

To discharge upon all escapes. R. *Hob*. 14.

To stand to the award of such a one. *Hard*. 42.

To pay the arrears found on account. 8 Co. 92. b.

To be accountable for all money paid to *A.* by *B.* R. 1 Lev. 47.

So, if he assumes, &c. to pay, &c. on the performance of a certain act by the obligee himself, or on the performance of an act by him to any certain person; for he takes upon himself to take notice of it at his peril: as, if a man assumes, &c. to pay on the marriage of the obligee, &c. with *B.* R. 2 Cro. 102. R. 2 Cro. 228. Yel. 168. R. 2 Cro. 405. 1 Rol. 461. l. 50. R. Cro. Car. 34. *Hut*. 80. *Per Ch. J.* 1 Sid. 36. 1 Rol. 463. l. 29. R. 2 Bul. 254. R. 3 Bul. 326. R. *Peeph*. 164.

To

To pay, when the obligee, &c. delivers a horse to B. *Per Yel. 1 Rol. 461. l. 45.*

Or, returns to London. *Per Dod. 2 Bul. 145. R. 1 Rol. 462. l. 15. Cont. per Warb. Hob. 68. R. cont. 1 Bul. 44.*

Or, returns from Rome. *Dub. Ow. 108. R. Hut. 85.*

Or, delivers up the bond. *R. Sal. 457.*

To indemnify when he shall be surety for his father to A. D. 1 *Leo. 105. R. 2 Cro. 287.*

[If the condition of a bond be to indemnify the obligee, from alimony and debts incurred by his wife after their separation, the obligee being sued for a debt of his wife's need not, in an action on the bond, allege notice of the action commenced, but without such allegation, is entitled to the *costs* of the action as well as the debt.

1 *T. R. 374.*]

To pay, if he borrows of any certain person. *Per three J. 1 Bul. 12.*

To pay for every acre, when it shall be measured. *R. 2 Cro. 472. 391. 1 Rol. 462. l. 45.*

To pay a rate for what the plaintiff shall sell to B. *R. 2 Cro. 432. R. 1 Rol. 463. l. 36.*

To pay when B. attains his full age. *Hard. 42.*

To surrender to B. or his assigns on request, there need not be notice of the assignment. *R. Poph. 136. 1 Rol. 464. l. 10.*

To give him as much as will make him content. *R. 1 Leo. 123.*

To pay all money delivered by A. to B., there need not be notice of the sums delivered to B. *R. Hard. 42.*

So, if he assumes in consideration of such a certain act, it is sufficient to aver performance of the act, without alleging notice of the performance to the defendant: as, if it be in consideration that she discharged him of a promise of marriage, it is sufficient to say *quod exoneravit ipsum*, without alleging that he had notice; for it shall be intended that there was a full disengagement made to the defendant himself in person. *R. 1 Rol. 470. l. 5.*

[Debt for freight on a charter-party; if the goods are laid to be delivered to defendant himself, the plaintiff need not aver notice of the delivery. *Dodd v. Atkinson, M. 10 G. 2. B. R. H. 342.*]

So, in consideration that she come to his house and offer to marry him, it is sufficient to say, *quod venit et obtulit* to marry; for it shall be intended that the offer was to himself in person. *R. 1 Rol. 470. l. 20.*

So, in debt for a penalty at a leet for not removing an encroachment, it is not necessary to aver notice of the order of removal; for every one within the leet ought to take notice of it. *R. 1 Rol. 468. l. 20.*

Or, for the penalty of a bye-law concerning a common; for every commoner ought to take notice of it. *R. Cro. Car. 498.*

(C 762) *When a fact shall be averred. To ascertain the case to be within a statute.* So, the plaintiff, in his declaration, ought to aver every fact, without being informed of which, the court cannot judge whether the plaintiff has cause of action. *Vide Action upon Statute, (A 3.)*

As, in an action founded on a statute, the plaintiff ought to aver every fact necessary to inform the court that his case is within the statute:



statute: as, in *quare impedit* by the king on the *st.* 13. *El.* 12. for not reading the thirty-nine articles, it ought to be averred that it was a benefice with cure, *R.* 1 *And.* 62. *Lut.* 1089.

So, in *quare impedit* by the king founded on the *st.* 31 *El.* 6. for simony. *Scmb.* *Lut.* 1089.

So, in *quare impedit* by the university on the *st.* 3 *Jac.* 5. for the benefice of a recusant, the plaintiff must aver that the patron was a recusant convict. *R.* 10 *Co.* 58. *a.*

So, in an action on the *st.* 7 *Ed.* 6, 7. against buying wood, coal, &c. in *London*, *Westminster*, or suburbs, and selling again unless by retail, if the plaintiff alleges that the defendant bought at *Whitechapple*, &c. he ought to aver that *Whitechapple* is within the suburbs. *Litt.* 162.

If a man entitles himself by a lease, which by a proviso in a statute will be good, if the antient rent be reserved; he ought to shew that a rent was reserved, and aver it to be the antient rent. *R.* *Pl. Com.* 105. *b.*

If, on an action on the *st.* 14 *H.* 8. 5. for practising physic within seven miles of *London* without a licence, he alleges practice at *Westminster*, and does not say that it was within seven miles of *London*, it is bad. *R.* 4 *Mod.* 47.

If an indictment be for taking toll above the rate appointed by a statute, it must be averred that it was in a market town. 2 *Rol.* 248.

So, in all cases where any circumstances are required by the purview of an act to make it good, they ought to be averred: as, where the *st.* 1 *R.* 3. 1. makes a feoffment, &c. by *cestuy que use* of full age, *fane*, and at large, &c. good; he, who pleads a feoffment by *cestuy que use*, ought to aver that he was *fane*, of full age, and at large. *Pl. Com.* 376. *b.*

If a man pleads a licence by three justices of the peace at sessions to be a jobber, &c. he ought to aver that he is an householder, &c. which is requisite by the *st.* 5 *El.* 12. in him who takes such licence. *R.* *Sav.* 58.

[So, where the statute 25 *G.* 3. *c.* 51. *f.* 27. relative to persons licensed to let post-horses, requires that the account directed to be given in by them shall contain the number of horses and miles, and the names of the drivers, but inflicts no penalty for not inserting the amount of the duties received by the post-master; if the declaration in an action on that statute only charge that the defendant made false accounts by not inserting the amount of the duties received, without alleging them to be false in the particulars mentioned by the statute, judgment shall be arrested after verdict, 3 *T. R.* 636. *Vide supra*, (C 50.)]

So, if a plaintiff declares upon an agreement in writing, which refers to a case to be stated and signed by both parties, he ought to shew the case stated, and then aver that that and the case in the declaration are the same; for it is not sufficient to say that he agreed in such a manner, and that both bound themselves in *pignoratione predicta*. *R.* *Lut.* 489.

So, if a condition be, that a lessee shall not oust the tenants of a manor, who do their duty, it is not sufficient to say that he ousted *A.*, a tenant of the manor, who did his duty; but he ought to aver in fact that *A.* was a tenant and always did his duty. *R.* 1 *Leo.* 246.

If

If a promise be to save harmless for beasts delivered out of the pound, he ought to aver that he delivered them, and it is not sufficient to say that *A.* recovered against him *in parco fracto pro deliberatione.* *Skin.* 141.

So, the case ought to be averred agreeable to the statute: as, if the *st.* 28 *El.* be pleaded, which enacts, that a recusant shall be convicted, if he render not himself before the next sessions; if it be pleaded that he did not render himself *at* the next sessions, it will be bad. 3 *Lev.* 333.

So, in all cases where there is a variance of the description of a thing or person, there ought to be an averment that it is the same: as in an information for an intrusion into lands in *N. Dale*, if the defendant pleads a grant to him of lands in *S. Dale*, he ought to aver that they are the same. *Sav.* 48.

If the licence of alienation be for a rectory, and twenty acres of land, and the fine be of a messuage, and twenty acres of land in process for aliening without licence, it ought to be averred that the messuage is parcel of the rectory. *Sav.* 14.

[In an inferior court the declaration must allege that the money was *had and received* within the jurisdiction, as well as that the defendant *promised to pay* within it. 1 *T. R.* 151.]

[And where one count of a declaration in an inferior court is not laid within the jurisdiction of that court, and the damages are given generally, the objection is fatal on a writ of error, although there be another good count. *Ibid.*]

If in *assumpsit* for 50 *l.* for oaks sold, the defendant pleads a contract for oaks by indenture, he ought to aver that they are the same oaks. *Sav.* 17.

On a *quo warranto* for having a part within the metes and regard of a forest; if the defendant prescribes for a park *infra metas*, it is not sufficient without averring that it was *infra regard* of the forest also. *Bridg.* 25.

So, if the executor of *H. de B.* be sued, and he pleads a judgment against him as executor of *H. de C.* he ought to aver that *H. de C.* is the same person. *R. Sav.* 92.

If *A.* assumes to deliver to *B.* a parcel of gum, then upon the sea, to be imported, being of the same value as other gum before delivered; it must be alleged that it was the gum on the sea, &c. *R.* 2 *Cro.* 235.

So, if the thing be averred is repugnant in words, but not in truth, it ought to be explained before the averment made: as, if a grant be of land in *A.*, to an information for land in *B.*, it cannot be averred to be the same land, unless it be explained that *A.* is a vill in the parish of *B.*, or, is known by the name of *B.*, as well as *A.*, and then it may be averred to be the same land. *Sav.* 38.

(C 77.) *By what words an averment shall be.*] An averment need not be in express words, *et A. in facto dicit*; for *licet* is a sufficient word. *R.* 2 *Cro.* 383. *Pl. Com.* 125, 126. *R.* 3 *Lev.* 67. *Vide ante*, (C 67.)—*Post.* (2 V 2.)

Or, *pro eo quod.* *R.* 1 *Sand.* 117. *Semb.* 2 *Vent.* 278. *R.* 1 *Lev.* 194.



*Et quia, &c. Co. Ent. 122. b. 1 Lev. 194.*

*Quod vendidit warrantizando* is a sufficient averment that he warranted. *Sal. 686.*

Or, that he demanded *proferendo satisfactionem* is a sufficient averment of a tender. *R. Sal. 686.*

So, any words which imply such a matter to be so, are sufficient: as, if it be pleaded, that *A.* was seised, and that *obiit*, and the land descended to *B.*, as his son and heir, this is a sufficient averment that he died seised, tho' it be not said *sic inde seisit. obiit*; for otherwise it could not descend to *B.* as his heir. *R. Lut. 1172.*

[So, in an information for writing and publishing a libel "of and concerning the king's government, and the employment of his troops," (setting forth the libel *verbatim*;) the words "of and concerning" are a sufficient introduction of the matter contained in the libel, and a sufficient averment that it was written "of and concerning the king's government, and the employment of his troops." *Cowp. 672.*]

[So, a complaint having been made *ore tenus* by a solicitor, before the chancellor, in the court of chancery, of an arrest in returning home after the hearing of a cause, the indictment stating, that "at and upon the hearing of the said complaint" the defendant deposed, &c. is a sufficient averment that the complaint was heard. *1 T. R. 70.*]

So, *presentat. fuit*, that he did a trespass; tho' it be not expressly averred that he did it. *Semb. 2 Cro. 582.*

*Quod scribi et ingrossari fecit indenturam, per quam mentionat. quod demisit, &c. quam sigillavit et deliberavit ut fact. suum virtute cujus fuit possessionatus*; tho' it be not expressly said, *quod demisit*. *R. 2 Jon. 24.*

[*Indentura fact.* between lessor and lessee, whereby lessee *convenit & agreeavit* to pay the rent, is a sufficient averment of a sealing by him. *Atkinson v. Coatsworth, P. 8 G. Str. 512.*]

That by the custom of London, they hold pleas of debt, arising within the city, and that he levied a plaint according to the custom, is a sufficient averment, that the debt, for which the plaint was levied, arose within the city. *R. Vau. 92.*

That he paid a debt of his intestate, and took a term in satisfaction, imports that he paid it with his own money. *R. 1 Lev. 154.*

That by refusing a poll *perdidit officium*, imports that he had a majority, if the poll had been taken. *R. 2 Lev. 50.*

An avowry by a husband seised in right of his wife, for rent *aretro existen.*, is a sufficient averment of the life of the wife. *R. on a special demurrer. 2 Lev. 88. Vide ante, (C 67.)*

So, if a covenant be to make a surrender of a copyhold; and he says, *quod sursum reddidit* to two tenants according to the custom, it is sufficient, without shewing the custom. *R. 1 Mod. 61.*

If a matter be to be determined by the groom porter: an averment, that he adjudged *in casu predict.*, is sufficient. *R. Lut. 488.*

In debt against an executor for 10*l.*, which *injuste detinet*; it is a sufficient averment that the testator did not pay. *1 Vent. 136.*

So, in debt against *A.* on articles, that he or *B.* would pay, for 10*l.* which *A.* *injuste detinet*; if *B.* sealed, it is a sufficient averment that *B.* did not pay. *R. 1 Vent. 136.*

So,

So, *quod A. seifitus de manerio unde predict. messuagium fuit parcell. a tempore cuius, &c.* levied a fine is an averment, that it was parcel at the time of the fine. 1 *Leo.* 75.

That A. demised to B. who entred, and being possessed *revertione eidem A. spectan., &c.* is a sufficient averment, that A. has the reversion. R. 1 *Sal.* 13.

If a custom be alleged for tenants to erect stalls in a market, it is a sufficient averment, that the market is within the manor. R. 3 *Lev.* 190.

If breach be, that the defendant did not cover with lead, according to the rules prescribed by the statute for the re-building of London; it is an averment, that the statute does require it. R. 2 *Lev.* 85.

That he entred, without saying, *by night or by day*, is sufficient if he says he entred lawfully. 2 *Mod. Ca.* 320.

[On an agreement to ride *absque flagello vel baculo vel aliis armis; absque flagello et baculo, vel aliis armis*, it is good. *Burgefs v. Bracher*, P. 10 G. 2 *Ld. Raym.* 1366. *Str.* 594.]

(C 78.) When an averment is not necessary.

(C 78.) *Of matter apparent to the court.*] But a matter apparent to the court need not be averred: as, if a man shews that his tenant aliened in fee to a dean and chapter, and that he as lord entred within a year, he need not aver, that such alienation is *mortmain*. *Pl. Com.* 81. a.

So, an action on the *ft.* 32 *H.* 8. 9. of maintenance, it need not be averred, that the thing bought was a pretended right, &c. *Semb.* *Pl. Com.* 81.

[In case, for falsely and maliciously suing out commission of bankrupt against plaintiff, it is not necessary to aver that plaintiff never committed an act of bankruptcy. *Chapman v. Pickersgill*, M. 3 G. 3. 2 *Willf.* 145.]

(C 79.) *An averment of that which appears otherwise to the court, does not avail.*] And if a man avers contrary to that which appears to the court, it is of no avail, but shall be rejected: as, if a man avers that land is appurtenant to a messuage, which cannot be by law. R. *Pl. Com.* 170. b.

If an obligation be in 200 l. penalty, for the payment of 104 l.; plea, *that the plaintiff released the said obligation by the name of an obligation of 200 l. for the payment of 100 l. and that no other obligation was given*, is not good; for an obligation for the payment of 100 l. cannot be an obligation for the payment of 104 l., and the averment that he released the said obligation cannot avail. R. *Al.* 71.

If the king by patent grants lands in A. and B., and to an information for an intrusion into lands in C. and D., this grant is pleaded with an averment, that they are the same lands, it is bad; for it is impossible that land in one vill should be the same with land in another vill. R. *Sav.* 38.

[Where two judgments refer to the same day, the priority of one cannot be averred. 1 *T. R.* 117.]

(C 80.) *Matter ex abundanti.*] Nor, matter surmised *ex abundanti*:



as, if the plaintiff alleges a condition subsequent to his estate, he need not aver performance; for the allegation was, *ex abundanti*. *Pl. Com.* 30. a.

(C 81.) *Matter which comes properly from the other side.*] Nor, matter in defeazance of the action; for this will come more properly from the other side: as, in debt, on the *st.* 23 H. 6. 14. against bailiffs, for not returning him a burghers, there need not be an averment that there is no mayor, tho' the statute says, that the sheriff shall send his precept to the mayor, and if there be no mayor, to the bailiffs; for if there be a mayor, it shall be shewn by the defendants. *R. Hob.* 78.

[So, where there was a covenant in a charter party, "that no claim should be admitted, or allowance made for short tonnage, unless such short tonnage were found and made to appear on the ship's arrival, on a survey to be taken by four shipwrights to be indifferently chosen by both parties," in an action for short tonnage, it is not necessary for the plaintiff to aver that a survey was made, and short tonnage made to appear; if such survey was not taken, that is matter of defence to be taken advantage of by the defendant. *1 Term Rep.* 645.]

In trespass *quare canem*, viz. a bloodhound, *cepit*, it need not be averred that the plaintiff can expend 40 s. *per ann.* *12 H.* 8. 3.

If a breach of covenant be assigned in pulling down a house, it need not be averred that this was not a house allowed to be pulled down. *R. 1 Leo.* 18.

If the defendant in trespass justifies entry by process on a *homine replegiando*, to do execution, he need not say, that the man to be replevied was not taken by the command of the chief justice, &c. *Semb. Lut.* 1433, 4.

In false imprisonment, it is sufficient to say, that he took him by force of a *capias*, without saying how it was returned. *Pl. Com.* 16. b.

If a man pleads a fine, it is not necessary to shew, that the person barred by *nonclaim* was *sane*, of full age, &c. for this shall come from the other side, not being put in the purview of the act, but as an exception. *Pl. Com.* 376. a.

So, if he pleads, *that such an one, being seised, made his will*, he need not say, that he was of full age, &c. *Pl. Com.* 376.

Or, *that tenant in tail demised*, he need not say, that he was of full age, tho' this is requisite to his making a lease by the *st.* 32 H. 8. 28. *1 Leo.* 76.

(C 82.) *Inducement.*] Nor, matter, which is only inducement: as, in an action upon the case for an escape upon a *capias utlagatum*, in the recital of the outlawry in the declaration, it need not be averred by *prout patet per recordum*. *Lut.* 111. *R. 5 Mod.* 9, 10. and now is aided by the *st.* 4 & 5 Ann. 16.

Yet some precedents do it. *Lut.* 111.

So, in escape after a commitment in execution on a judgment, it will be good without such averment. *R. on general demurrer. Sal.* 565.

(C 83.) *An immaterial thing.*] So, a description, not material, need not be averred: as, if a man makes title by prescription to a portion of tithes, and that the tithes came to the king, who granted them by the name of all tithes, part of the *demefnes* of the archbishop, &c. and in the tenure of B., it need not be averred, that they were part of the *demefnes*, or in the tenure of B., for the tithes are otherwise described and ascertained, and whether it be true or false, the grant will be good. *R. Dy. 87. b.*

(C 84.) Conclusion of a Declaration.

A declaration generally ought to conclude *ad damnum* of the plaintiff.

But in an action by a prior and his bretheren, *ad damnum ipsius prior.*, is sufficient. *Th. Dig. l. 10. c. 25.*

Or, *ad damnum ipsorum.* *Th. Dig. l. 10. c. 25.*

So, in an action by husband and wife for battery, &c. of the wife, *ad damnum ipsorum*, is good. *Th. Dig. l. 10. c. 25. Vide post. (2 A 1.)*

Yet, in trespass, *quod clausum fregit et bona B. ibidem cepit ad damnum ipsorum*, is bad. *R. 2 Mod. Ca. 370.*

[If an action for penalties brought by the farmer of the tax, on 27 G. 3 c. 26. (by which the duties on post-horses leviabie under 25 G. 3. c. 51. were transferred from the king to the farmers of the tax,) the offence may be laid to have been committed with intent to defraud the farmer and not the king. 3 T. R. 632.]

If, in the conclusion of a declaration, the plaintiff claims more or less than his due, it is bad, generally: as, in debt on a bond for forty pounds, if the declaration concludes his demand for forty marks, it is bad, if he does not shew how the residue is discharged. *Per Cur. 48 Ed. 3. 3. a. Vide post. (2 W. 7.)*

So, in debt for rent for one year and a half on a lease, rendering 74*l.* per ann. if he concludes his demand for 100*l.* it is bad, without saying how the residue is satisfied. *Semb. 2 Lev. 4. R. Cro. Car. 137.*

So, if the plaintiff avows for 10*s.* per ann. on a lease, rendring 5*l.* per ann. it is bad, without saying how the residue is discharged. 20 Ed. 4. 2. a. *R. Cro. Car. 104. R. Hut. 96.*

So, in debt for 6*l.* 14*s.* 2*d.* if the plaintiff declares on several contracts, that one for 3*l.* 10*s.* 6*d.* the other for 3*l.* 3*s.* 5*d.* and has a verdict and judgment for the whole, it is error; for the judgment is for 3*d.* more than is due. *R. Mo. 298. Gout. Cro. El. 22. R. Yel. 5.*

So, if the plaintiff has judgment for more damages than are alleged in his declaration, it is error. *R. 1 Bul. 49.*

But, if it may be rejected as surplusage, it is good: as, in debt for 10*l.* if the plaintiff declares on a contract for 10*l.* for a horse, and for 5*l.* for a cow, and the defendant pleads to the 10*l.* *nil debet*, and a verdict and judgment be thereupon, it is good; for one contract answers to the plaint, and the other shall be rejected as surplusage. *R. Yel. 5.*

So, if it be only a miscasting, it will not hurt: as, in an action on the *st.* 2 Ed. 6. 13. for not setting out his tithes, if the plaintiff shews that the tithes were of the value of so much per acre in toto attingen. ad 11*l.* per quod actio accrevit ad habend., for the treble value 33*l.* where it is miscast for 11*l.* 2*s.* and the treble value 33*l.* 6*s.* it is good;



good; for the demand is not for a sum certain, but ought to be given by the jury. *R. 2 Cro. 499.*

So, in *assumpsit* for 200 weight of prunes at 19s. *per cent. in toto attingen. ad 180 l.* where it should be more, and the jury gives 100 *l.* damages, such miscasting does not hurt. *R. cont. by all in C. B. and Exch. 2 Cro. 247. R. acc. Hob. 89. R. 2 Cro. 569.*

So, in *assumpsit*, where there are several counts for several sums *que attingunt ad 52 l.* which is more than the total of the sums, this miscasting does not prejudice, if the jury give less in damages than the total. *R. Latch, 175. P. Popb. 209. R. 2 Lev. 58.*

So, in covenant, *assumpsit*, &c. if the plaintiff demands more or less than is due, it does not prejudice. *Semb. 2 Lev. 57. Vide post. (2 V 2.)*

So, in debt for 100 *l.* if the plaintiff declares on particular sums due which exceed 100 *l.* and the defendant does not demur, but there is a verdict for the plaintiff; if he releases all above 100 *l.* he shall have judgment for 100 *l.* *R. 5 Mod. 214.*

So, if the declaration be, *ad damnum 40 l.* where the writ was only 20 *l.* if the verdict finds less damages than the writ, it is good. *R. 2 Cro. 629.*

So, if it finds greater damages, and the plaintiff *remittit damna*; for he shall not have more damages than are in the writ. *R. 2 Cro. 128.*

(C 85.) When a Declaration shall be aided.

(C 85) *By the bar.*] Sometimes a defect in a count or declaration shall be aided by the defendant's bar: as, if the plaintiff, in *assumpsit* to perform an award, does not shew special performance on his part, and the defendant does not demur, but pleads, *no such award*, he waives the other matter, and cannot afterwards take advantage of this defect in the declaration. *R. Cro. Car. 385. R. Lut. 253. Vide post. (E 37.)*

So, if in an action for an escape by an administrator *durante min. atate* of an executor, it is not averred that the executor is within the age of seventeen years, if the defendant pleads a removal by *habeas corpus*, which is the same escape, he shall not take exception to the want of averment; for he admits that the plaintiff has authority to sue. *R. Lut. 632.*

So, in debt for rent, if the plaintiff does not shew any place where the lease was made, if the defendant by his plea admits the lease, the declaration is aided. *R. Hob. 82. R. 2 Cro. 682. R. 2 Rol. 66. 2 Cro. 125.*

So, in covenant, if the defendant pleads *non est factum*, this aids a breach badly assigned; for the defendant admits the breach, if it was his deed. *R. 2 Cro. 370.*

So, in an action for rent, without saying how much is due, or on what contract, if the defendant pleads *payment*, he cannot afterwards except to the uncertainty of the declaration. *R. 2 Cro. 668.*

So, in debt on a bond, if the defendant demands *oyer*, and pleads *payment*. *R. Cro. Car. 209.*

So, in an action for words for saying, *you are foresworn*, without saying in what court, if the defendant justifies, for that he took a false oath at the sessions. *R. Cro. Car. 288.*

So, in debt for an escape on a commitment in execution, without saying

saying *prout patet per record.*, if the defendant pleads a licence from the plaintiff; for he admits the commitment. *R. 3 Lev. 393.*

So, in trespass, *quare pullos cepit*, without an *Anglice*, if the defendant justifies, he aids the uncertainty. *R. Lut. 1492.*

[In trespass *quare 100 cataractas, vocat*, wears, *aut fensur. prostravit*, if defendant justifies in the words of the declaration; the plea taking notice that wear and fence are the same thing, makes the declaration good. *Luke v. Helmer, T. 12 G. Fort. 377.*]

In *assumpsit*, to pay when he receives money, without alleging the time when, or from whom, it will be aided by the plea of *non assumpsit*. *R. 1 Mod. 169.*

In an action for disturbing him in his way, without shewing the vill or county, where the close to which, &c. lies, if the defendant pleads *not guilty*, it is good; for then the obstruction only is material. *R. Noy, 9.*

In debt for rent, where the plaintiff does not shew where the lease was made, if the defendant pleads *nil debet*. *R. 2 Cro. 125.*

So, if the count wants time, place, or other circumstances, it may be aided by the bar. *R. 8 Co. 120. b. Vide supra.*

As, if the count wants the time or place of the adjudication upon which it is founded, when it is confessed by the bar. *R. Lut. 487.*

If a bond be alleged in a count, and it is not said where it was made, and the defendant pleads *per duress apud B.*, for he admits the bond was made. *Dy. 15. a.*

[In *quare impedit*, if declaration does not aver next turn to be plaintiff's, yet it is helped by defendant's pleading over. *Bishop of London v. Mercers' company, H. 5 G. 2. Str. 925.*]

[And it is a general rule that, when the defendant has pleaded over, he cannot afterwards object to want of form in the declaration. *3 Wils. 297.*]

But, if the count be defective in substance, the bar cannot make it good. *D. 8 Co. 120. b.*

As, in an action for words, *thy father*, &c. without saying the plaintiff was present, or that the speaking was to him; tho' the defendant justifies, and thereby acknowledges the words, this does not aid the declaration. *R. Cro. El. 416.*

So, if an avowry, which is in the nature of a count, shews a grant of a rent for life out of an estate for years; tho' the plaintiff in his bar shews that the grant was also out of a freehold, it does not aid the avowry. *R. 7 Co. 25. a.*

So, if the defendant pleads, as to all, except a particular part, *not guilty*, and as to that part justifies, matter confessed by the justification does not aid a defect in the other plea; for they are *quasi distinct* pleas. *R. 2 Cro. 87.*

(C 86.) *By the writ.*] So, a defect in a declaration may be aided by the plaintiff's writ; for in *C. B.* the writ is part of the count; and therefore in trespass, *vi et armis*, be omitted in the count, but mentioned in the recital of the writ, it is sufficient. *R. Lut. 1509. Vide ante, (C 12.)*

[In battery, there was *quod cum* in the declaration. *Per curiam, (dissent. Fortescue)*—This is aided by the writ; which is, *quare* he did the trespass. *Rogers v. Gibbs, P. 3 G. 2. Fort. 376. Vide 2 Wils. 203. acc.*]

[In



[In trespass, declaration for taking dung and soil (without saying of plaintiff,) is aided by recital of the writ, in which it appears it was plaintiff's dung and soil; tho' there is no original (if after verdict). *Franklyn v. Reeve*, M. 9 G. 2. Str. 1013. *Dubitante Hardwicke* C. J. for the writ contains no averment, but is interrogatory. *Et per Lee* C. J.—It has not been determined in B. R. that in trespass of declaration *quod cum* is aided by the writ. *Goodright v. Hodgson*, M. 12 G. 2. Andr. 282.]

[*Quare cum* in trespass helped by the recital of the original after verdict. *Barnes*, 249.]

(C 87.) *By verdict.* So, if the declaration omits that which was necessary to be proved, otherwise the plaintiff could not recover, this shall be aided by a verdict for the plaintiff: as, in *assumpsit*, reciting that the defendant had sold to him all the furzes growing upon such land, to be taken before such a day, the defendant, in consideration, &c. promised that the plaintiff should not be disturbed in carrying them away: he does not say that he was disturbed *before such day*; yet this is aided by the verdict. *R. Cro. Car.* 497. [3 T. R. 147.] *Vide post.* (E 38.)

So, in debt for rent by the grantee of a reversion, if attornment be not alleged, yet it is aided after verdict; for if it was not proved, plaintiff would have been *non suit*. *R. Ray.* 487. 2 Jon. 232.

So, the want of a place, where a lease was made, is aided by verdict. *R. 2 Rol.* 66. where the issue was upon a collateral point, by which the lease is admitted. *Vide ante*, (C 85.)

So, in an action upon the case against a sheriff, if the plaintiff alleges that the sheriff *potuit arrestare* A. against whom a writ was delivered to him, tho' he does not say that he was in his presence, &c. it shall be aided by verdict. *R. 2 Jon.* 40.

[In case against officer for removing goods taken in execution before the landlord is paid a year's rent, want of alleging notice of rent due shall be aided by the verdict. *Palgrave v. Windham*, M. 6 G. Str. 212.]

So, an allegation of a right to elect for 200 years and more, is sufficient after verdict, tho' it is not said, *from time whereof*, &c. *R. 2 Jon.* 145.

If the plaintiff declares on an *assumpsit*, against an executor, to pay 50s. when he receives money, and avers that he received money, without saying that he received 50s. it will be good after a verdict for the plaintiff. *R. 1 Mod.* 169.

In an action upon the case for not bringing goods sold to the common beam, it shall be aided after verdict, tho' he does not say that the goods were sold by weight. *R. per tres J.* 3 Mod. 162. *Carth.* 7.

In *assumpsit*, in consideration that he assigned goods taken in execution, to the defendant, to pay the plaintiff, *de et ex bonis predict.*, all his interest and costs, tho' he does not aver, that the defendant has raised the money *de et ex bonis*, it shall be aided after a verdict for the plaintiff. *R. Sho.* 308.

In *rescous* of goods, without saying what goods, it shall be aided by a verdict, which finds two horses. *Ow.* 123.

In *assumpsit* by an indorser against the drawer, if the declaration alleges

alleges that *B.* paid the money on the part of the plaintiff, without saying to whom, after a verdict for the plaintiff, it shall be intended that the payment was to an indorsee, and not to a stranger. *R. Carth. 130.*

So, if an ejectment be for land in *A.*, but by deed it appears that the land lies in *A. B.*, if the verdict finds a demise of *tenementa predicta*, this aids the declaration. *R. Yel. 101.*

In waste upon a lease by husband and wife, not saying by deed, if it is necessary to be by deed, it shall be aided, if the verdict finds a lease by them by deed. *Sal. 111.*

So, in debt for rent for three years on a demise for a year *et sic de anno in annum*, without saying that he continued in possession for three years, for, after a verdict, it must be intended. *R. 1 Sid. 423.*

So, in *assumpsit* by an executor, if the plaintiff does not aver, *no payment to the testator*, &c. it shall be aided. *R. 1 Vent. 119. R. Hard. 221.*

Or, on an *assumpsit* by *A.* and *B.*, where the action is brought against *A.*, the survivor, if the plaintiff does not aver, that *B.* did not pay. *Per Hale, Hard. 221.*

So, in *trover* against husband and wife, alleging a conversion *ad usum ipsorum*, if the verdict finds the wife not gilty, this aids the declaration. *R. Mar. pl. 134.*

So, in an action for words by both. *R. 1 Rol. 781. l. 50.*

So, in *assumpsit* to pay the costs in such a suit, if the plaintiff does not shew how much costs, it is aided after verdict. *R. Cro. El. 276.*

So, in covenant by an executor for rent in the *detinet*, if he does not shew whether due before or since the death of the testator, it shall be aided after verdict; for being in the *detinet*, it shall be intended before his death. *R. 1 Sid. 376.*

In *assumpsit* to pay, if the plaintiff drains land *ita quod*, it be dry *aliquo tempore* between such feasts, if the plaintiff alleges that it was dry *aliquo tempore*, whereas it should be *toto tempore*, it shall be aided after verdict for the plaintiff. *Semb. 2 Rol. 246. l. 30.*

So, in assault and battery by the husband and wife for a battery of both, it will be aided, if the verdict finds the defendant guilty only of a battery of the wife. *R. 2 Mod. 66. 2 Lev. 101. Vide Action (G).*

So, in trespass by them for a battery of the wife and taking the goods of the husband, if the defendant be found not guilty as to the goods. *Dub. 1 Lev. 3. Per two J. but two J. cont. Pal. 339.*

In *assumpsit* for money received by the defendant for the plaintiff to the use of the defendant, after verdict it will be good; for the words, *to the use of the defendant*, being repugnant, and insensible, shall be rejected. *R. 1 Sal. 24.*

So, false *Latin* will be aided by verdict. *2 Mod. Ca. 380.*

So, if the declaration shews a title imperfectly, it may be aided by verdict: as, if the plaintiff says that he is *tenens custum, qui tenet tenementa*, &c. *parcell. manerii per cop. rotuler.*, without saying *ad voluntatem domini*; it shall be intended after verdict that he was a copyholder. *R. 1 Sal. 365.*

[A title defectively set forth is good after verdict, but not a defective title. *Bolton v. Carlisle, C. P. M. 34 Geo. 3. 2 H. Bl. 261.*]



[In an action on the *stat.* 34 Geo. 3. c. 23. for pirating a pattern for printing callico, the omission of an averment in the declaration "that the day of first publishing the pattern was printed at each end of the piece of callico," (which together with the name of the proprietor is required by that statute, the monopoly being limited for three months from the day of first publishing the pattern,) was holden to be aided by verdict; it being stated in the declaration that the defendant pirated the pattern *within the term of three months from the day of the first publishing thereof, and while the plaintiffs were entitled to have the sole right of printing the same, &c.* *Macmurdo v. Smith, B. R. H. 38 Geo. 3. 7 T. R. 518.*]

[If the crown in *quare impedit* does not allege presentation, it is cured by verdict. *Rex v. Bishop of Landaff, H. 8 G. 2. Str. 1006.*]

[So, in an action of debt in a manor-court of an amerciamment, if the declaration does not shew that defendant was resiant at the time of the amerciamment set, it is aided by verdict. *Wicker v. Norris, P. 8 G. 2. B. R. H. 116.*]

[If defendant makes defence on a writ of inquiry, he cannot afterwards take advantage of mistake in the declaration. *Freeland v. Hunt, P. 8 G. 3. 2 Wilf. 380.*]

[Although declaration begins *whereas*, and nothing is averred, and would be bad on special demurrer, yet the conclusion, *by reason whereof*, is an averment, and after verdict the defect is aided. *Barnes, 452.*]

[In action on 9 Ann. c. 14. if the parish where the offence is committed is not specified, it is cured by verdict that defendant owes to the poor of the parish of *A.* *Frederick v. Lookup, H. 7 G. 3. 4 B. M. 2018.*]

But, if the verdict falsifies the declaration, the plaintiff shall not have judgment: as, in conspiracy if he finds all, but one, *not guilty.* 1 Sand. 230.

So, if the declaration does not contain a cause of action, it shall not be aided: as, in *assumpsit*, if the promise alleged does not appear to be made upon good consideration, it shall not be aided by verdict. *R. 1 Sal. 364.*

[In *assumpsit*, a consideration shall not be presumed after a verdict, if it appears on the face of the declaration to be illegal. *Stotesbury v. Smith, H. 33 G. 2. 2 B. M. 924.*]

When a defect in a declaration shall be amended, *vide Amendment, (L 1, 2.)*

How it shall be amended, *vide ante, (C 6.)*

## (D) Impar lance.

(D 1.) What it is.

**I**mpar lance is, when the court gives leave to a party to answer at another time, without the assent of the other party.

Impar lance is general or special.

Special impar lance is, where the party imparls, *salvis sibi omnimod. advantag.*

[An impar lance so special as to save all exceptions to the jurisdiction of the court cannot be entred without the leave of the court. 2 B. 1094.]

General,

General, is where the party imparls generally without exception.

And in *C. B.* it shall be at the return day.

In *B. R.* at a day certain, viz. the day of appearance after the return.

The defendant may pray an imparlance to plead to the declaration.

So, the plaintiff to reply.

So, to rejoin, sur-rejoin, &c.

Imparlance may be to another time in the same term.

Or, to the next term.

But it cannot be omitting a term; as, from *Hilary* to *Trinity* term.

*R. 2 Rol. 442.*

[In *B. R.* on a declaration of *Hilary*, there may be an imparlance to *Trinity* term; for it is the course of that court to give imparlance on declaration till the day of pleading. *Fletcher v. Richardson, M. 10 G. 2. B. R. H. 322.*]

In personal actions, if the defendant does not appear at the day given by the imparlance, there shall be final judgment against him; for no process lies to bring him into court. *Mod. Ca. 5.*

Tho' the imparlance be prayed upon a plea in abatement. *Ibid.*

Tho' it be prayed by the plaintiff. *Ibid.*

Tho' the imparlance be to another term, or to another day in the same term. *Mod. Ca. 8.*

[Time to plead is the same as an imparlance. *Barnes, 345.*]

#### (D 2.) When it shall be given.

In all real actions the defendant shall have an imparlance of course. *C. Att. 294.*

So, in all actions in *B. R.* where the defendant is taken on a *latitat*; for the cause of action does not appear by the writ. *Vide C. Att. 38.*

So, if he appears on a special original, or summons, as a member of parliament. *2 Mod. Ca. 228.*

So, in *C. B.* if the defendant be taken on a *clausum fregit*, and the plaintiff declares thereon specially, the defendant may plead in the same term, or have an imparlance. (*Vide C. Att. 294.*)

So, in ejectment and personal actions in *C. B.*, or by original in *B. R.* in *London* or *Middlesex*, if the defendant appears *Craf. Ascens.*, or the last return of any other term, he shall have an imparlance of course. (*Vide C. Att. 295. 347.*)

So, where the action lies in any other county, if the defendant appears *Craf. Mart.* or *Mens. Pasche*, or afterwards, or after the first return in any other term. (*Vide C. Att. 295. 347.*)

[It shall be granted, tho' writ returnable on first return, if declaration was not delivered with notice to plead. *Barnes, 225.*]

So, if the defendant appears the first term, but does not give a rule to declare, he shall be compelled the second term to accept of a declaration with an imparlance. *C. Att. 294. 346.*

So, since the *st. 4 & 5 W. & M. 21.* on a declaration delivered to the defendant in custody before *Mens. Pas.* or *Craf. Animar.*, in actions not brought in *London*, *Middlesex*, or within forty miles' distance, if the defendant enters his appearance within ten days after



*Easter* or *Mich.* term, he shall have an imparlance till the next term. (*Vide Rules and Orders B. R.* 58. 85. *Mills*, 114.)

So, where the action is in any county, if the declaration be delivered upon or after *Mens. Pas.* or *Craf. Animar.*, or at any time in *Hilary* or *Trinity* term, and the defendant enters his appearance two days before the effoin-day of the next term. (*Vide Rules and Orders B. R.* 58. 85. *Mills*, 115.)

So, if the plaintiff declares, and does not demand a plea within three terms, the defendant shall have an imparlance of course. 2 *Rol.* 46.

[If notice of declaration is served on *Sunday*, imparlance shall be granted. *Barnes*, 309.]

[If defendant is lunatic, there be imparlance. *Barnes*, 225.]

[In action for words, defendant shall have imparlance, on affidavit of plaintiff's being under prosecution for the offence. *Barnes*, 224.]

[On an amendment, defendant shall have an imparlance or costs, at his election. *Lechill v. Reynell*, T. 6 G. Str. 950.]

[If plaintiff has a rule to file bill to warrant proceedings, he may enter imparlance on roll; but if not entred in time, he pays costs. *Barnes*, 227.]

#### (D 3.) When not.

But, if the appearance in actions by original in *London* or *Middlesex* be before the last return of the term, or in any other county before *Craf. Mart.* or *Mens. Pas.*, or upon the first return of *Trinity* or *Hilary* term, the defendant shall not have an imparlance without consent or special rule; but upon a rule given he ought to plead the same term, or within fourteen days after the term. (*Vide C. Att.* 294, 295.)

[So, in *B. R.*, if a declaration in *London* or *Middlesex* be delivered before *Mens. Pas.* or *Craf. Animar.*, the defendant shall plead the same term without imparlance. By rule in *B. R.* 5 *Ann.* (*Vide Rules and Orders B. R.* 72, 73.)]

If a declaration be against an attorney, or officer of the court, he shall plead without an imparlance, if there are four days within the term after the bill is filed. *Sal.* 517.

[On process returnable the first, second or third return of any term, if declaration is delivered within four days before the end of the term, defendant shall plead without imparlance. *General Rule, C. B. T.* 8 G. 3. 2 *Wilf.* 381.]

[On all process sued out of this court, returnable the last return of any term, if the plaintiff declares in *London* or *Middlesex*, and the defendant lives within 20 miles of *London*, the defendant shall plead within four days after such declaration filed or delivered, with notice to plead accordingly, without any imparlance, provided such declaration be filed or delivered on the day of such return, or on the day next after the same, unless such return day shall happen on a *Saturday*, in which case the plaintiff shall have the whole of the *Monday* following to file or deliver such declaration as aforesaid. And in case the plaintiff declares in any other county, or the defendant lives above 20 miles from *London*, the defendant shall plead within eight days after the declaration filed or delivered, with notice to plead accordingly, without any

any imparlance, provided such declaration be filed or delivered as aforesaid. *Reg. Gen. C. P. H. 35 Geo. 3. 2 H. Bl. 383.*

So, he shall plead in the same manner, when the appearance upon process is voluntary, as if he was arrested upon process. *Sal. 518.*

So, if he in reversion be received on the default of tenant for life, he shall not have an imparlance; for the plaintiff is delayed by the receipt. *Mo. 34.*

So, in an action by or against an attorney of the court, the defendant shall not have an imparlance. *Pr. R. 180.*

Nor, where the defendant comes in upon an outlawry, and the plaintiff declares against him. *Pr. Reg. 180.*

So, for cause, the court may force the defendant to plead the same term without an imparlance: as, in an action against an executor, who would confess the actions of others to defeat the plaintiff. *R.*

*1 Bul. 122.*

So, in assize, no imparlance shall be given without special cause.

*1 Sal. 83.*

The defendant shall not be allowed an imparlance, or a motion to amend his plea, or change the venue, before his appearance is entred with the proper filazer. *By Rule Pas. 24 Car. 2.*

[After appearance by attorney and special imparlance, a plea to the jurisdiction of the court cannot be pleaded. *2 Bl. Rep. 1094.*]

[But after a special imparlance, misnomer may be pleaded in abatement. *1 Bl. 51.*]

[If *habeas corpus* removes a cause from sheriff's court to *B. R. Nov. 6.* and declaration is delivered *Nov. 12.* and rule to plead given, the court will not grant imparlance. *Wood v. Wenman, M. 20 G. 2. 1 Wilf. 154.*]

[If on the return of a writ in a personal action the defendant cast an *essoign* which is not adjourned to a particular day, and it is not quashed, and the plaintiff deliver his declaration on the first day of the following term, the defendant is not entitled to an imparlance. *Rooke v. Leicester, B. R. T. 27 Geo. 3. 2 T. R. 16.*]

[In *trover* for goods, where the defence is that they were sold by the plaintiff, the court will give the defendant time to plead, in order that he may have time to obtain a discovery in the court of *Chancery*. *Whitter v. Cazalet, B. R. M. 29 Geo. 3. 2 T. R. 683.*]

[If a writ be returnable the last day of one term, and the defendant does not justify bail until the fourth day of the next, he is not entitled to an imparlance to the third term, tho' the plaintiff do not deliver a declaration *de bene esse* before the *essoign* day of the second term. *Rolleston v. Scott, B. R. M. 34 Geo. 3. 5 T. R. 372.*]

[The plea of *solvit ad diem* cannot be entred in the general issue book; and if a defendant, who is entitled to an imparlance, enter it there, it operates as a waiver of the imparlance. *Lockhart v. Mackreth, B. R. T. 34 Geo. 3. 5 T. R. 661.*]

[When the defendant removes the cause by *habeas corpus* from an inferior court, and the plaintiff does not declare until the next term, the defendant is not entitled to an imparlance. *Ray v. Bissell, B. R. T. 5 Geo. 3. Smith v. James, B. R. T. 36 Geo. 3. 6 T. R. 752.*]

[Not in real actions. *Barnes, 2.*]

[Not after a peremptory rule to plead. *Barnes, 225.*]

B b 3

[Nor,



[Nor, if notice to plead has been served, tho' not indorsed on the declaration. *Barnes*, 226, 227.]

When plea may be after imparlance or not, *vide Abatement*, (I 19, 20.)

### (E) Plea.

**A** Plea shall be in abatement, or in bar.

As to pleas in abatement, *vide Abatement per tot.*

As to pleas to a bill in equity, *vide Chancery*, (I 1.)

#### (E 1.) Must Answer the whole Declaration.

A plea in bar must be conformable to the count. *Co. Lit.* 303. *a. Vide post.* (F 4.)—(Q 3.)—(W 2.)

And therefore, if the plea does not answer to every part of the declaration, it is a discontinuance for the whole: as, in trespass for cutting down 300 trees, if the defendant pleads, *quoad* all but the entry and cutting down 20 trees, *not guilty*, and *quoad* the entry justifies, but says nothing to the cutting down of the 20 trees; this is a discontinuance for the whole. *R. 4 Co.* 62. *a.*

So, in trover for 300 sheep, if the defendant justifies *quoad* 296, but says nothing as to the remaining four, it is a discontinuance for the whole. *R. Cro. El.* 434. *Vide 2 Mod.* 259.

So, in trespass with horses and sheep, if he justifies only with horses. *R. Mar. pl.* 47. *R. 2 Cro.* 27.

So, in covenant to provide 200 men and pay so much for every one, if the plaintiff assigns a breach in both points, and the defendant pleads only as to the providing of men, and says nothing to the non-payment. *R. 1 Lev.* 16.

So, in debt on a bond to perform an award, if the defendant pleads performance only of part, it is bad. *R. 3 Lev.* 24. *Vide in Arbitrament*, (I 4.)

In account as bailiff of his house and goods, if he pleads only as to the goods. *R. 2 Leo.* 195.

In trespass for breaking his close and destroying his hop-poles, if the defendant pleads *his freehold*, and he took the hops, *damage feasant*, it is bad; for this does not answer to the destruction of the poles. *R. 2 Mod. Ca.* 330.

So, in trespass for a battery and wounding, if the defendant justifies the putting of him into the stocks, and says nothing more, it is bad; for that matter does not go to the wounding. *R. Cro. El.* 268.

So, in trespass for an assault and battery, if the defendant, as to the *vi et armis*, pleads *not guilty*, and *quoad residu. transgressionis* justifies by the taking his hat off his head in a church, it is bad; for this does not go to the battery. *Semb. but Cur. cont.* 1 *Sand.* 14. *R. 2 Vent.* 193.

So, in trespass for an assault and imprisonment, if to all, *præter* the assault and imprisonment, the defendant pleads *not guilty*, and *quoad* the imprisonment justifies, without saying any thing to the assault, it will be bad, tho' there cannot be an imprisonment without an assault. *R. 1 Rol.* 176, 7.

In trespass for entering a close and taking timber, if the defendant makes

makes a title to the close without answering to the timber. *R. 1 Rol. 406.*

In trespass for driving away his cow, if the defendant justifies the taking of plaintiff's heifer; for they are different. *R. Lut. 1355.*

So, in trespass with a *continuando a 1 die M. ad. 25 Jul.* if the defendant justifies except *a 1 die M. ad. 20 Jul.* *R. 2 Cro. 27.*

So, the defendant ought to allege the matter of his plea in the same place that the declaration mentions if the justification is not local. *Vide Action, (N 12.)*

[If the plea begins; And *the said A. B.*, who is sued by the name of *C. D.* it is bad; for *A. B.* is not named in the declaration: it should also say by whom he is sued. *Jackson v. Ford, P. 31 G. 3. 3 Wils. 413.*]

But if he answers in sense, tho' not in words, it is sufficient: as, if a bond be to perform all covenants, agreements, articles, &c. and the defendant pleads that he has performed all covenants and agreements, it is good; tho' he omits (*articles*); for (*agreements*) is *tantum*. *R. Cro. El. 255.*

So, in trespass for an imprisonment till he paid so much, if the defendant justifies the imprisonment, it is sufficient, without answering to the taking so much, which is only aggravation. *R. 1 Sal. 408. Ray. 469.*

[So, in trespass for breaking and entring the plaintiff's house, and expelling him therefrom, the breaking and entring are the gist of the action, and the *expulsion* is merely aggravation; and therefore a justification as to the breaking and entring will cover the whole declaration. *3 T. R. 292.*]

Or, for an assault, battery and menacing, if he justifies the assault without answering to the menaces, which is aggravation. *R. Mo. 705.*

So, in trespass for an assault, battery and imprisonment, if he justifies the trespass and imprisonment, it is sufficient. *R. 1 Lev. 31.*

Or, pleads *quoad* the residue of the trespass and imprisonment; for *trespass* goes to the whole. *R. 3 Lev. 404.*

So, in trespass *quare clausum fregit et januas rupit et clausum intravit*, if he pleads to all but the breaking *not guilty*, and then justifies his entry by process, &c. it is sufficient, for the entry is a breaking in law. *Semb. Lut. 1433. R. Latch, 188.*

So, in trespass *quare clausum fregit* and so many cart loads of timber *cepit*, if he makes title to the close, and shews the timber to be trees growing, it is sufficient. *R. 1 Rol. 406.*

But by the *st. 32 H. 8. 30.* after verdict a discontinuance shall be amended. *R. 2 Rol. 161. R. 4 Mod. 246.*

And so it was by consent. *4 Co. 62. a. Vide Amendment (I).*

Yet it shall not be amended, or aided, on a general demurrer. *Semb. Tel. 65. 1 Sand. 338, 9.*

If the plea begins by answering only to part, the plaintiff ought to take judgment by *nil dicit*, to avoid a discontinuance. *1 Sal. 179, 180.*

If it begins as an answer to the whole, but answers only to part, it will be bad on demurrer.

[On a writ in debt for 1066*l.* plaintiff declared for 1000*l.* borrowed by defendant of plaintiff, and in a second count for 66*l.* for interest]



interest of money lent by plaintiff to defendant. Defendant pleaded in abatement of the writ, that "the said sum of money in the said writ mentioned, and thereby supposed to be borrowed from plaintiff," was borrowed by defendant and others, and not by defendant separately. On special demurrer, because this plea answered only one of the causes of action, (that mentioned in the first count,) the court held the plea bad. *Herries v. Jamieson*, B. R. E. 34 Geo. 3. 5 T. R. 553.]

(E 2.) And must not be double.

So, if a plea contains duplicity, and alleges several distinct matters (which require several answers) to the same thing, it is bad. *Co. Lit.* 303. a. 304. a. *Hob.* 295. *Vide ante*, (C 33.)—*Post.* (F 16.)

As, if an avowant alleges seisin of services in his grandfather, and also in himself, it is double; for either is traversable, and one had been sufficient. *Pl. Com.* 140. a.

So, if a man alleges two continual claims, one by his ancestor, and the other by himself. *Ibid.*

Or, two descents in fee. *Ibid.*

So, if a man pleads a patent, as a grant and also as a confirmation, it is double. *R. on demurrer.* 1 *Sid.* 176.

So, in debt for rent, if the defendant pleads that it was a navigable river, and that the plaintiff had no right to demise the toll of it, it is double. *R. by three J. Vent. cont.* for one is a consequent of the other. 2 *Vent.* 68.

*Nil debet* to part, and *nil habet in tenementis* to other part; for *nil debet* admits the demise. *R. 4 Mod.* 254. *R. 1 Sal.* 218.

So, if the defendant pleads matter in law, and also matter in fact: as, if he says that *S.* lies within the *Cinque Ports*, where *breve domini regis non currit*, and does not lie in *com. Cant.* *R. Yel.* 13.

If he pleads several outlawries in disability of the plaintiff; for one is sufficient. *R. Carth.* 9.

So, if he pleads *not guilty* to part, and justifies for the same part. *R. 1 Rol.* 49.

So, if he pleads several matters together, tho' one be in bar and the other in abatement. *D. 1 Sid.* 176.

And a double plea is bad, tho' one matter or the other be not well pleaded: as, in trespass, if the defendant pleads *molliter manus imposuit* and a release, it is double, tho' the release is not well pleaded. *R. 1 Sid.* 176.

Tho' but one of the several matters pleaded be material. *Per Dod. Poph.* 186.

But it is not double, where one matter alleged is a consequence of the other: as, if the defendant pleads *plene administravit* and so nothing in his hands. *Pl. Com.* 140. a.

Or, is pleaded only as inducement to the other. *Per Holt, H. 10 W.* 3. *Poph.* 186.

As, in *detinue* by a woman, if the defendant pleads that she took husband who released; for he cannot plead the release of the husband without shewing that the plaintiff married him. *R. Mo.* 25. *Dal.* 30.

In debt on a bond to deliver hops which the plaintiff was to chuse, if the defendant pleads that he was ready, but the plaintiff did not chuse, it is not double. *Semb. Mar. pl.* 113.

[And

[And tho' a plea contain many parts, yet if it form one connected proposition, it is not double. 2 Bl. 1022. 1028.]

So, it is not double, if one answer is sufficient for the several matters: as, if the defendant alleges two descents in tail; for the gift is the substance, and *ne dona pas* is an answer to the whole. Pl. Com. 140. a.

In trespass for an assault, battery and imprisonment till he paid 7*l.* fine, if the defendant pleads *not guilty* for all but the assault and imprisonment, and then justifies by process for 7*l.*, it is not double; for the taking of the 7*l.* is not within the *not guilty*. R. Jon. 367.

So, it is not double where a matter is added only for the maintenance of the count or bar: as in *quare impedit*, if the ordinary pleads, that he presented on a lapse, and the plaintiff replies, that he presented before a lapse, and the ordinary refused, and afterwards presented his clerk on pretence of a lapse; for that matter that the ordinary presented on pretence of a lapse, is alleged only to maintain the disturbance mentioned in the count. Hob. 198.

So, it is not double, if one matter cannot be well pleaded without the other, and he relies upon one: as, if two statutes are pleaded for the repeal of a former law, if the one has reference to the other. Semb. 1 Rol. 88, 89.

So, if a man pleads a feoffment with warranty, and relies only on the warranty. Per Berkley, Mar. pl. 84.

If the defendant pleads several matters, and concludes *et sic non est factum*. Kit. 223. b. 224. a.

If the defendant pleads, that the principal rendred himself and died, and relies on the death. R. Jon. 139.

If he pleads, *nient alien artificer*, and relies upon his being born within the king's ligeance. R. 1 Sid. 357.

In *detinue*, if the defendant pleads that the plaintiff married after bailment, and the husband released to him. R. Mo. 25.

But the defendant may plead one matter to part, and another matter in bar to other part. Co. Lit. 304. a.

As, in dower, the tenant may plead joint-tenancy to part, and detinue of charters to the residue, tho' this goes to the whole. Kit. 223. b.

In assize, a fine as to a moiety, and a release of the father with warranty as to the other moiety. Ibid.

In trespass for an assault, battery, and wounding, the defendant may plead *not guilty* to the wounding, and justify the assault and battery. Marl. pl. 106.

So, in trespass for breaking his house, &c. the defendant may plead as to all the trespasss, *prater* three posts, *not guilty*, and as to the breaking the three posts the defendant may justify; for tho' he pleads *not guilty* to all the trespasss in the house, yet it is with an exception of the three posts. R. Cro. El. 87.

And one tenant or defendant may plead a matter which goes in bar to the whole, and the other tenant or defendant may plead another matter in bar to the whole. Co. Lit. 303. a.

So, if a plea is double, and the plaintiff by his replication answers only to one matter and takes issue upon it, which is found, this aids the duplicity of the plea. Kit. 238. a. Vide when a bar is aided by the replication, *post*. (E 37.)

And a double plea shall be aided upon a general demurrer. R. 1 Sand.



1 *Sand.* 337. *R.* 2 *Rol.* 336. *Semb.* 1 *Rol.* 112. *Vide* when an unnecessary traverse, which makes the plea double, shall be aided on a general demurrer, *post.* (G 22.)

And therefore there was a special demurrer to it. *Cro. Car.* 61. 2 *Vent.* 68. *Mar. pl.* 113.

So, if an assignment of errors be double, there ought to be a special demurrer; for a general demurrer is not sufficient. *R.* 1 *Lev.* 76.

And by the *st.* 4 & 5 *Ann.* 16. the tenant or defendant in any action, or plaintiff in replevin, in any court of record may, with leave of the court, plead as many several matters as he shall think fit. But if any such matter shall be judged insufficient, costs shall be given at the discretion of the court. So, if on an issue in any such matter verdict be for the plaintiff or demandant, costs shall be given, unless the judge certifies he had a probable cause to plead it.

[Leave to plead several matters must be given in court, not at judge's chambers. *Barnes*, 357.]

[Defendant may plead three pleas. *Verney v. Fox*, T. 5 G. 2. *Fort.* 337.]

[If defendant plead double, it must be at one and the same time. *Hall v. Tullie*, P. 8 G. *Fort.* 336.]

[Defendant may have leave to add a plea after two terms since pleas pleaded; for there is no time limited. *Waters v. Bovell*, T. 21 & 22 G. 2. 1 *Wils.* 223.]

[On motion to plead double, the court will not take into consideration whether it be a good plea or not. *B. R. H.* 126.]

[The court will, on circumstances, give leave to withdraw a plea, and plead another, (as on a bond to withdraw *non est factum*,) and plead the statute of gaming on payment of costs, taking short notice of trial, and giving judgment of the same term, if verdict for plaintiff. *Jefferys v. Walter*, M. 21 G. 2. 1 *Wils.* 177. *Nichols v. Sutcliffe*, T. 7 G. 2. *B. R. H.* 56.]

[So, on false imprisonment, defendant having pleaded general issue, may plead a justification, and the general issue, on terms. *Taylor v. Joddrell*, M. 23 G. 2. 1 *Wils.* 254.]

[And if in parliament, on waiving privilege. *Wilkes v. Wood*, *Wilkes v. Webb*, M. 4 G. 3. 2 *Wils.* 204.]

[The court will, on circumstances, give leave, after general issue pleaded, to plead a special plea, which brings it on upon the merits; but not a plea that excludes the merits, as the statute of limitations. *Cox v. Rolt*, M. 5 G. 3. 2 *Wils.* 253.]

[Defendant may move to plead double, after rule to plead is out, and before judgment. *Barnes*, 329.]

[After rule to plead is out, defendant cannot have leave to plead performance on a bond, and also *such* administration not granted to plaintiff; for that cannot be pleaded without craving *oyer*, which cannot be craved after the rule to plead is out. *Garrard v. Early*, T. 9 G. 3. 2 *Wils.* 413.]

[Defendant may plead double, after order to plead issuable plea. *Barnes*, 338.]

[If defendant pleads the general issue, plaintiff demurs and defendant joins, the court may give leave to withdraw his plea, and plead double. *Meard v. Philips*, T. 5 G. 2. *Str.* 906.]

[Defend-

[Defendant in *qui tam* cannot plead double. *Morgan v. Lookup*, T. 9 G. 2. Str. 1044. B. R. H. 262. *Law v. Crowther*, P. 28 G. 2. 2 Wilf. 21.]

[So, action on 9 Ann. for money won at play, is not within 4 Ann.; so two pleas cannot be pleaded. *Barnes*, 365.]

[If defendant pleads several pleas, without saying *by leave of the court*, it is only irregularity, but is good on special demurrer; and any duplicity of plea must be pointed out by the demurrer. *Ryley v. Parkhurst*, T. 21 & 22 G. 2. 1 Wilf. 219.]

[Defendant must shew that all the pleas pleaded were by leave of the court; therefore, if in trespass he pleads *not guilty*, and then, "by leave," &c. according to the statute, justifies, and concludes with averment, and then as to the second count justifies again; it does not appear that this second justification was by leave of the court, and it will be bad on demurrer. *Bartholomew v. Ireland*, H. 11 G. 2. Andr. 108.]

[Rule *nisi* to plead double shall be discharged, if defendant has not appeared. *Barnes*, 331.]

[*Non assumpsit* and *ne unq. exec.* allowed without affidavit. *Haggard v. Collington*, T. 2 G. 2. Fort. 336.]

[*Non assumpsit* and a recovery and execution executed, as to part of the debt, allowed. *Levat v. Resbere*, M. 4 G. Fort. 337.]

[In *indeb. assumpsit*, *non assumpsit* and *plene administravit* allowed, on affidavit. *Ld. Bristol*, M. 1724, Bunb. 182.]

[*Non assumpsit*, and *non assumpsit infra sex annos*, allowed. *Harrison v. Winchcombe*, H. 12 G. *Folkes v. Smith*, in C. B. M. 12 G. *Bristow v. Woodward*; *Toepfen v. Elking*, M. 13 G. Str. 678. allowed on solemn debate; because hereby defendant secures to himself a trial on the merits at all events. *Da Costa v. Carteret*, H. 4 G. 2. Str. 889.]

[*Non assumpsit* and discharge by bankruptcy, allowed. *Philips v. Wood*, M. 8 G. 2. Str. 1000.]

[To *assumpsit*, testator made no such promise, cause of action not within six years, executor made no promise, and *plene administravit*. *Hughes v. Pigot*, P. 9 G. 2. B. R. H. 243.]

[In trespass for cutting down plaintiff's tree, that he cut it down for repairs, and that it interrupted his water-course, allowed. *Clare v. Frost*, P. 7 G. Str. 425.]

[On debt on bond against an administrator, *solvit ad diem* and *plene administravit* allowed, on affidavit of the *plene administravit*. *Jones v. Lord Strafford*, M. 1724, Bunb. 181.]

[To debt on bond, executor may plead payment of principal and interest, according to *st. 4 & 5 Ann.* and *plene administravit*. *Anon.* M. 9 G. 2. B. R. H. 178.]

[*Non est factum*, and discharge by commission of bankrupt, allowed. *Atkinson v. Atkinson*, T. 4 G. 2. Str. 871.]

[Bankrupt allowed to plead his bankruptcy generally and specially. *Ld. Clinton v. Morton*, M. 8 G. 2. Str. 1000.]

[In debt on bond, to marry plaintiff if requested, allowed to plead *non est factum*, and never requested. *Dunn v. Vacher*, T. 5 G. 2. Str. 908.]

[On an information of debt on bond to the crown, *non est factum*, and conditions performed, allowed. *Att. Gen. v. Snaw*, H. 1721, Bunb. 96.]

[In



[In replevin, *non caput*, property in another, and *liberum tenementum*, allowed. *Barnes*, 364.]

[In *quare impedit*, that he was seised in fee of advowson, and that he had the next turn, allowed. *Winchester v. Cook*, P. 3 G. 2. *Fort.* 337.]

[Where the king is plaintiff in *quare impedit*, the defendant cannot plead double. *Rex v. Hayes*, C. P. H. 18 Geo. 2. *Willes*, 533.]

[To a *scire facias* on an old judgment, terre-tenant may plead payment of the money recovered, and that defendant in that judgment was not seised. *Ellis v. Mortimer*, T. 8 G. 2. *B. R. H.* 153.]

[Not guilty, and *liberum tenementum*—in replevin, that plaintiff has no property, and justification—damage-feasant, and under demise from defendant to plaintiff—distress for damage-feasant, and rent in arrear—*solvit ad diem*, and mutual debt—*non assumpsit*, and discharge under debtor's act—*non est factum*, and such discharge—*non assumpsit*, and *non assumpsit infra*, &c.—*plene administravit*, and set off—*non assumpsit*, and *plene administravit*—not guilty, and general release—not guilty, and money paid plaintiff in satisfaction of all trespasses to such a time—*ne unques executor*, and *plene administravit*—not guilty, and *molliter manus imposuit*, *son assault demesne*—*non est factum*, and *ne unques executor*—not guilty, *son assault demesne*, and satisfaction for all trespasses—not guilty, and justification—*non est factum*, and duress—*non assumpsit*, set off and tender—tender to first count, *non assumpsit* to the residue—*non assumpsit* by testator, general *plene administravit*, and special *plene administravit*—in trespass, assault, and battery, not guilty and licence—may be pleaded jointly. *Barnes*, 272. 275. 279. 286. 329. 336. 338. 339. 340. 343. 347. 348. 349. 352. 355. 356. 359. 360. 362. 363. 364. 365. 366.]

[*Non assumpsit*, and statute of usury, refused. *Barnard v. —*, H. 8 G. *Fort.* 336.]

[Bankruptcy and *non assumpsit*, refused. *Newman v. Chandler*, *Fort.* 336.]

[*Non assumpsit*, and *non assumpsit infra sex ann.* refused *per Cur.* *Fort. cont.* *Whelpdale v. Atkinson*, *Fort.* 337. *Vide supra contra.*]

[*Non assumpsit* and a general release, refused. *Glover v. Heathcot*, *Fort.* 337. *Barnes*, 328.]

[*Non assumpsit*, and a tender, not allowed. *Baker v. Westbrooke*, P. 6 G. 2. *Str.* 949. *Vide 2 Bl.* 723.]

[A defendant cannot plead *non assumpsit* as to the whole, and a tender as to part. *Maclellan v. Howard*, B. R. H. 31 Geo. 3. 4 T. R. 194.]

[Neither can *non est factum*, and a tender as to part, be pleaded to an action on a bond. *Jenkins v. Edwards*, B. R. H. 33 Geo. 3. 5 T. R. 98.]

[The statute of *Anne* gave a discretion to the court either to permit or to refuse several matters to be pleaded; which discretion they should exercise in refusing such matters to be pleaded as would introduce an incongruity upon the record. *Ibid.*]

[To *assumpsit* on a bill of exchange, the court will not allow a defendant to plead the general issue; and that the bill was given on a stock-jobbing transaction, contrary to *stat.* 7 Geo. 2. c. 8. *Shaw v. Everett*, C. P. H. 38 Geo. 3. 1 *Bos. & Pull. Rep.* 222.]

[In trespass, not guilty, and a justification for a way, not allowed. *Fisher's Case*, *Fort.* 335.] [In

[In trespass, tender of amends, and justification that plaintiff's fences were out of repair, not allowed. *Antony v. Williams*, T. 4 G. Fort. 336.]

[But not guilty and tender of amends have been allowed. 2 Bl. 1003.]

[If defendant in trespass pleads in justification two titles, one by lease for lives and one life living 12th July, and yet as to 12th July another title and seisin in fee; it is repugnant and naught. *Taylor v. Woollen*, P. 2 G. 2. Fort. 380.]

[In assault and battery, *non est factum* and a justification cannot be pleaded. *Palmer v. Wadbrooke*, M. 4 G. 2. Str. 876.]

[To debt on bond, *non est factum* and coverture in plaintiff not allowed; for one is in bar, the other in abatement. *Holt v. Mabblerley*, T. 8 G. 2. B. R. H. 135.]

[*Liberum tenementum*, and justification or not guilty—not guilty, and accord and satisfaction—*non assumpsit*, and several set offs—*nil debet*, and *nil habuit in tenementis*—not guilty and justification, in trespass—*non assumpsit*, and *non assumpsit infra*, &c. after money paid into court—[*non assumpsit* and alienage of the plaintiff]—not guilty, and a release of particular trespass—not guilty, and tender—in trover, not guilty, and that plaintiff became bankrupt—*non assumpsit*, and infancy—*non est factum*, and *solvit post diem*—*non assumpsit* and *solvit ad diem*—cannot be pleaded jointly. Nor *non assumpsit*, and *plene administravit*—*solvit ad diem*, and *riens per descent*—not guilty, and a licence—without affidavit. *Barnes*, 329. 332, 333. 338, 339. 350, 351. 359, 360. 363. 2 Bl. 905. 993. 1326.]

But this statute does not extend to plead double matter, which shall have different trials: as, in dower, to plead *ne unques accouple* and a mortgage; for the first matter shall be tried by the bishop, and the other by a jury, and the judge cannot certify if there was a probable cause. *R. inter Harding and Harding*, C. B. M. 9 Ann. (Com. 148.)

[In dower, leave to plead *ne unques seise*, and *ne unques accouple* denied. 2 Bl. 1157. 1207.]

[*Non assumpsit*, and *non assumpsit infra sex ann.* pleaded, to the second replication, an original, rejoinder, *nul tiel record*, judgment for plaintiff, and plaintiff executes writ of inquiry; afterwards the first issue of *non assumpsit* tried, and plaintiff nonsuited, and thereupon, on motion, the writ of inquiry discharged; for if one issue be for defendant, plaintiff cannot recover. *Prior v. Ilay*, M. 8 G. 2. Fort. 338.]

(E 3.) Must not be Argumentative.

So, a plea ought to be direct and positive, and not by way of rehearsal, or argumentative. *Co. L. 303. c. Mar.* 207.

As, in trover for an indenture, whereby A. granted a manor, rendering rent, it is no plea that A. did not grant the manor; for it is no answer to the declaration, except by argument. *R. Tel.* 223, 4.

In ejectment on a lease for 10 years, it is no plea, that by custom there cannot be a lease for more than six years. *R. Dy.* 357. b.

In *formedon* for a manor, if the tenant says that A. being seised levied a fine, &c. it is not sufficient to reply, that *tempore finis* and at all



all times afterwards *B.* was seised, &c. for this is an answer only by argument. *Sav.* 85, 86.

So, if a man pleads a grant by the king, he ought to plead directly, that the king *concessit*, and not by a *testat. existit quod concessit*. 1 *Sand.* 274.

Otherwise in covenant. *Vide post.* (2 V 2.)

If the defendant avows and says that *A.* was possessed, *et sic possessionat. per indenturam testat. existit* that he assigned, it is not good. *R.* 2 *Sand.* 319. 2 *Lev.* 12.

So, if the defendant pleads a lease, &c. by a *testat. existit*, it is bad. *Cro. El.* 195. 2 *Cro.* 537.

But an argumentative plea shall be aided by verdict, or on a general demurrer. *Al.* 48.

(E 4.) Nor vary from the Place in the Declaration without Necessity.

So, a plea in excuse or justification ought to allege the fact in the place mentioned in the declaration, if the nature of the justification does not otherwise require: and therefore in trespass at *A.*, if the defendant justifies by an execution at *B.* in the same county, it is bad; for no place in the same county is material upon process to the sheriff. *R.* 3 *Lev.* 113.

In debt at *London* on a bond to pay, if a ship did not miscarry, plea that it did miscarry at *Falmouth* in *Cornwall*, is bad; for the place is not material. *R.* 1 *Lev.* 149.

So, a plea that he made the bond in another county being within age, is bad. *Dal.* 18.

(E 5.) Must be certain.

So, a plea ought to be certain. And therefore, if the defendant pleads that he has expended 810*l.* for repairs *et alia onera necessaria*, it is bad for the uncertainty; for he ought to shew for what charges he has expended them, by which the court may judge whether they were necessary or not. *R.* 1 *Sand.* 49. *Vide* certainty in the declaration, *ante*, (C 17, 18, 19, 20, 21, 22.)

So, in debt upon a bond to make an assurance of land, if the defendant pleads, that he executed a release, it is bad, if he does not shew that it concerns the same land. 2 *Co.* 4. *a.*

If the defendant pleads, that he paid *tot denar. summas quant.* the plaintiff *meruit*, without saying what sum he paid, it is bad. *R.* *Mar. pl.* 120.

So, if a man be bound to give all the money in his pocket, if he says that he gave all, it is bad; for he ought to shew what sum he gave. *Latch.* 16.

So, if he be bound to convey all his land, and he pleads, that he has conveyed all. *Ibid.*

So, if a man be bound to pay all charges to *A.*'s attorney, expended in such a suit, if he pleads that he paid *omnes misas et custagias* in that suit, it is bad; for he ought to shew that the charge was so much, which he has paid. *R.* *Lut.* 421, 422.

If the defendant pleads, that *A.* has paid all debts to the plaintiff, he ought to shew what debts, &c. *R.* 3 *Leo.* 3. *Mo.* 12.

If he pleads that he made an estate by the advice of *B.*, it is bad, if he does not shew what estate. *Hob.* 295.

If

If he pleads that he levied part of the money, without saying how, it is bad. *R. 3 Leo. 223.*

If he justifies a taking for a contempt *tam verbis quam factis*, without shewing what the words or facts were. *R. 2 Leo. 34.*

If he pleads payment to an assignee of a bill of exchange, he ought to shew a custom to assign. *Semb. 3 Mod. 226. ; but afterwards it was R. cent. Sho. 128.*

If he pleads an excuse of his performance, he ought to shew all done by him that he could do. *R. Sho. 335.*

If he pleads the taking of a ship as a prize, he ought to shew a cause of forfeiture. *R. Carth. 32.*

If a condition be to deliver at such a day, it is not sufficient to say that he delivered *secundum formam conditionis*, without shewing what and at what time in certain. *Semb. 1 Lev. 145.*

If it be to enjoy an office according to letters patent, he ought to shew the effect of the patent, and that the plaintiff enjoyed accordingly. *Hob. 295.*

If the defendant pleads a feoffment to a use, it is not good, if he does not shew a seisin at the time of the feoffment. *Kit. 228. b.*

So, if he pleads a lease and release, and does not shew possession at the time of the release. *7 H. 7. 3.*

If he pleads an entry by the command of *cestuy que use*, and does not shew that he was seised to the use. *Kit. 228. b.*

If he pleads a re-entry for non-payment of rent, and does not allege a certain demand. *R. Al. 19. R. Hob. 331.*

If he pleads a descent to him as heir, without saying how he is heir. *1 Lev. 190.*

If the defendant, in trespass *quare clausum fregit*, pleads, that it was his freehold, he must say, at the time of the trespass, otherwise it will be bad. *Pol. 132.*

So, if he pleads that the rent was more than the value, in debt for rent against him as executor, without saying at what time it was so, it is bad. *Pol. 132.*

If in trespass, he pleads that three justices did not, &c. he must say, *nec eorum aliquis*. *2 Mod. 284.*

If he pleads *pro eo quod non monstravit*, &c. it is bad; for the matter in bar must be alleged certainly. *R. Cro. El. 242. Semb. 1 Sand. 117. Dy. 254. b.*

Or, he pleads *quia obstruxit*; for he ought to say precisely *quod obstruxit*. *Cro. El. 441.*

In a plea to part, the part to which it is pleaded ought to be ascertained. *Vide post. (E 27.—F 4.)*

In a plea, the certain place and time of every thing material and traversable ought to be alleged. *Vide ante, (C 19, 20.)*

How it shall be alleged, *vide ante, (C 19.)*

(E 6.) And shall be most strong against the Defendant.

And shall be taken most strongly against the defendant. *Co. Lit. 303. b. Pl. Com. 29. a.*

And therefore, in trespass, if the defendant pleads a release, without saying at what time it was made, it shall be intended to be made before the trespass; for this is most strong against the defendant. *Pl. Com. 46. a.*

So,



So, in waste, if the lessee pleads that it was for mines, without saying when the mines were opened, it shall be intended that they were opened after the lease; for that is the most strong against the defendant. *Per Hob. 234.*

If the defendant pleads, that *A.* seised of a manor *unde locus in quo*, &c. was parcel, demised his manor except *B.* &c. it shall be intended that the *locus in quo*, &c. was parcel of *B.* if the contrary does not appear. *R. Pl. Com. 104. a.*

So, if to a bond the defendant pleads *payment*, it shall be intended after the day, if he does not say otherwise. *Pl. Com. 104. a.*

In *dum fuit infra atat.*, if the tenant pleads a release by the demandant, without saying when, it shall be intended within age. *Pl. Com. 104. a.*

If a man pleads *quod A. capt. et arrestat. fuit in Lond.*, without saying by what authority, it shall be taken to be an arrest by wrong. *Dy. 120. a.*

But it shall not be intended against the defendant, where such intendment is not consistent with another part of the plea; as, a lease by a bishop shall not be intended to be by one then alive, where the plea afterwards says *per A. nuper episcopum.* *R. 10 Co. 59. b.*

(E 7.) But Certainty to a Common Intent is sufficient.

But certainty to a common intent is sufficient. *Co. Lit. 303. a. Vide ante, (C 24.)*

And therefore, in assize, if the tenant plead that his father was seised and died seised, and he entred a son and heir, it is good; tho' it may be that the father of the demandant abated after his ancestor died and before his entry: but it shall not be intended; for when he says, that his father died seised and he entred, the common intendment is, that he entred immediately. *Pl. Com. 26. 28. 33.*

So, if a plea be, that the defendant surrendered and released a copyhold in full court, and the plaintiff accepted it, tho' it is not said that the surrender was to the plaintiff's use, it is sufficient; for it shall be intended. *R. Cro. Car. 6.*

So, a plea to debt on a bond for the enjoyment of land, which *post confessionem usque diem billæ* the plaintiff enjoyed, is good, tho' it is not said *semper post*; for it shall be intended. *R. Cro. Car. 195.*

So, in trespass, if the defendant justifies as servant, without saying by his command, it is good; for it shall be intended.

If the defendant says that the master of a college and his fellows were seised in fee, it shall be intended, in right of the college. *Pl. Com. 102. Vide post. (2 B 1.)*

If several writs are mentioned to sheriffs of several counties, and one was an extent, and it is said *quod prædict. sheriff returned*, &c. it shall be intended the same sheriff to whom the writ was directed. *Pl. Com. 65. b.*

[In pleading the taking of a term under a *feri facias*, it is sufficient to state that the party was possessed "of a certain interest in the residue of a certain term of years;" for the sheriff, who has not the title-deeds, cannot exactly define what the precise interest is. *Taylor v. Cole, B. R. E. 29 Geo. 3. 3 T. R. 292.*]

(E 8.)

(E 8.) So, less Certainty where the Matter may be ascertained by Evidence.

So, where no certainty at present is known, it is sufficient to shew the certainty in evidence, and allege generally in the pleading: as, if a man assumes to give a bond with sufficient sureties to save harmless in such a suit; it is sufficient to say that he gave a bond with sufficient sureties, without saying in what penalty, &c.; for, till the suit is determined, it is not known how much is sufficient, and it shall be shewn in evidence. *R. 1 Lev. 297.*

[But, a corrupt agreement for the forbearance of money, 'till one or the other of two days, must be pleaded according to the fact in the alternative; and if it be stated as an absolute forbearance 'till one of those days, the evidence will not support the plea. 3 *T. R. 531.*]

(E 9.) And necessary Circumstances shall be intended.

And necessary circumstances shall be intended: as, if a man pleads a feoffment, livery need not be alleged; for it shall be intended. *Co. Lit. 303. b.*

So, attornment of tenants shall be intended, if a feoffment of a manor be pleaded. *Co. Lit. 310. b.*

So, if the defendant pleads an assignment of dower, it shall be intended to be by *metes* and bounds. *D. Cro. Car. 162.*

If he pleads a request by an inferior judge to a superior to assume the jurisdiction of a cause out of the inferior ecclesiastical court; it shall be intended that the request was under seal. *R. Cro. Car. 162.*

So, if he pleads that the sheriff made a warrant, he need not say *sub sigillo*. *R. Cro. El. 53. Pal. 357.*

If he pleads himself to be heir to *A.*, he need not say that *A.* is dead. *Dal. 67.*

Or, that *A.* had no son, &c. *Dal. 67.*

So, where the plea refers to a thing which shews the certainty, it need not be particularly alleged: as, in debt on a bond, if the defendant pleads a recovery and execution against another obligor, he need not say by what process or in what county; for this appears by the record. *R. Dal. 33.*

So, where the certainty of the lands appears, there is no need to say *per nomen* how they are described by the deed; which will not make a bad plea good, tho' sometimes it makes a plea bad. *Lut. 1006.*

(E 10.) And less Certainty is necessary for an Inducement.

And it is not requisite to have so much certainty in pleading a matter which is only conveyance or inducement. *Co. Lit. 303. a. Vide ante, (C 31. 43.)—Post. (E 18.)*

As, in trespass, if the defendant justifies, that he being possessed for years the plaintiff would have ousted him, and he in defence of his possession *molliter manus imposuit*, he need not shew by whom, or when, or for how many years he was possessed. *R. Cro. Car. 138. Vide post. (E 19.)*

In annuity, if the defendant pleads that it was granted for holding his courts, and being seised of the manor of *D.*, he requested the



plaintiff to hold a court there, who refused; he need not say of what estate he was seised. *Cro. El.* 419.

In trespass, if the defendant justifies by a devise, and the plaintiff replies that the devisor died seised, and it descended to him as cousin and heir, he need not shew, how cousin. *R. 2 Cro.* 86.

In an action upon the case for a nuisance in throwing carrion into a close *per quod diversa averia interierunt*, it is sufficient, without saying what or how many beasts. *R. Al.* 22.

If a man makes title to an office, he ought to prescribe for it; but if he alleges the office only as inducement, it is sufficient to say *quod est antiquum officium*. *R. 10 Co.* 59. b.

In avowry, if he alleges a partition between *A.* and *B.*, whereby the *locus in quo*, &c. *inter alia fuit allot.* to *A.*, and so justifies, *damage feasant*, it is sufficient, without saying what lands in certain were allotted to *A.* and what to *B.* *R. Pl.* 431. a.

(E 11.) Or, for a Negative Matter.

So, there is no need of so much certainty for a matter in the negative. *D. Pl. Com.* 33. b.

As, in an action upon the case for not taking sufficient pledges, the general averment, that he has not taken sufficient pledges, is sufficient, being in the negative. *R. Lut.* 159.

In debt on a bond to indemnify, it is sufficient to say, *not damnified*, without shewing how he has indemnified. [*Vide post.* (E 25.)]

In debt on a bond that he will permit ingress and regress, &c. it is sufficient to say *quod permittit*; for that is tantamount to *that he did not disturb*. *R. 1 Leo.* 136.

(E 12.) And Surplusage does not prejudice.

And surplusage does not prejudice: as, if the defendant in replevin avows as bailiff to *A.* administrator of *B.*, where *A.* ought to distrain in his own right, the words *administrator of B.* shall be rejected as surplusage. *D. Hob.* 208. *Vide ante*, (C 28.)

Except where it is repugnant or contrary to matter precedent. *Co. Lit.* 303. b.

As, if in *quare impedit* the defendant pleads a presentment of one *mere laicus* who was admitted, instituted, and inducted, *per quod ecclesia remansit vacua*; this is repugnant. *Dy.* 293. a.

[In action of assault against *A.* and *B.*, if *A.* confesses, and *B.* pleads that he and *A.* are not guilty, and issue is joined, and *B.* found guilty, the words relating to *A.* may be rejected. *Hill v. Fleming*, *M.* 10 G. 2. *B. R. H.* 341.]

(E 13.) When the General Issue shall be pleaded.

When a man has no special matter for his justification or excuse, he ought to plead the general issue, to avoid prolixity in records.

[And in some cases, by certain acts of parliament, the general issue may be pleaded, and the special matter given in evidence.]

[As, in trespass for a tortious distress for rent, by 11 Geo. 2. c. 19. s. 21. *Vide Doug.* 283.]

[So, by s. 7 Jac. 1. c. 5. made perpetual by 21 Jac. 1. c. 12. 2 justice of peace, constable, &c. being sued for what he had done by virtue

virtue or reason of his office, may plead the general issue, and give the special matter in evidence. *Vide Doug. 307.*]

And he may plead the general issue, tho' the declaration contains matter of record, as well as of fact. *Vide post. (2 H).*

And if a man may plead the general issue, it is more safe; for if he pleads specially, he gives the advantage of a replication or defence to the other party. *D. Hob. 103.*

And therefore after a special plea, he may waive it, and plead the general issue.

But he cannot waive it after a motion and order for a trial at bar. *F. g. 267.*

The general issue needs no inducement: as, *not guilty, nil debet, ne disturba pas, &c.* *Hob. 103.*

If the general issue be pleaded, the plaintiff cannot reply, but must join issue. *Semb. Co. Lit. 126. a.*

As, if the defendant pleads, *not guilty, nil debet, &c. et de hoc ponit se super patriam*, the plaintiff regularly shall join with him in the like form, *et prædict. plaintiff similiter.* *Co. Lit. 126. a.*

So, sometimes on a negative plea, the plaintiff or defendant shall join as on a general issue, and cannot reply: as, in dower, if the tenant pleads *ne unques seise que dower.* *Co. Lit. 126. a.*

So, if the defendant or tenant pleads a fine in bar, and the plaintiff or demandant replies *quod partes finis nihil habuerunt, et hoc petit quod inquirata per patriam*, the tenant or defendant shall say *et prædict. A. similiter.* *Co. Lit. 126. a.*

So, if the tenant vouches, and the demandant counterpleads the voucher, for that the vouchee or his ancestors had nothing by which they could enfeoff, *et hoc petit, &c.* the tenant shall say, *et prædict. T. similiter.* *Co. Lit. 126. a.*

[On *non assumpsit*, an usurious contract may be given in evidence, but in case of a specialty, it must be pleaded. *Lord Bernard v. Saul, H. 8 G. Str. 498.*]

[On not guilty, for beating a horse, defendant may justify in evidence. *Slater v. Sevan, T. 4 G. 2. Str. 872.*]

[In case, on general issue pleaded, any thing may be given in evidence that destroys plaintiff's action. *Barber v. Dixon, H. 17 G. 2. Wilf. 44.*]

[If defendant withdraws a special plea, he cannot plead another, but the general issue only. *Law v. Law, H. 7 G. 2. Str. 960. 1 T. R. 693.*]

[Tho' defendant may strike out special plea, and plead the general issue, yet he cannot do so without leave of the court, nor can he do it after a sham plea. *Weld v. Needham, M. 17 G. 2. 1 Wilf. 29. Ellis v. —, H. 8 G. 3. 2 Wilf. 369.*]

[He may do it the same term before replication without costs; and if plaintiff has a verdict afterwards, he cannot have those costs. *Barnes, 127.*]

[Plea of judgment, &c. may be withdrawn, and *plene administravit* pleaded. *Barnes, 330.*]

[Plea of tender cannot be withdrawn to plead general issue. *Ibid.*]

[After *non assumpsit infra*, &c. defendant may not add *non assumpsit.* *Barnes, 332. 338.*]

[After demurrer by bail, joined, *nul tiel record* shall not be pleaded. *Barnes, 334.*]



[Demurrer may be withdrawn, and general issue pleaded, if defendant offers it before assises. *Barnes*, 337.]

[General issue may be withdrawn, and special justification pleaded, on costs, if plaintiff not delayed thereby. *Barnes*, 346.]

[Leave has been given to withdraw a plea of *non est factum*, and plead infancy. 1 *Bl.* 357.]

[If a special plea goes to the action, and plaintiff replies to the country, and has been delayed, the court will not give leave to withdraw and plead the general issue. *Freeman v. Jones*, H. 9 G. 3. 2 *Wils.* 391.]

[If a mistake happens by death of attorney, general issue may be withdrawn, and money paid into court. *Barnes*, 344.]

[Payment of money into court is an acknowledgment by the defendant of the contract, and that the plaintiff is entitled to recover the sum so paid. *Cox v. Parry*, B. R. M. 27 Geo. 3. 1 T. R. 464. *Watkins v. Towers*, B. R. H. 28 Geo. 3. 2 T. R. 275.]

[Payment of money into court on the whole declaration, in an action on a bill of exchange, is such an admission of the validity of the bill, as to prevent the necessity of proving the hand-writing of the drawer. *Gutteridge v. Smith*, C. P. M. 35 Geo. 3. 2 H. Bl. 274. *Vide supra*, (C 10.)]

(E 14.) Plea amounting to the General Issue is bad.

And therefore a plea, which amounts to the general issue, is bad; for the general issue ought to be pleaded. *Co. Lit.* 303. b. 3 *Mod.* 166.

As, in trespass by a commoner, if the defendant pleads, that, being lord, he dug in the common for coals and left sufficient common; for this amounts only to *not guilty*. R. 1 *Sid.* 106.

So, in *assumpsit*, if the defendant pleads a bond given for the debt and execution thereon, and traverses that he was indebted *aliter aut alio modo*. R. *Cro. El.* 201. *Semb.* 5 *Mod.* 314. *Vide post.* (2 G 12.)

Or, pleads another promise, and traverses the assumption *modo et forma*. R. 2 *Rel.* 350.

So, in assize, if the tenant pleads a scoffment by the demandant; for this amounts to the general issue.

So, in trespass for goods taken; property in A. who gave them to the defendant amounts to the general issue. 5 *Mod.* 253.

Or property in A., and impounding by the plaintiff, upon which the defendant by replevin took them. *Semb.* 5 *Mod.* 252. R. 1 *Sal.* 394.

So, in trespass *quare clausum fregit*, if the defendant justifies by a demise to him by the plaintiff at will, for years, &c. *Sti.* 355. 5 *Mod.* 253.

Or, if he justifies *damage feasant* in another close. *Lut.* 1451. *Per two J.* Dy. 19. a.

[So, in trespass *quare clausum fregit*, and broke his hop-poles, if defendant pleads *liberum tenementum*, and that the poles were damage feasant and he distrained them, it is bad. R. *on demurrer.* *Sparks v. Keble*, M. 11 G. Fort. 378.]

[Or, if plaintiff declares for obstructing his watercourse, by digging pits and making ponds, and defendant pleads that there were two antient

antient pits which where choaked up with mud, and therefore he made two others, which he had a right to do, &c. it amounts to the general issue; for he had no right to make new pits, tho' he might have scoured the old. *Brown v. Best*, M. 21 G. 2. 1 *Wils.* 174.]

So, in *audita querela* on a defeazance, if the plaintiff pleads another defeazance, and traverses the defeazance in the declaration, for it amounts to *non est factum*. R. *Cro. El.* 532.

In debt on a bond, if the defendant pleads that it was his deed, but not delivered to the plaintiff but to another. R. 1 *Sid.* 450.

If on a bond to A. the plaintiff's wife, the defendant pleads that it was delivered to A., *quæ obiit inupta*; for, then *non est factum*. R. 1 *Vent.* 77.

If to an action on the case for a vexatious petition against him in council, he pleads that the plaintiff did such an act, for which, &c. R. 3 *Mod.* 166.

So, in trover, if the defendant pleads that he took, as a distress for toll, &c. R. *Hob.* 187. R. *Cro. El.* 435.

So, in trespass by A. for goods, if the defendant justifies by process out of the hundred court upon a replevin against the goods of B., for if they are the goods of a stranger the defendant is not guilty. R. *Skin.* 674.

Yet matter of law may be pleaded specially, tho' it may be given in evidence on the general issue. R. 2 *Vent.* 295. R. *inter Hussy and Jacob in B.R. T. 8 W.* 3. 1 *Sal.* 344. 2 *Mod.* 276. *Per Holt*, *Skin.* 362.

So, if an administrator pleads, that goods of the intestate to such a value came to his hands, which he detains for his own debt, and has no assets *ultra*, it is good, tho' it amounts to *plene administravit*. R. *Hob.* 127.

In conspiracy, the defendant may plead a legal prosecution, tho' it amounts to *not guilty*. R. *Cro. El.* 871.

In *assumpsit*, payment, tho' it may be given in evidence on *non assumpsit*. R. 1 *Sal.* 394.

In debt, a release, tho' it may be given in evidence on *nil debet*. 1 *Sal.* 394.

In debt upon a lease for years, entry into part. 1 *Vent.* 2.

So, if the plea be for greater certainty: as, in trespass in A., if the defendant pleads that there are several A.'s, and none without addition, and justifies in black A.; this does not amount to the general issue. *Semb. Lut.* 1492.

So, an entire plea is good, tho' to part of the declaration it amounts only to the general issue. R. 3 *Lew.* 40.

So, a plea, which confesses and avoids the plaintiff's title, is good, tho' the matter may be given in evidence, on the general issue: as, in trover, if the defendant pleads that A. was possessed and lost the goods, that B. found them and gave them to the plaintiff, who lost them, and the defendant found them, and by the command of A. converted them. R. *Cro. El.* 262. R. *cont. Latch*, 185. for there it is said, that every plea in trover, which gives colour to the plaintiff, is bad, because it amounts to the general issue, except where it concerns the title of land. *Vide Cro. El.* 555. 146. 1 *Leo.* 178. *Vide Action upon the Case upon Trover*, (G 6.)



So, it is bad, tho' it concerns the title, if it does not convey a good title. *Latch*, 185.

And therefore it seems to be in the discretion of the court, when a plea amounting to the general issue shall be allowed; and therefore the plaintiff ought not to demur, but pray the opinion of the court. *D. Hob.* 127. *R.* 1 *Leo.* 178.

And a plea amounting to the general issue is only form. *Semb.* 1 *Rel.* 113. *Cont.* 2 *Rel.* 350. *Semb. Cro. El.* 871. *R. Sho.* 76, 133.

(E 15.) When a Plea shall be Special.

(E 15.) *If it be by way of excuse or justification.*] But, if a man has matter of justification or excuse, he ought to plead it specially. *Co. L.* 282. *b.*

As, if he justifies by process out of an inferior court, he ought to shew in what action, &c. that it may appear that the inferior court had jurisdiction. *Per two J. Mar.* 118.

In debt upon a lease of a vicarage, if the defendant pleads a sequestration, he ought to shew before whom, for what cause, and legal process. *Hob.* 296. *Vide post.* (E 18.)

If the defendant pleads a discharge, he ought to shew specially how he was discharged. *Hob.* 296.

As, if he pleads a discharge of tithes, which is a bar to a thing due of common right, he ought to shew how. *Ibid.*

A plea in justification must confess the trespass, tort, &c. *Sal.* 637, 8.

[Trespass for taking materials; on not guilty pleaded, defendant shall not give evidence of taking the goods as a *deodand*, for he should have justified. *Dryer v. Mills*, T. 3 G. Str. 61.]

[On trespass by husband and wife, defendant on the general issue shall not controvert the marriage, *Deckinson v. Davis*, M. 8 G. Str. 480.]

[If defendant claims an *easement*, he must plead it specially, and cannot give it in evidence on the general issue. *Hawkins v. Wallis*, T. 3 G. 3. 2 *Wilf.* 173.]

[To trespass *quare clausum*, &c. an highway must be pleaded specially. *Barnes*, 448.]

How performance or other acts are to be averred, *vide ante*, (C 51, &c.)

(E 16.) *In answer to special matter.*] So, special matter ought to be specially answered. *Co. Lit.* 303. *b.*

In maintenance, the defendant justifies, that he being a neighbour, recommended a counsel to him; the plaintiff replies, that he gave him money; the defendant cannot rejoin, that he did not maintain *modo et forma*, but must answer the special matter. *Kitt.* 232. *a.*

(E 17.) *Act by special authority.*] So, if a man be enabled by a warrant, or other authority, regularly, he ought to shew it specially. *Co. Lit.* 283. *a.*

As, in trespass, if the defendant justifies as bailiff to the sheriff, it is not sufficient to say, that he did it by the mandate of the sheriff, but he ought to shew his warrant. *R.* 3 *Mod.* 138. 4 *Mod.* 378.

So,

So, in trespass, it is not sufficient to say that the defendant took, &c. *tanquam ballivus manerii per mandat. domini*; but he ought to shew a precept directed to him. *R. 4 Mod. 378.*

And he ought to shew the substance and effect of his authority to have been specially pursued. *Co. Lit. 303. b.*

[In a justification under mesne process, the defendant must plead that the writ was returned; but in a justification under a writ of execution, the return need not be stated. *5 Co. 90. Cowp. 18.*]

[A defendant in an action for false imprisonment, pleading a justification under *mesne process* sued out by him in a cause in which he was plaintiff, may state that the writ issued on an affidavit to hold to bail, without setting forth the cause of action. *3 T. R. 183.*]

[And if the writ be pleaded as sued out on a day between the *essoign-day* and the first day of the term, and there be a special demurrer for that cause, the objection will not prevail, tho' the court do not in fact sit 'till the *quarto die post*. *Ibid.*]

(E 18.) *When a record, &c. shall be specially alleged.*] When matter of record is the foundation and substance of the plea, it ought to be certainly and truly alleged. *Co. Lit. 303. a.*

And a record must not be alleged *inter alia*, for it is entire, and depends upon an original and a judgment, and cannot be divided. *D. Hob. 226. Pl. Com. 65. a.*

And therefore, in an inferior court, which is not of record, the whole proceeding there ought to be pleaded at large; and it is not sufficient to say, *taliter processum fuit*. *R. 2 Vent. 100. Vide infra.*

So, the proceedings in an inferior court, tho' it be of record. *Semb. 2 Vent. 100.*

So, a plaint alleged, upon which *taliter processum fuit* that there was judgment, without shewing an appearance and declaration, is not sufficient. *R. Lut. 918.*

So, in pleading an execution by a court at *Westminster*, he ought to allege an ejection, &c. upon which *taliter processum fuit*, that the plaintiff had judgment, and thereupon sued out execution; and it is not sufficient to allege an execution without shewing the judgment. *R. 1 Lev. 83.*

Yet, if proceedings in an inferior court be pleaded, it is sufficient to say that a plaint was levied, and thereupon *taliter processum fuit*, that the plaintiff was nonsuited, &c. *R. 2 Lev. 81. Semb. Sho. 48. Semb. 3 Lev. 243. R. 3 Lev. 404. Ca. Parl. 94. Carth. 53. [Cowp. 18.]*

So, if he pleads, that *implacitasset* and found pledges, upon which *taliter processum fuit*, &c. without saying that a plaint was levied, for it is tantamount. *R. 3 Lev. 404.*

So, if he pleads that a plaint was levied, upon which process issued to the defendant, who took and afterwards permitted an escape, it is sufficient, without shewing what authority the court had, where the plaintiff is a stranger to it. *Adm. Cro. Car. 46. Dub. Mod. Ca. 72.*

And such short pleading is sufficient in an inferior court, tho' it be not of record; for the whole shall be given in evidence. *Ca. Parl. 94.*

[In an action founded on the judgment of a court of record of limited jurisdiction, sufficient must be set forth to shew that they had jurisdiction to give the judgment; and if sufficient be stated for that



purpose, it will be intended that they acted right, unless the contrary appear upon the record. *Sollers v. Lawrence*, C. P. T. 16 & 17 Geo. 2. *Willes*, 413.]

But, if matter of record is only conveyance, it is sufficient if it be summarily alleged. *Co. Lit.* 303. a.

As, in *assumpsit*, to indemnify his bail, if it shews that he was bail in an action in the court of *Oxford*, in which *taliter processum fuit*, that the defendant there was condemned, it is sufficient, without setting out the whole record; for it is but inducement. *Per two J. Fenner cont. Vel.* 16.

So, in an action for an escape on a *capias utlagat.*, it is sufficient to begin, *quod cum recuperasset*, &c. without setting out the whole record; for it is only conveyance to the action. *R. Cro. El.* 877. *Lut.* 111.

So, in *assumpsit* to indemnify, it is sufficient to shew, *quod implacitasset et recuperasset*, without alleging how. *R. 2 Cro.* 10. 46.

So, in an action for a deceit, conspiracy, &c. founded on a record, it is sufficient to begin, *quod cum recuperasset*. *2 Cro.* 567.

So, in debt upon a judgment in an inferior court not of record, it is sufficient to say, *quod cum recuperasset*, without shewing the plaint or process. *R. after verdict. Sho.* 71.

So, in an action, where the record is not inducement, but the very foundation: as, in debt on a judgment, it is sufficient to begin, *quod recuperasset*. *R. 2 Cro.* 567.

So, proceedings and sentences in the ecclesiastical court may be summarily alleged: as, that there was a divorce between such parties, for such a cause, before such a judge, *concurrentibus iis quæ in jure requiruntur*. *Co. Lit.* 303. a. *D. Hob.* 296. *Cro. Car.* 162. *R. 2 Cro.* 351.

That *A.* sued in the spiritual court for a portion of goods, *et taliter processum fuit*, that the judge decreed, &c. *Lut.* 304.

But it is not sufficient to allege generally, *concurrentibus iis qui in jure requiruntur*. *D. Hob.* 296.

Nor, is it sufficient to allege *taliter processum* in the same court, without saying in what place the court was held; for tho' the same court shall be intended the same as to jurisdiction, it shall not be intended to be held in the same place. *Lut.* 305.

So, if the defendant justifies the taking of ship as a prize, and that it was condemned in the admiralty, it is not sufficient, without saying how it was a prize, and before what judge, and where it was condemned. *R. Sho.* 6 *Carth.* 32.

[So, if in justification in trespass for carrying away plaintiff's goods, defendant pleads process of an inferior court, directed to the bailiffs of the borough, being officers of the court, and that he, being a bailiff and officer of the court, by virtue thereof, took, &c. it is bad. *Watkins v. West*, T. 2 G. 2. *Ld. Raym.* 1530.]

(E 19.) *When estates shall be specially alleged.*] So, the commencement of particular estates ought to be specially shewn. *Co. Lit.* 303. b. *Vide infra.*

As, if the defendant pleads an estate for life.

So, if he pleads that *A.* was seised for life, remainder to *B.* in tail, remainder to *B.* in fee; and that *A.* and *B.* demised to him, it is not good;

good, without shewing the commencement of the estate for life. *Dub. 1 Leo. 177. Cro. El. 153, 4.*

That husband and wife seised to them and the heirs of the husband demised, &c. *Semb. Cro. El. 112.*

So, the commencement of an estate-tail, generally, ought to be shewn. *Co. L. 303. b.*

In a bar, though it need not in a count. *Semb. Cro. Car. 571. Jen. 453.*

So, if he pleads a confirmation by patron and ordinary, tho' he need not shew what estate the patron has, yet, if he pleads that he has for life, he ought to shew how it commenced. *R. Cro. El. 18.*

So, if a man pleads a term for years, he ought to shew the commencement of the term.

As, in an action for land, or trespass upon the land, in which the title to the land may come in question, if the defendant justifies under a term for years, it is not sufficient to say *quod possessionatus fuit* of the term, without shewing the commencement of the term. *Agr. 2 Mod. 70. R. Carth. 444.*

[So, if defendant in trespass *quare clausum*, &c. justifies under a lease from a tenant for ninety-nine years, he must shew the commencement of that estate for ninety-nine years, tho' the original lease is in the hands of plaintiff. *Johns v. Whitley, P. 10 G. 3. 3 Wils. 65.*]

So, in trespass for the taking of a horse, &c. if the defendant justifies under a term, he ought to shew the commencement of his estate. *R. cont.*; for here it is alleged only as inducement to his plea. *Cro. Car. 138. 2 Mod. 70. 3 Mod. 132. R. acc. Lut. 1492. D. Lut. 1165.* For the title may come in question. *Per Pol. 3 Mod. 132. Vide ante, (C 41. 43.)*

So, if a man pleads a tenancy at will, he ought to shew how he has it, viz. by demise, as a copyholder, or as tenant, at sufferance. *Bro. Plead. 85.*

So, the commencement of a copyhold estate ought to be shewn. *R. 2 Cro. 103. R. Cro. Car. 190. Vide Copyhold, (P 4.)*

Tho' it be in a justification to a trespass, as *damage feasant*. *R. 4 Mod. 346.*

Tho' it be a copyhold in fee. *R. 2 Cro. 103. Cro. Car. 90. R. 4 Mod. 346.*

But it is sufficient to shew the copy of the *last* admission. *R 2 Cro. 103.*

And the omission is only form, and aided on a general demurrer. *Cont. 2 Cro. 103. R. Cro. Car. 190.*

But it need not be shewn where it is alleged as inducement: as, in trespass in his close, if the defendant pleads that he was possessed for years of the adjoining close, and the plaintiff ought to repair the fences, and thro' the want of repair his cattle escaped, it is good, without shewing the commencement of the estate; for the interest of the land cannot come in question. *Yel. 74. Co. Lit. 303. Vide ante, (C 43.—E 10.)*

So, if the plaintiff shews that husband and wife, seised to them and the heirs of the husband, demised to him, and the defendant obstructed his water-course, he need not shew the commencement of the



the estate of the wife; for it is only inducement. *R. Cro. El. 112.*

So, if a man shews a grant by copy of a reversion after the death of *A.*, and that *A.* is dead, he need not shew the grant to *A.*, for it is only conveyance. *R. 2 Cro. 52.*

(E 20.) *When not.*] But the commencement of estates in fee need not be shewn. *Co. L. 303. b. Cro. Car. 571.*

So, a man may plead seisin or reversion in fee after an estate for life, without shewing the commencement of the estate. *1 Sand. 250. 260.*

So, the king, seised *in jure corone*, need not shew how the estate came to him, if he shews that his ancestor was seised in fee; for it shall be intended to have continuance. *R. Bridg. 8.*

So, the commencement of an estate-tail need not be shewn in a count: and therefore, in debt for rent, if the plaintiff counts that his father was seised in tail and made a lease, and that the reversion descended to him as heir of his body, without shewing the commencement of the entail, it is good. *R. Cro. Car. 571.* But antiently it was shewn. *4 Mod. 419.* And *R.* that a verdict ought to shew it. *Cro. El. 407.*

So, in an inquisition on the *ft. West. 2. 46.* against those who throw down inclosures, it need not be shewn when the estate, which *A.* (who inclosed) had, commenced. *R. Carth. 115.*

(E 21.) *It shall shew by what title.*] If a man pleads or alleges any estate, he ought to shew by what title he has it, and it is not sufficient in a bar to allege only a possession. *2 Cro. 52. Yel. 74. 1 Rol. 13. Vide ante, (C 34. 39, &c.)*

Except where it is alleged as inducement: as, in trespass for an assault, if the defendant says that he was possessed of a house for years, and the plaintiff disturbed him, for which reason *molliter manus imposuit*, &c. it is sufficient, without shewing by what title he was possessed. *R. Cro. Car. 138. 4 Mod. 420. Vide ante, (E 10.)*

In action upon the case by the lessee of a tenant for life, it is not necessary to shew the commencement of the estate for life. *R. Cro. El. 112. R. Ibid. 113.*

(E 22.) *In what right seised.*] So, if he alleges that he was seised, he ought to allege of what estate he was seised. *Cont. 1 Jac. 2. But afterwards 8 W. 3. R. acc. Lut. 1316. Semb. 5 Mod. 72. 150. R. Lut. 1232. Carth. 9. Vide ante, (C 35.)*

So, if persons, who constitute a body politic, are named by their proper names, it is not sufficient to say that they are seised, without saying in right of the corporation. *Pl. Com. 103. a.*

So, persons seised to the use of an hospital ought to plead seisin *in jure hospital.*

So, persons incorporated to the use of an hospital ought to plead seisin *jure incorpor. sue*; for *jure hospital.* is not good. *R. 10 Co. 34. a.*

So, a sole corporation ought always to plead seisin in his corporate right. *R. 2 Lev. 68. Pl. Com. 103. a.*

And

And the omission will be bad on a general demurrer. *Per Powell, Lut. 1232.*

But an abbot or prior, &c. and convent, need not say in what right they are seised; for, being persons dead in law, they cannot be seised but in right of their house. *Pl. Com. 102. b. Dub. Sho. 63.*

So, a corporation named by their corporate name need not say *quo jure* they are seised; for it cannot be otherwise intended: as, if a mayor and commonalty plead seisin, it is sufficient, without saying *jure corporat.* *1 Leo. 153.*

If *A.*, master of a college, and his fellows, plead seisin, it is sufficient, without saying *jure collegii.* *R. Pl. Com. 102. b. R. Cro. El. 232.*

So, if by the whole plea the manner of the seisin appears, it is sufficient: and therefore, if it be alleged that a woman had a term for years, and took husband, by reason whereof the husband and wife were possessed, it is sufficient, without saying *in jure uxoris.* *R. Pl. Com. 191. a.*

(E 23.) *And shall not plead by que estate.]* A man cannot prescribe to a thing which lies in grant, and does not pass without a deed or fine, otherwise than in himself and his ancestors, and not by *que estate*; for he ought to shew the deed. *Co. Lit. 121. a. Vide post. (O 1, &c.)*

As, in prescription for a hundred. *Bro. Que Estate, 9.*

So, he cannot prescribe by *que estate* to a rent. *Bro. Que Estate, 16. 23, 24.*

Nor, to a common, estovers, acquittal, &c. *Bro. Que Estate, 16.*  
Nor, to land.

Otherwise, if the rent, common, &c. are appendant to a manor, &c. for he may prescribe by *que estate* to a manor, and what is incident or appendant goes with it. *Bro. Que Estate, 30. Agreed, 1 Mod. 232. 1 Vent. 139.*

So, a plaintiff generally shall not plead by *que estate*, except where he is in the nature of a defendant, as in a bar to an avowry, vouchee, &c. *Hard. 458.*

Nor, in a bar to an avowry, where the assignments are traversable. *R. Skin. 304.*

So, a corporation cannot prescribe by a *que estate*, but only in themselves and their predecessors. *D. 2 Cro. 673.*

Nor, a lessee for years, *that he and all those whose estate, &c.* *Lut. 81.*

For he ought to allege the prescription in him who has the fee. *R. 1 Sal. 363.*

So, a man cannot plead or make title by *que estate* to a thing which does not pass without deed. *Co. Lit. 121. a.*

So, in *quare impedit*, the plaintiff cannot make title to himself by *que estate* to land, to which the advowson is appendant. *Bro. Que Estate, 1.*

So, in trespass as well as in real actions, the plaintiff cannot make title to land by *que estate*, without saying how, *viz.* by feoffment or otherwise. *Bro. Que Estate, 18. 27.*

So, in an information for intrusion in the *Exchequer*, (in which by the course of the *Exchequer* the intruder must make title against the king,



king, otherwise he shall be dispossessed,) the defendant cannot make title to a term by a *que estate*. Dy. 238. b.

(E 24.) *When he may plead by que estate.*] But a defendant may plead by a *que estate*, when the plaintiff cannot. Bro. *Que Estate*, 1. 27. 40.

So, a plaintiff in *replevin* in bar to an avowry; for he is in the nature of a defendant. Co. Lit. 121. a. Bro. *Que Estate*, 1. 3. 20. 47. [3 T. R. 147.]

As, if a tenant or defendant pleads a good bar; as, a feoffment, release, recovery, &c. by A, *que estate* he hath, it is good, without saying how he had the estate; for it is not material to the bar. Bro. *Que Estate*, 34.

[And a plea of prescription for common in a *que estate* is good after verdict, tho' it be not in *express terms* alleged that the owners of the estate have used it from time immemorial. 3 T. R. 147.]

So, a plaintiff may claim a thing which lies in grant by a *que estate*, when it is only conveyance to the thing in demand: as, he may say that he and all those *quor. stat. habet* in a hundred have had a leet, time whereof, &c. tho' a hundred does not pass without deed; for it is only conveyance to the leet, which is demanded. Co. Lit. 121. a. Semb. 2 Leo. 74.

So, he may prescribe that a corporation, and all those whose estate they have in a house, have had a way, &c. tho' a corporation cannot have without deed; for it is only conveyance. Per three J. 2 Cro. 637. Vide 2 Vent. 139.

So, a plaintiff may allege a *que estate*, when the title is not in question: as, in trespass, if the defendant justifies the taking for rent due from the plaintiff, he may say that the lord enfeoffed A, *que estate* he himself has, to hold by 3 s. rent; for the plaintiff is allowed tenant, and the title to the land is not in question. Bro. *Que Estate*, 6. 17.

So, he may claim a thing as appurtenant to a manor, by a *que estate*, tho' not of itself: as, toll, common, &c. R. 1 Mod. 231.

So, he may plead *que estate* in a stranger: as, the plaintiff in *replevin* may plead a *que estate* in the avowant in the feignory. Co. Lit. 121. a. Bro. *Que Estate*, 2. 12. 21. 26. 37.

An avowant for rent on a lease to A. may plead *que estate* the defendant has. R. Salk. 562. Hard. 459.

So, he may plead title by a *que estate* to an inheritance or freehold. Hard. 459.

So, he who comes to an estate *in the post.* may plead by a *que estate*: as, a disseisor, abater, intruder. Co. Lit. 121. a.

So, a recoveror. Co. Lit. 121. a. Bro. *Que Estate*, 41. 48.

So, a man shall plead title to an estate in fee by a *que estate*. 40 Aff. 28.

So, to an estate-tail, with an averment of the life of tenant in tail. Co. Lit. 121. a. Bro. *Que Estate*, 7. 28, 29. 31.

So, to an estate for life, with an averment of the life of the tenant. Co. Lit. 121. a. Bro. *Que Estate*, 46. Hard. 459.

So, in the case of the king, where the plea goes in discharge of a debt assigned to the king, and shews the estate out of the debtor before the assignment. R. Hard. 459.

But,

But, generally, he shall not plead a title to a term for years by a *que estate*. *Co. Lit.* 121. a.

As, to say that *A.* being seised demised to *B.* for years, *que estate* he has. *R. Dyer*, 238. b.; for he ought to shew all mean assignments. *R. Raym.* 389.

Nor, to an estate at will. *Co. Lit.* 121. a.; for it cannot be assigned. *Bro. Que Estate*, 38.

Yet a man may avow for rent on a lease for years made to *A.*, *que estate* the plaintiff has, without shewing all mean assignments; for he is a stranger to the assignments which might be without deed. *Semb. Cro. El.* 22.

So, he may have debt for rent or waste against an assignee, and declare on a lease to *A.*, *que estate* defendant has, without shewing the mean assignments. *R. cont. Cro. El.* 22. *R. acc.* 1 Sid. 298. 1 Lev. 190.

So, he may have covenant against the assignee of a term granted to *A.*, *que estate* the defendant has. *R.* 3 Lev. 19.

So, if the defendant pleads a lease for years to *A.*, *que estate* he has, and the plaintiff does not demur, but traverses the lease to *A.*, whereby the assignment is admitted, it is good. *R. Dy.* 238. b.

So, if the plaintiff makes title to a term for years in himself by a *que estate*, it shall be aided on a general demurrer. *Semb. Ray.* 389.

If a *que estate* be pleaded, it ought to be alleged in the plaintiff or defendant himself; as, to say the plaintiff and all *quorum statum habet*. *Co. Lit.* 121. b.

For, if it be alleged in one in a mesne conveyance, it is bad. *Semb. Co. Lit.* 121. b. *Bro. Que Estate*, 8. 19. 49.

But a woman, tenant in dower, may prescribe that her husband and his ancestors, *que estate* she has in the feigniory, were, &c. tho' the husband had a fee and she not. *Bro. Que Estate*, 10.

[Freehold tenant of a manor must plead prescription, and by way of *que estate*; and not by way of custom, which is only for copyholders. *Thomson v. Roberts*, H. 5 G. 2. Fort. 339.]

(E 25.) *When he shall plead to covenants specially.*] If a man pleads to an action of covenant, where any of the covenants are negative, he ought to plead to them specially; for the negative cannot be performed. *Co. Lit.* 303. b. *R. Cro. El.* 691. *Mo.* 856. *Hob.* 13.

As, if a covenant be to proceed on a voyage *et quod non deviare*, he ought to plead specially that he did not deviate. *R.* 1 Sid. 87.

So, if the condition of a bond be in the negative, the defendant shall plead to it specially. 10 H. 7. 12. b.

So, if the condition be for performance of covenants, and some of the covenants are in the negative, he ought to plead performance specially. *Semb. Dy.* 373. a. *Pal.* 70.

But general performance shall be aided on a general demurrer. *R. Cro. El.* 232. 1 Leo. 311. *Vide post.* (E 26.)

So, it shall be aided by the plaintiff's replication, *that he has not performed*, &c. *D. Sho.* 1.

So, if any of the covenants are in the disjunctive, he ought to shew which he has performed. *Co. Lit.* 303. b. *Lut.* 581. 10 H. 7. 12. b. *R.* 2 Cro. 560. *Pal.* 70. *Sav.* 120.

So,



So, if the condition be to pay at four days, or within six months after each feast. *Per two J. Cro. Car. 421.*

And if he does not, it will be bad on a general demurrer, for the court do not know what part is performed. *R. 1 Leo. 311. D. Cro. El. 232. Vide post. (E 26.)*

So, if the condition of a bond requires several things to be done, it is not sufficient to say *quod performavit omnia, &c.* tho' all are in the affirmative; but he ought to answer specially to every particular mentioned in the condition. *R. 1 Lev. 303. Vide post. (2 W 33.)*

So, if an act required by a covenant is to be done by a stranger to the covenants: as, if B. covenants that A. and his wife shall levy a fine. *Per melior. opinion. 2 Rol. 159. R. 2 Cro. 559, 560. Dub. Pal. 70.*

That A. shall render a just account. *R. Sho. 1.*

And it shall not be aided by the plaintiff's replication, *that he has not performed. Ibid.*

So, if a covenant requires an act on record, he ought to shew it specially. *Co. Lit. 303. b.*

As, if the covenant be that A. shall levy a fine. *R. 2 Rol. 159. R. 2 Cro. 560. R. Pal. 70.*

That the defendant shall become nonsuit in all actions by him, he must shew specially that he was nonsuit; for it cannot be tried but by the record. *R. 13 H. 7. 19. b. acc. 10 H. 7. 12. b.*

So, if the condition be to make a bond, release, &c. it is not sufficient to say that he has done it, without shewing it, whereby the court may judge whether it be sufficient. *R. Sal. 498. Vide Kit. 223. b. Lut. 421. Vide post. (2 V 13.)—Ante, (E 5.—C 58, &c.)*

So, if the condition of a bond be to perform such a thing, or pay such a sum, it is not sufficient to plead payment generally without shewing how or at what time, so that issue may be joined thereon. *R. 2 Cro. 360.*

If the condition be, that he shall prove a debt paid, it is not sufficient to say that A. and B. proved it, without saying how. *R. Bend. 66.*

So, if it be to perform a will, it is not sufficient to plead performance, without shewing the will and how he has performed it. *R. 2 Cro. 360. 2 Bul. 267.*

If he pleads that a patent became void, he ought to shew how. *R. Skin. 303.*

So, if a condition be to indemnify, plea *quod exoneravit* is not good without shewing how. *R. 2 Cro. 363. R. 2 Cro. 165. 635. R. Mar. pl. 200. D. 2 Co. 4. a. Semb. Lut. 428. R. 2 Cro. El. 916. Mo. 857.*

Otherwise, if he pleads in the negative *non damnificat.* *R. Cro. 363. 634. Mar. Pl. 200. 2 Co. 4. Vide post. (2 W 33.)*

So, if a covenant or condition be for quiet enjoyment, it is not sufficient to plead disturbance, without shewing how he was disturbed. *Semb. 2 Vent. 278.*

And that it was by an elder title. *R. Hob. 35. Win. Ent. 120. R. 2 Cro. 315. 444. R. Cro. Car. 5. 4 Co. 80. Van. 120. Vide ante, (C 49.)*

But it is not bad upon a special demurrer. *Lut. 428.*

And shall be aided after verdict. *R. 2 Mod. 213.*

(C 26.)

(C 26.) *When generally.*] But where all the covenants are affirmative, it is sufficient to shew performance generally. *Co. Lit.* 303. b. 10 *H.* 7. 12. b. *Vide post.* (2 V 13.)

So, in debt on a bond to perform covenants in an indenture, it is sufficient to plead performance generally, if they are all in the affirmative. *R. Cro. El.* 749. 2 *Sand.* 411. 1 *Lev.* 303. *Dy.* 373. a.

Or, if any are in the negative: but the negative covenants are all void and contrary to law; for the court will take notice that those in the negative are contrary to law. *R. Mo.* 856. *R. Hob.* 13.

Or, if the negative be but an affirmance of a precedent affirmative covenant. 1 *Sid.* 87.

So, tho' to an affirmative covenant negative words are added of the same import. *Adm.* 1 *Sid.* 87.

So, if he covenants that *A.* shall quietly enjoy without interruption, and discharged and acquitted of all incumbrances, he may plead *quod performavit* generally, tho' it is not so well. *R. Lut.* 608.

So, if a covenant be to make further assurance, be it by fine, feoffment, &c. as shall be advised, it is sufficient to plead *performavit* generally, tho' it is not so well. *R. Lut.* 609.

So, the plaintiff to a *plene administravit præter* a debt on a bond may say, that the bond was for such a purpose and that he has performed it, without saying that this was the whole of the condition. *R. Lut.* 1637.

So, where a covenant is affirmative and comprehends multiplicity of matter, to avoid prolixity the defendant may plead performance generally, without shewing how, and the plaintiff shall assign a particular breach; as, in debt on a bond with a condition to deliver the tallow of all beasts killed by him: it is sufficient to say that he has delivered all the tallow, &c. without saying how much he has delivered, or how many beasts he has killed. *Cro. El.* 749. *Vide post.* (2 V 13.)

So, on a bond to pay all rents received, it is sufficient to say that he has paid all, without saying what sum or how much he has received. *R. Cro. El.* 749. *R.* 1 *Sid.* 334.

So, on a bond to deliver all evidences, or to assure all his lands. *Cro. El.* 750.

So, where a man covenants to discharge all bonds. *R. Cro. El.* 916.

Or, to acquit of all escapes, fines, &c. it is good without saying how. *R. Mo.* 857.

Or, to indemnify against the king for all receipts as collector. *Semb. Cro. El.* 253.

So, if a man pleads performance generally, when some of the covenants are in the affirmative and others in the negative, it shall be aided on a general demurrer. *R. Cro. El.* 232. *Vide ante,* (E 25.)

Otherwise, if some of the covenants are in the disjunctive; for the court cannot judge what part he has performed. *D. Cro. El.* 232. *Vide ante,* (E 25.)

And, if he pleads payment or performance generally to the condition of a bond, it is not aided on a general demurrer. *R. Mar. pl.* 200. *R. cont.* 1 *Lev.* 194.

#### (E 27.) The Form of a Plea in Bar.

Every plea in bar must begin with the defence. *R. Yel.* 210. *Vide for this in Abatement,* (I 16.)



If a plea goes only to part, it must ascertain the part of the declaration to which it is applied; as, in debt for rent for several years, if the defendant says, *quoad* 20 l., parcel of rent *nil debet*, and does not shew when the 20 l. was due. R. 1 Sid. 338.

In *assumpsit* on several promises, if the defendant pleads *quoad* all except 4 l. *non assumpsit*, and a tender *quoad* the 4 l. and does not shew upon which promise the tender was made, it is therefore bad. R. Lut. 241.

If the plea admits the cause of action, and avoids it by a discharge or matter *ex post facto*, he must say *quod* plaintiff *actionem non*, &c. R. Sal. 516.

But where there was no cause of action, he may say *onerari non debet*. Sal. 516.

(E 28.) How it shall conclude.

(E 28.) *To the action.*] Every plea shall have its proper conclusion; and therefore a plea in bar shall conclude to the action. Co. Lit. 303. b. *Vide Abatement*, (I 12.)

But sometimes a conclusion is aided on a general demurrer; as, if it be only informal. D. Hob. 298. 321.

Or, prays judgment of the writ, where it should be *si serra respondue*. Semb. Latch, 179.

If a plea begins in abatement, and concludes to the action, it shall be a plea in bar. Sho. 4.

(E 29.) *To the record.*] And if a matter of record be pleaded, it shall conclude *prout patet per recordum*. 1 Lev. 211. R. 3 Lev. 334. *Vide ante*, (C 82.)—*Post*. (O 17.)

So, if a matter be pleaded proveable only by a record. R. Lut. 163.

And if it concludes, *et hoc paratus est verificare*, when it ought to be *prout patet per recordum*, it is bad. R. Ray. 50.

Or, if it concludes to the country, when it should conclude to the record. R. 1 Leo. 90.

Or, if it adds matter of fact, and then concludes to the country. R. Lut. 1272.

If several records are pleaded, it must conclude every one *prout patet per recordum* of such court; for, after pleading all, to say, *prout patet per recorda prædicta*, is bad, at least if it does not say, *prout patet per separal. recorda prædicta*. Per two J. 2 Cro. 626.

But, *per separal. recorda* is good. R. 1 Lev. 200. 1 Sid. 333.

But where a general statute is pleaded, there is no need to say *prout patet per recordum*; for the judges take notice of it. R. Hard. 335.

So, if the defendant *proferet* the record by his plea, he need not say *prout patet*, &c. Skin. 526.

[If matter of record be pleaded by way of dilatory, if of another court, it must be *sub pede sigilli*; if of the same court, not. Curwen v. Fletcher, P. 8 G. Str. 520.]

[To action on the case, if defendant pleads a recovery, and plaintiff replies *nul tiel record*, and concludes with averment, it is good, especially if it is a record of another court; but (Semb.) he may also conclude with giving a day to defendant to produce record. Sandford v. Rogers, H. 33 G. 2. 2 Will. 113.]

Yet

Yet, by the *st.* 4 & 5 *Ann.* 16. no exception shall be taken for want of *hoc paratus est verificare per recordum*, or *prout patet per recordum*, unless specially shewn for cause of demurrer.

And it was before aided on a general demurrer; for the party might say, *nil tiel record*, notwithstanding the omission. 1 *Sal.* 1.

So, it is not necessary to conclude *prout patet per recordum*, where the plea is in the negative. *Sal.* 520. *Vide post.* (E 33.)

When it shall conclude to the country, *vide post.* (E 32.)

(E 30.) Special Conclusion.

(E 30.) *Et sic.*] If a plea does not avoid the plaintiff's demand but by argument, there ought to be a special conclusion: as, in a *scire facias* for the arrears of an annuity against a parson, if the defendant pleads that he has resigned, it is not good, without saying, *et sic* not parson. *Kit.* 214. b. 220. b.

So, in debt for rent, or upon a contract, if the defendant pleads payment in the same county, it is not good without concluding, *et sic nil debet.* *Kit.* 220.

So, in debt on a bond, if the defendant pleads special matter, which proves the bond to be void, he ought to conclude, *et sic non est factum*: as, if he pleads rasure or interlineation. *Ibid.*

That the obligor was a *feme-covert*, &c. *Kit.* 220. b.

That the defendant is unlearned, and it was read in other form. *Kit.* 220.

But if the special matter of the plea be a sufficient bar, there is no need to say *et sic*: as, in debt for rent, payment, or levy by distress, in another county, is sufficient, without concluding, *et sic nil debet.* *Ibid.*

So, if the defendant acknowledges the deed, and pleads a plea to avoid it, he cannot conclude *et sic non est factum*: as, if he pleads *duress*, within age, &c. he cannot conclude *et sic non est factum.* *Kit.* 220. a. b.

If a plea concludes with *et sic*, &c. in the affirmative, this does not waive the special matter. *Co. Lit.* 303. b.

As, if he pleads specially that *A.* was born between *B.* and his wife before their marriage, *et sic* a bastard. *Pl. Com.* 14. b.

In *formedon*, if the tenant pleads *ne dona*, to which the plaintiff replies, recovery in value by reason of a warrantry, *et issint dona.* *Pl. Com.* 15. a.

So, if he pleads special matter, and concludes with (*et sic*) on the general issue, this does not waive the special matter; as, if he pleads *unlearned*, and read in other form, &c. *Et sic non est factum.* *Ibid.*

But generally, where the conclusion (*et sic*) goes to the point of the writ or action, the special matter is waived. *Co. Lit.* 303. b.

Or, if a plea concludes with (*et sic*) in the negative. *Co. Lit.* 303. b. *Pl. Com.* 15. a.

(E 31.) *Quæ est eadem.*] So, in trespass, if the defendant justifies the trespass in another place, or at another day, he ought to conclude *which is the same trespass.* *R.* 1 *Bul.* 138. 9 *H.* 6. 30. a.

So, in conspiracy, if the defendant justifies, he ought to conclude that it is the same conspiracy. *Kit.* 237. b.



So, in an action for an escape in *London*, if the defendant justifies by a re-taking on fresh suit in *Surry*, which is the same escape, it is good. *Latch*, 201.

So, in *quare impedit* on an avoidance by deprivation, if the defendant pleads a deprivation, after which the church lapsed, &c. he ought to conclude, *which is the same deprivation*. *Dy.* 293. a.

So, in trespass and imprisonment till he paid 10s. if the defendant justifies till payment of 11s. *Skin.* 664.

If the defendant justifies in another place and says, *which is the same*, &c. it will be good, where the place is not material, without a traverse. *R. Cro. El.* 667.

And if the defendant justifies upon another day, and concludes *which is the same*, &c. when the day is not material, it is good without a traverse of the day. *R. 1 Lev.* 241. *R. Cro. Car.* 228. *R. Lut.* 1457. *Semb.* 2 *Jon.* 146. *R. Sal.* 641.

And, if he adds a traverse, which is defective, it does not prejudice. *Sal.* 641, 2.

But, if he justifies at the same day, and in the same place, he need not say *which is the same*. *R. Skin.* 387.

So, if the defendant does not justify the trespass, but only excuses himself, he ought not to say *which is the same*.

So, in trespass for false imprisonment, if the defendant pleads that he brought the plaintiff to S. with his consent, he cannot say *which is the same imprisonment*; for it is no imprisonment if it be not against his will. *Kit.* 237. a.

Or, if he pleads that he advised A., being in fear of his life from the plaintiff, to go to a justice of peace for a warrant, and by such warrant he was arrested, he cannot say *which is the same*, &c. for he was not imprisoned by the defendant, but by A. *R. 12 H.* 7. 14. b.

So if the defendant, in debt upon a bond, pleads *per minas*, if the plaintiff replies that he said, *if the defendant would not give him a bond for the rent due he would sue him*; he ought not to say, *which is the same menace*; for it is not a menace, but lawful. *Kit.* 237. b.

So, in maintenance, if the defendant says that he feed counsel, he cannot say, *which is the same*, &c. for this is no maintenance. *Ibid.*

So, in trespass for an assault, battery, and wounding, if the defendant justifies a taking by a warrant, *which is the same assault, battery and wounding*, it is not good; for this does not go to the wounding. *21 H.* 7. 39. *Vide post.* (3 M 15.)

In trespass for an assault and imprisonment, it is not sufficient to say that the defendant shewed the plaintiff to an officer who had process against him, who thereupon arrested him, without saying that he requested the officer to arrest; for, without such request, it is no confession of the imprisonment. *R. 4. Ed.* 4. 36. a.

In trespass for taking and carrying away his goods, if the defendant justifies a taking in execution and removal, *which is the same*, it is no answer to the carrying away, without saying to what place they were removed, and where left. *R. Lut.* 1486.

So, a plea, which is a general bar, shall conclude to the action generally: as, a fine with proclamations. *R. Dal.* 68.

But

But where the matter of the plea is a bar only by *estoppel*, he ought to rely on the *estoppel*; for it is a special conclusion between the parties; as, if he pleads a collateral warranty. *Dal.* 68.

(E. 32.) When it shall conclude to the Country.

When there is a complete issue between the parties, *viz.* a direct negative and affirmative, the plea shall conclude to the country: as, in *assumpsit*, if the plaintiff declares upon a submission to an award, and that such an award was made, and that the defendant has not performed it; if the defendant pleads, *no such award*, he ought to conclude to the country. *R. 2. Sand.* 337.

So, if the plaintiff alleges that the award was tendred to the parties, &c. and the defendant answers, that it was not tendred *modo et forma*, he ought to conclude to the country. *R. 2. Sand.* 190. *Lut.* 528.

So, in debt on a bond, with a condition to pay all expences, if the defendant pleads that he paid all, and the plaintiff replies, *that he has not paid*, he ought to conclude to the country. *R. Ray.* 98.

So, if the defendant pleads, *plene administravit*, and the plaintiff replies, *assets at the time of the original*, he ought to conclude to the country. *Semb. Lut.* 101. *R. Yel.* 137.

So, if the plaintiff in an *audita querela* alleges tender at the day, and no one ready to receive, and the defendant pleads, *ready*, and traverses the tender, it is bad; for he ought to conclude to the country; for he should have been ready to receive at the day, whether it was tendred or not. *R. 2 Cro.* 14.

Tho' the payment by a defeasance ought to be to a stranger. *2 Cro.* 14.

So, in trover for selling a chain of gold, and converting the money to his own use, if the defendant pleads *non vendidit*. *R. 1 And.* 20.

So, in *assumpsit*, for payment of money at such a day, if he pleads *solvit ad diem*. *R. Sal.* 516.

So, in covenant, if the plaintiff assigns the breach, *quod non solvit*, &c. and the defendant pleads, *quod solvit*. *R. Carth.* 88.

So, he ought to conclude to the country, tho' matter of record be mentioned in the plea: as, if it be alleged that the plaintiff procured letters patent, and he says that he did not procure; for the procurement is the principal thing. *R. 3 Mod.* 79.

[Plea of bankruptcy ought to conclude to the country. *Gery v. Bayley, M. 7 G. Miles v. Williams, Fuller v. Byng, C. B. T. 3 G. Fort.* 334. *Barnes* 330.]

[If to covenant by an executor, defendant pleads another executor, who has proved, administered, and is living, plaintiff's replication shall conclude to the country. *Wilkins v. Brown, H. 18 G. 2, Str.* 1220.]

[Bond that *M.* on thirty days' demand in writing, should account and pay; breach assigned, that *A.* did not account in thirty days after demand in writing; pleas, 1st. no demand; 2d. (protesting no demand, &c.) that *A.* did account and pay; replication, that a demand in writing was made on a day, (naming it,) and no account by *A.*; this concludes well to the country. *Trapaud v. Mercer, T. 33 & 34 G. 2. 2 B. M.* 1022.]

[As, a replication denying the whole substance of a plea of the *stat. 23 H. 6. c. 9.* ought to conclude to the country; and if it con-



cludes with a verification, it is bad on special demurrer. *Boyce v. Whitaker, B. R. H. 19 G. 3. Doug. 94.*

So, if the defendant pleads a fact merely in the negative, he ought to conclude to the country; for a negative cannot be averred.

So, if a plea concludes with a special negative to the affirmative in the declaration: as, in debt on a bond, if he pleads a special *non est factum*, as, a delivery as an escrow. *R. 1. Sal. 274.*

But when a plea may have an answer to it, it shall not conclude to the country: as, if the defendant pleads the statute of limitations, and the plaintiff shews another original sued out, he shall not conclude to the country; for he cannot take away the defendant's liberty of answering it. *R. Lut. 101. R. 4 Mod. 376. Vide Action upon Assumpsit, (H 7.)*

If the defendant pleads *alien enemy*, and the plaintiff replies, *born at London and no alien.* *R. 4 Mod. 285.*

If plaintiff replies, *not an attorney*, he must not conclude to the country. *Barkerv. Orest, M. 9 G. Str. 532.*

So, where there is not a direct negative and affirmative, he need not conclude to the country; as, if an avowant says an office was granted to such person or persons as the bishop pleased, and the plaintiff replies in bar, that it was granted only to one. *R. 10. Co. 59.*

If the plaintiff says that the defendant received 20*l.* for which he did not account, the defendant pleads that he accounted *modo sequen. viz.* that he was robbed of it, and gave notice to the plaintiff. *R. 2. Lev. 5.*

And if a plea does not conclude to the country when it ought, it is error. *R. Yel. 58.*

Also, if a plea does not conclude to the country when it ought, it is bad on a general demurrer. *R. 2 Sand. 190. Semb. Ray. 94. 98. R. Cro. Car. 164. R. Sho. 70.*

Yet it was shewn for cause of demurrer. *2 Sand. 337.*

And it seems to be only form, and not bad on a general demurrer. *Per Hale, 1 Vent. 240.*

But it is bad on a special demurrer. *R. Lut. 21.*

So, if a plea concludes to the country, when it ought not, it is bad. *R. on a general demurrer. Lut. 101. 1272. R. 1 Sid. 215.*

Yet, if the other party joins issue, and a verdict is obtained, it is aided by the *jt.* *32 H. 8. R. 2 Cro. 580. 589. R. Cro. Car. 317. R. 1 Sid. 341.*

(E 33.) When it shall be averred.

All pleas in the affirmative ought to be averred by *et hoc paratus est verificare.* *Co. Lit. 303. a.*

So, ought a replication. *Cro. El. 256.*

So, pleas in abatement. *R. 1 Vent. 264. R. Lut. 1466.*

So, a plea to an *English* bill in the *Exchequer.* *Hard. 160.*

So, a traverse of a particular matter *absque hoc, &c.* ought to conclude with an averment, *et hoc paratus est verificare.* *1 Sal. 4 R. 5 Mod. 203. F. g. 130.*

Yet, where *absque hoc* comprises all the matter of the plea, as *absque tali causa* does, it may conclude to the country. *R. 1 Sal. 4.*

[If a writ is pleaded, it shall conclude, *et hoc parat. est verificare.* *Baxter v. Douglas, H. 8 G. For. 334.* [So,

[So, if defendant in *indeb. assump.* pleads *infra stat.* *Croft v. Bevan*, M. 13 G. Fort. 334.]

[If a person charged as occupier of the goods of a debtor to the crown, pleads that he is not occupier, he must conclude with *et hoc parat*, &c. *Bunb.* 331.]

[If plaintiff in his replication discloses new matter, the rejoinder must answer it, and conclude with averment. Thus, debt on bond, conditioned that *A.* should not run away during his apprenticeship; plea, *A.* did not run away; replication, *A.* was bound for seven years, and did run away before the end of them; rejoinder, *A.* was bound for five only; it must conclude with averment. *Long v. Jackson*, M. 27 G. 2. 2 *Wils.* 8.]

[If on *scire facias* against bail, defendant pleads principal died before return of any *ca. sa.* against him; replication, *ca. sa.* returned, and he then living, must conclude with averment. If it concludes to the country, by denying his death, or with a traverse, it is bad; for it deprives defendant of right to rejoin; no *ca. sa.* And where either party introduces new matter, (as here the *ca. sa.*) the other must have an opportunity of answering it. *Filewood v. Popplewell*, P. 30 G. 2. 2 *Wils.* 61. 65.]

[If, to an action by a sheriff against a bailiff's surety, on a bond for the performance of an indenture of covenant, to execute all warrants, and to pay over all money received by him, a plea of performance generally be put in; and the replication state a particular warrant, to the said bailiff, and that he neglected to return it, the plaintiff must conclude with an averment. *Cowp.* 575.]

[So, if to a *sci. fa.* against bail the defendants plead that the principal died before the return of any *ca. sa.* and the replication state a particular *ca. sa.* and that the principal was alive at the return of that *ca. sa.* it ought to conclude with an averment. *Doug.* 58. 2 *T. R.* 576.]

[And it is a general rule that wherever new matter is introduced, the plea; &c. must conclude with an averment, because the other party must have an opportunity of answering it. *Doug.* 60. 2 *T. R.* 576.]

[It is also a general rule that where the plaintiff selects one out of several facts in the plea, he may traverse that one and conclude with a verification: but where a replication denies the whole substance of the plea, the conclusion may be to the country. *Doug.* 436. 2 *T. R.* 439.]

[Yet there are exceptions introduced by practice, where the conclusion is good either way. *Ibid.*]

[If the plea is, that *A.* did pay all he received, and the replication narrows it to a particular sum, that he did receive 1400*l.* which he did not pay, it shall conclude with averment. *Cornwallis v. Savery*, P. 32 G. 2. 2 *B. M.* 772.]

But pleas in the negative need not be averred. *Co. Lit.* 303. a.

As, in *assumpsit* by an attorney for fees, if the defendant pleads, *no bill delivered under his hand* pursuant to the statute 3 *Jac.* there is no need of an averment. *R. Sho.* 338.

So, to a *scire facias* upon a recognizance against bail, if the defendant pleads that the judgment is pending and not determined, he need not say *prout patet per recordum*. *R. Sali* 520.

So, an avowry need not be averred; for it is in the nature of a count. *Co. Lit.* 303. a. *R. Pl. Com.* 342. a. 163. a. *Vide ante*, (C 51.)



So, the general issue need not be averred; for it is not traversable, but the plaintiff ought to join issue or demur. *Kit. 219. b.*

So, a challenge of an array need not be averred. *27 H. 8. 13. b.*

So, a demurrer need not be averred, *et hoc paratus*. *R. 1 Leo. 24.*

[Nul tiel record need not be averred. *Obin v. Knatt, M. 9 G. 2. Fort. 339.*]

[If defendant in trespass for taking trees, justifies under a licence and avers the trees were used for gates, &c. and replication traverses the licence, protesting the trees were not used for gates, it may conclude to the country, and not with averment. *Robinson v. Raley, P. 30 G. 2. 1 B. M. 316.*]

Default or omission of an averment in the conclusion of a plea, is but form, and does not prejudice on a general demurrer. *R. Lut. 16. Cont. Jon. 406. R. cont. Lut. 1466. Semb. acc. 1 Vent. 240. R. acc. Skin. 340.*

And now, by the *st. 4 & 5 Ann. 16.* no exception shall be taken for want of averment by *et hoc paratus est verificare*, unless shewn for cause of demurrer.

But it is bad on a special demurrer. *R. Lut. 21.*

#### (E 34.) Must be triable.

Every plea ought to be triable. *Co. Lit. 303. b.*

And therefore must consist of matter of law, which is determinable by the court; or matter of record, which is triable by the record; or matter of fact, which is triable by the country. *9 Co. 24. b.*

And if fact is complicated with matter of law, so that it cannot be tried by the court, or jury, the plea is bad: as, if the defendant pleads that *A. licite gavissus fuit bona felon.*, it will be bad, for the jury cannot determine whether he lawfully enjoyed, nor the court whether he enjoyed. *R. 9 Co. 25. a.*

[And therefore, that defendant was always ready to pay, (without pleading tender,) is bad. *French v. Watson, T. 30 & 31 G. 2. 2 Wilf. 74.*]

So, if the condition of a bond be, that he will shew a sufficient discharge of an annuity, it is bad, if he pleads that he shewed a sufficient discharge; for the jury cannot try whether it is sufficient, but he ought to shew what discharge he gave, and the court will judge whether it be sufficient. *9 Co. 25. a.*

But where the effect of the words represents a matter triable, it is sufficient, tho' according to the letter it is not triable: as, in covenant for enjoyment free from arrears of rent: plea, that he delivered money to the plaintiff *ea intentione* that he should discharge the arrears, will be good, tho' the intent is not triable; for it is *tantum* as if he had said that he delivered *ad solvendum*. *R. 4 Mod. 249.*

#### (E 35.) Form of Pleading.

(E 35.) *When several defendants, &c.* If there are several defendants, they may join in a plea. *Sal. 456.*

Or, may plead severally. *Ibid.*

If they sever in plea, the plaintiff may enter a *non pros* against one, at any time before the record is sent down to the assizes. *R. Sal. 457.*

[In *assumpsit*, if defendants sever in pleading; one pleads to issue, and

and there is judgment against him; the other pleads bankruptcy, and plaintiff enters *nolle prosequi*: this does not destroy the action against the first. *Noke v. Ingham*, P. 18 G. 2. *Wilf.* 89.]

If the defendants join in the plea, and it is in the singular number, it will be bad. *R. Lut.* 1531.

And this on a general as well as a special demurrer. *Semb. Lut.* 1531.

If the defendants plead severally, the plaintiff may demur to one and join issue on the other. *Cro. Car.* 243.

And may afterwards enter a *nolle prosequi* on the demurrer, and proceed on the other. *Ibid.*

Or, if several issues are joined, he may enter a *nolle prosequi* as to one, before judgment or after. *Ibid.*

Tho' they are charged jointly. *Ibid.*

If the defendant pleads to a general demand or charge he ought to answer to every part: as, in waste for cutting down twenty oaks, the defendant ought to say that he did not cut down them or any of them. *Cro. El.* 84.

But if a collateral issue be tendred, it is sufficient to answer in the words of the plaintiff: as, in account, if the plaintiff charges that the defendant received 100*l.* *ad computandum*, and the defendant says that he expended the said 100*l.* it is sufficient to say that he did not expend the 100*l.* without saying *nec aliquem partem inde*, tho' if he expended part he ought to be allowed it. *Ibid.*

[In trespass against two, if one suffers judgment to go by default, and the other justifies for a distress for rent, and licence from the plaintiff to sell, and a verdict for defendant, judgment shall be arrested as against the other. *Biggs v. Bonger*, M. 11 G. 2. *Ld. Raym.* 1372. *Str.* 610.]

(E 36.) Plea bad in Part is bad for the Whole.

If an entire plea is bad in part, it is bad for the whole: as, in trespass if the defendant justifies, as servant to B., his entry to take care of the cattle there, and does not say that he put the cattle there, this is a good justification of his entry, but is not a justification with cattle, for if he did not put them there, he is not guilty, and then he cannot justify; and the plea being bad in part is bad for the whole. *R. 1 Sand.* 28. *Vide post.* (F 25.)

In assumpsit on several promises, if the defendant pleads the statute of limitations, which is a bad plea as to one count, where the action does not arise upon the promise, but not as to the other count, it will be bad for the whole. *R. 1 Lev.* 48.

In debt against an executor or administrator, if the defendant pleads several judgments and *no assets ultra*; if the plea is bad as to one of the judgments, it will be bad for the whole: as, if one of the judgments was against the testator and B., and he does not shew that the testator survived, for otherwise he shall not be charged with it. *R. 2 Sand.* 50.

In covenant and several breaches, if defendant pleads *outlawry* in bar, which is a bar for one breach, and not for the others, it will be bad for the whole. *R. Lut.* 515.

If an attorney puts in court a plea notoriously false for delay, it will be a breach of his oath, for which he may be fined. *Sal.* 515.



But an attorney is not bound to swear his plea, but where it is a foreign plea. *Sal. 515.*

(E 37.) When it shall be aided.

(E 37.) *By the replication.*] A bad bar may be aided by a replication: as, if the defendant in assize pleads a feoffment upon condition, and entry for the condition broken, without shewing the deed, as he ought; if the plaintiff replies, that after the feoffment and entry he re-enscoffed him, this confession in the replication aids the defect in the bar. *Pl. Com. 230. b. Vide antea (C 85.)*

So, if the plaintiff replies, that before entry the defendant released to him. *Ibid.*

So, in debt on a bond to make an estate to *A.*, if the defendant pleads that he enscoffed another to the use of *A.*, which is not good without shewing that *A.* was a party or had the deed. *Sc.* yet if the plaintiff replies, that he did not enscoff, this aids the bar. *R. Cro. El. 825.*

So, if on a bond to accept a lease on request, the defendant pleads *non requisivit*, the plaintiff replies that he tendred a lease without saying of what lands, and issue is joined on the request, this aids the defect in the replication. *R. Cro. Car. 560.*

So, if the defendant pleads an award, *Sc.* uncertainly, and the plaintiff makes a replication, which imports the award, *Sc.* to have been made, it aids the uncertainty of the bar. *Vide Kit. 238.*

So, if the defendant pleads a judgment without saying *prout patet per recordum*, and the plaintiff by his replication says the judgment is fraudulent. *R. 3 Lev. 311.*

So, if the plaintiff by his replication shews that he has no cause of action, there shall be judgment for the defendant, tho' the bar is defective; for the court will judge on the whole record: as, in escape at *London*, the defendant pleads a retaking upon fresh suit at *Stoke*, the plaintiff replies that he was out of his view before the retaking; this admits the retaking on fresh suit, and then he shall not have an action for an escape; tho' retaking at another place would be a bad plea on a demurrer. *R. 3 Co. 52. b.*

But a bar, which wants substance, cannot be aided by a replication. *D. 8 Co. 120. b.*

As, if the defendant pleads an agreement, and does not shew a satisfaction, if the replication denies the agreement, this does not aid the bar. *Kit. 237. b.*

[On demurrer, the court looks for the first fault; therefore, if to debt on bond defendant pleads payment before the day, it is not made good by plaintiff's replying and tending issue. *Anon. H. 3 G. 2 Wilf. 150.*]

(E 38.) *By verdict.*] So, a bad bar or replication cannot be aided by a verdict: as, if the defendant prescribes for a common and justifies *utend. communia prædicta*, but does not shew that the cattle were *levant and couchant*, or put therein at a proper time; this shall be intended after a verdict for the prescription. *R. Cro. El. (458.) R. 2 Cro. 44. Vide antea (C 87.)*

[In prescribing for common as appurtenant to a *messuage*, it shall be understood,

understood, after a verdict, that land was included in the term mes-  
suage. *Scholes v. Hargreaves*, B. R. M. 33 Geo. 3. 5 T. R. 46.]

If the defendant justifies as assignee of a reversion for rent in arrears,  
and issue is upon *nothing in arrears*, and it is found for the defect of  
attornment to the grant in reversion shall be aided. R. 2 Lev. 234.

So, if the defendant pleads an insufficient plea, whereon issue is  
joined, and a verdict for the plaintiff, no advantage shall be taken  
by the defendant of his bad pleading. R. 5 Mod. 227. *Vide Amendment* (P).

[So, in replevin, a plea of prescription for common in a *que estate*  
is good after verdict, tho' it be not in *express* terms alleged that the  
owners of the estate have used it from time immemorial. *Clark v.*  
*King*, B. R. R. 29 Geo. 3. 3 T. R. 147.]

(E. 39.) By the statute of jeofails. By the 8 H. 6. r. 1. mispri-  
sion of a clerk, and after verdict by the 32 H. 8. 30. mispleading,  
lack of colour, insufficient pleading or other default of the party, and  
by the 16 & 17 Car. 2. 8. defect in form, mistake of name, term,  
or time, or other matter of like nature, not being against the right of  
the suit or whereby issue or trial is altered, shall be amended. *Vide*  
*Amendment* (K. 2.—L. 2.—M.).

[But no substance is within any of the statutes of jeofails. By *Bul-*  
*ler J. Ward v. Honeywood*, B. R. H. 10 Geo. 3. 10 Dougl. 63.]

What shall be a misprison or defect in form, *vide Amendment*,  
(T. 1, &c.—W.).

After a plea delivered, and before entry on the record, it may be  
amended on notice and payment of costs. *Pr. Reg.* 19. *Salk.* 520.

Tho' it be three times after. *Pr. Reg.* 408.

So, a defendant before issue or demurrer may waive a special plea,  
and take the general issue. *Salk.* 515.

Not, after a rule to plead peremptorily or demurrer to his plea.  
*Ibid.*

And there shall not be a rule for a peremptory plea till the rules  
are expired. *Salk.* 516.

[If defendant pleads *nil debet* to debt on bond for performance of  
covenants, the court will permit him to waive his plea after joinder  
in demurrer, and to plead performance, on putting plaintiff in as  
good condition as if he had pleaded right at first. *Herbert v. Grif-*  
*fiths*, H. 16 G. 2. *Str.* 1181.]

So, if a declaration be amended after a plea, the plea may be al-  
tered. *Pr. Reg.* 409.

So, a plea may be waived by the consent of the plaintiff's attorney,  
without motion. *Pr. Reg.* 423.

Or, if the attorney will not consent, by rule of court on motion,  
if it be no prejudice to the plaintiff. *Ibid.*

But after the plea is entred on record it cannot be amended. *Pr.*  
*Reg.* 415.

(E. 40.) To whom a Plea shall be delivered.

The plea ought to be delivered to the plaintiff's attorney or clerk.  
*C. Att.* 297.

Or, if he is not known, or refuses to accept it, it may be left in  
the prothonotary's office. *C. Att.* 297. *Pr. Reg.* 418.

In



In *C. B.*, if the general issue be pleaded, the defendant's attorney signs the plaintiff's attorney's dogget, who thereupon makes a copy of the issue and delivers it to the defendant's attorney, who pays for the entry and the book. *C. Att.* 40. *Vide post.* (R 11.)

If the plea be special, it must be delivered under the hand of a serjeant or counsel. *C. Att.* 40.

Counsel ought not to sign a frivolous plea. *Sal.* 517.

(E 41.) At what Time.

If the defendant has not an imparlance, he must plead the same term, or within 14 days after. *C. Att.* 295.

Or, at least, if the plaintiff gives a rule to plead, he must plead before the effoin day of the next term. *Mod. Ca.* 22.

So, if there be an imparlance, he must plead within four days after the beginning of the next term.

[Declaration *de bene esse* is necessary to take advantage of the term, if the writ is of the first or second return, where defendant is to plead without imparlance, but not otherwise. *Barnes*, 91.]

If a declaration be delivered before the effoin-day of the term after the process is returnable, and rule given the next term, he must appear and plead before the rule expires.

So, he has the whole term to plead in abatement. *Sal.* 515.

[Every plea in abatement must be pleaded, before the rule for pleading is out, and cannot be pleaded after an imparlance, unless the declaration be delivered so late in term that the defendant is not bound to plead to it in that term, or be delivered after term; in both which cases the defendant may, within four days inclusive of the subsequent term, plead any plea in abatement, as of the preceding term. By *Buller J. Jennings v. Webb*, *B. R. T.* 26 *Geo.* 3. 1 *T. R.* 278.]

[The four days allowed for pleading in abatement are both inclusive. *Ibid.*]

[If declaration is delivered without notice to plead, and afterwards notice in writing is given to defendant (living above 40 miles from London) to plead in eight days, it is good, *Anon. H.* 2 *G.* 3. 2 *Wils.* 137.]

[In country causes, defendant living above 20 miles from London, has eight days to plead. *Barnes*, 244.]

If a declaration be delivered to a defendant in prison upon the 4<sup>th</sup> & 5<sup>th</sup> *W. & M.* 21. before *Mens. Pasch.* or *Craft. Animar.*, in London or *Middlesex*, or 40 miles' distance, he must plead two days before the effoin day of the next term. *Vide ante*, (B 5.—C 4.)

If farther distant, he may imparl to the next term. *Vide ante*, (D 2.)

If the defendant appears upon a *habeas corpus* returnable immediately, in *Hilary* or *Trinity* term, and the declaration be delivered eight days before the end of the term, the defendant shall plead the same term, so that it may be entered. *Pr. Reg.* 70. 406.

If in *Easter* or *Michaelmas* term, and the declaration be delivered before *Mens. Pasch.* or *Craft. Animar.*, the defendant shall plead the same term, so that it may be tried. *Pr. Reg.* 70. *Sal.* 515.

If a declaration be so delivered on a *cepi corpus*, he shall only plead to enter. *Sal.* 515. [If

[If declaration is delivered to a prisoner last day but one of term, he must plead two days before the *essoin* of next term. *Barnes*, 224.]

[Where a defendant (a prisoner) pleads at an earlier time than by the rules of the court he is compellable to do, he must give plaintiff notice of having filed a plea. *Thomas v. Prichard*, B. R. E. 32 Geo. 3. 4 T. R. 664.]

[Where the plea is regular in point of time, no such notice is necessary. *Rusholm v. Chapman*, B. R. M. 34 Geo. 3. 5 T. R. 473.]

If the defendant be an officer of the court, he must plead within eight days after the bill filed and rule given. *Sal.* 517.

And the rule may be given the day of the filing of the bill. *Sal.* 517.

And Sundays, &c. are counted. *Ibid.*

[Sundays are counted, unless they are the first or the last day; if the rule is given on Sunday, it is void; if it expires on Sunday, defendant has all next day to plead. *Anon.* E. 4 G. Str. 86.]

[Sunday is included in matters in *pais*; as, notice of trial; but not in matters in court; as, in pleading. *Prosser v. Winslow*, T. 1722, Bunb. 113.]

And, if there are not eight days within the term, he must plead in four. *Sal.* 517.

[Defendant shall not now be obliged to plead sooner upon a special *capias* by original, than upon a *latitat*; tho' formerly it was otherwise. *Haywys v. Savage*, H. 12 G. Str. 684.]

[Formerly the rules to plead ran for eight days, and the four first only were allowed for pleas in abatement; but pleas in chief were sufficient, if they came in before judgment signed. In *Trin.* 6 G. 2. the time of pleading was shortened to four days, and no provision for any distinction between the two sorts of pleas; but this does not enlarge the time as to pleas in abatement, which must still come in within the four days, and cannot be received after. *Long v. Miller*, T. 16 G. 2. Str. 1192. *Wilf.* 23. *Anderson v. Baddislade*, P. 20 G. 2. Str. 1268.]

[If the plaintiff do not demand a plea, the defendant may plead in bar after the expiration of the four days, but he cannot plead in abatement after the four days, tho' no demand made; and if he does, the plaintiff may sign judgment. 1 T. R. 689.]

[So, he may sign judgment at any time after twenty-four hours from the time of the plea demanded. *Id.* 454.]

[In C. P. the plaintiff may sign judgment at the opening of the office in the afternoon of the day after the time to plead has expired. *Kay v. Whitehead*, C. P. E. 32 Geo. 3. 2 H. Bl. 35.]

[But where a plea in abatement is not merely dilatory, but goes to the merits of the cause, the court will allow the defendant a longer time than the four days to offer such a plea, in the same manner as they will permit a tender after a special imparlance. By *Ld. Kenyon* C. J. *Milner v. Milnes*, B. R. E. 30 Geo. 3. 3 T. R. 632.]

[If *oyer* is not delivered in time, defendant has as many days to plead after the rules are out as he had when he demanded *oyer*. *Powell v. Guy*, T. 12 G. Str. 705.]

[Defendant has as long time to plead after *oyer* given, as he had when *oyer* demanded. *Barnes*, 238.]

[And the party who is to give *oyer* of a deed is allowed two days for



for that purpose, which are both reckoned exclusive. *Page v. Dineen*, B. R. T. 27 Geo. 3. 2 T. R. 40.]

[The court will grant time to plead, if defendant is so ill of a palsy as not to be able to speak or write, on condition that he do nothing to prejudice plaintiff; but, if it continues long, there must be a commission out of Chancery to take him into custody. *Jasper v. Grosvenor*, 1 T. R. 1. B. R. H. 52.]

[On affidavit that defendant does not know plaintiff, and cannot find his attorney, whose name is not on the roll of attorneys, the court will stay proceedings till notice where plaintiff lives; and fixing the rule in the office, good service. *Evans v. Jones*, M. 9 G. 2. B. R. H. 179.]

[If defendant is abroad, and his attorney dead, on notice to bail, court will order that demand of plea in the office shall be sufficient. *Barnes*, 307.]

[The court cannot stay proceedings in debt on bond, because it was agreed not to be made use of but on certain contingencies. *Doliffe v. Langley*, P. 9 G. 2. B. R. H. 240.]

On an information, if the defendant be brought up by a *capias*, he must plead *instante*. R. 3 Mod. 215. *Vide Information*, (D. 5.)

So, if he comes in person, or by recognizance, or is a prisoner. D. 3 Mod. 215.

By the st. 13 Car. 2. a prisoner brought up by *habeas corpus*, and served with a declaration at the bar; and now by the st. 4 & 5 W. & M. 21. and 8 & 9 W. 3. 25. a prisoner served with a declaration in gaol, shall appear and plead; otherwise, on rule given to be out in eight days at least after delivery of the declaration and affidavit of such delivery, plaintiff may sign judgment. *Vide ante*, (C. 4.)

Rule shall not be given, till affidavit filed with the secondary of the time when, and to whom the delivery was.

And judgment shall not be signed before a copy of an affidavit be produced to the prothonotary, and a certificate that there is no appearance entred.

[If a plea be filed before the bail are perfected, it is a nullity, and does not become a good plea by perfecting the bail afterwards. *Venn v. Calvert*, B. R. H. 32 G. 3. 4 T. R. 578. *Vide Cook v. Raven*, 1 T. R. 635. *Smith v. Painter*, 2 T. R. 719.]

[A judge at his chambers, in vacation-time, may make an order that defendant shall plead such plea as he will stand by. *Foster v. Snow*, P. 32 G. 2. 2 B. M. 781.]

[And after a rule to abide by a special plea, or plead such other plea as the defendant will abide by, he can only plead the general issue. 1 T. R. 693.]

[But he may along with the general issue give notice of set off. *Ibid.*]

[If after four days rule is expired, defendant obtains judge's order to plead issuably two days before effoin of next term; and before that pleads tender, and intitles it as of preceding term, it is regular; for it is not after an imparlance, and tender is issuable within the meaning. *Kilwick v. Maidman*, H. 30 G. 2. 1 B. M. 59.]

[After a defendant has obtained an order for time to plead on the terms of pleading issuably, he cannot plead the statute of limitations, or any other plea that does not go to the merits; and if he does, the

court

court will set it aside on motion. 2 T. R. 396. *Rucker v. Hannay*, B. R. H. 29 G. 3. 3 T. R. 124. *contra*.]

[The plea of alien enemy is not a good plea under a judge's order to plead issuable. *Simeon v. Thompson*, B. R. M. 39 Geo. 3. 8 T. R. 71.]

[Thus, a plea of judgment recovered, if not true in fact, is not an issuable plea within the meaning of a rule for time in B. R. 1 Bl. 376. so, *vice versa*, *comme sembler*. and so a judgment in the same court.]

[After an order to plead an issuable plea, tender to part and *non assumpsit* to the residue, is a nullity. *Barnes*, 252.]

[If defendant has time to plead on the common terms, and doth not, and plaintiff thereby loses an assize, judgment signed shall not be set aside on terms. *Barnes*, 254.]

[If defendant obtains judge's order for time to plead, on pleading issuable, and taking short notice for next assizes, and pleads recovery in another court, and plaintiff thereupon signs judgment, tho' the court will set it aside, as the plea is within the letter of the order, yet as it is not within the intent, they will direct that if the record is not produced in proper time, there shall be judgment for plaintiff, and defendant shall take short notice of executing inquiry within the term. *Lowfield v. Jackson*, P. 33 G. 2. 2 Wils. 117.]

[If defendant has time on rule to plead issuable, and pleads a recovery in another court, it shall be set aside with costs on the attorney. *Cave v. Aaron*, M. 10 G. 3. 3 Wils. 33.]

[General performance of covenants, not signed by counsel, is not an issuable plea. *Barnes*, 354.]

[Demurrer is not an issuable rejoinder within an order for time. *Barnes*, 168.]

[Yet a demurrer on the merits is an issuable plea within the meaning of such rule. 2 Bl. 923.]

[If defendant, being under an order to plead issuable, pleads several pleas, one of which is not issuable, the plaintiff may sign judgment as for want of a plea, though the others are issuable pleas. *Waterfall v. Glode*, B. R. E. 29 Geo. 3. 3 T. R. 325.]

(E. 42.) Judgment for Default of a Plea.

When there shall be judgment on default or confession, *vide sup.* (E. 41.)—*post.* (Y. 1, 2.)

[If plaintiff enters appearance, judgment may be signed, without calling for plea. *Barnes*, 249.]

[No demand of a plea is necessary, when the defendant is in the custody of a sheriff. *Wilkinson v. Brown*, B. R. H. 36 G. 3. 6 T. R. 524.]

[Neither is it necessary in cases where the plaintiff sues the defendant in the custody of a sheriff, and the defendant, without notice to the plaintiff, removes himself to a different custody. *Ibid.*]

[A demand of a plea may be made at the time of delivering the declaration. *Edmonton v. Osborne*, B. R. E. 36 G. 3. 6 T. R. 689.]

[Plaintiff cannot sign judgment for want of a plea, without demanding one; though defendant has not taken the declaration out of the office. *White v. Dent*, C. P. M. 39 G. 3. 1 Bos. & Pull. 341.]

[If



[If defendant's attorney has undertaken to appear, judgment may be signed tho' appearance is not actually entred. *Barnes*, 238.]

[If declaration is left in the office before appearance or notice, then appearance, and then notice in another term, and judgment signed next term, it is good; for the declaration is only well delivered from the notice. *Barnes*, 242.]

If the defendant appears and pleads nothing, his attorney may suffer judgment on *non sum informatus*. *Vide post*. (Y 1.)

[If a matter which ought to be pleaded in abatement is pleaded in bar, judgment shall be for plaintiff; as, if defendant, who is sued alone, pleads that it is upon a joint bond. *Watts v. Goodman*, H. 13 G. *Ld. Raym.* 1460.]

[Summons after rule to plead is out, is no stay, and judgment may be signed. *Barnes*, 241. 252. 254: 273.]

[If summons for time is served before judgment can be regularly signed, it shall be set aside on terms. *Barnes*, 265.]

[If defendant has time, on terms of pleading issuably, and puts in a sham demurrer, judgment may be signed; but not if it is a fair demurrer. *Gray v. Ashton*, M. 6 G. 3. 3 B. M. 1788.]

[The defendant cannot put in a special demurrer when he is under terms of pleading issuably. *Berry v. Anderson*, B. R. H. 38 G. 3. 7 T. R. 530.]

[If defendant, when under an order to plead issuably, puts in a plea, which, though informal, goes to the substance of the action, the plaintiff cannot sign judgment as for want of a plea. *Thebussan v. Smith*, B. R. H. 33 G. 3. 5 T. R. 152.]

[A. having privilege of parliament, owes B. a sum of money, for which B. sues him; in consequence of which C. enters into a bond, together with A., conditioned for the payment to B. of such sum as B. shall recover in the action against A., in pursuance of the *stat.* 4 G. 3. c. 33. In that action B. obtains judgment, and puts the bond in suit against C. To the action on the bond, C. being under terms by a judge's order to plead *issuably*, may plead in bar, that a writ of error is depending on the judgment against A. *Curling v. Innes*, C. P. M. 35 G. 3. 2 H. Bl. 372.]

[Or, if he is to rejoin *gratis*, &c. and instead thereof demurs. *Barnes*, 371. 168.]

[If defendant, under order to plead issuably, pleads in abatement, plaintiff may sign judgment without applying to the court. *Barnes*, 263.]

[Judgment may be signed without a new rule, after order for time to plead. *Barnes*, 243.]

[After rule given to plead, plaintiff being staid by injunction, may sign judgment without a new rule. *Barnes*, 238.]

[Judgment shall not be set aside for irregularity in the appearance entred by plaintiff, if defendant had notice of the declaration left in the office, for he should have applied sooner. *Barnes*, 242.]

[If *non. prof.* is signed irregularly, plaintiff may proceed to judgment. *Barnes*, 251.]

If the defendant appears, but does not plead according to the course of the court, there shall be judgment against him by *mili dicit*.

[If

[If defendant dies pending argument, judgment shall be signed *nunc pro tunc*, even tho' plaintiff had delayed himself by joining issue on an immaterial plea. *Barnes*, 255.]

[Judgment signed after defendant's death is good by relation, if roll filed before *effoin* day of next term. *Barnes*, 266, 267, 268. 270.]

But there shall be no judgment against him till a rule to plead, given in the prothonotary's office where the cause is entred, and expired. *C. Att.* 295. *Mod. Ca.* 21.

[If several defendants, and one has no notice of writ or declaration, judgment must be set aside. *Barnes*, 246, 293.]

[Notice of declaration must be dated, and contain the nature of the action. *Barnes*, 291, 295, 299, 409.]

[If the nature of the action is not expressed in notice of declaration, judgment shall be set aside. *Barnes*, 498.]

[Notice of declaration left under the door of the house where defendant had been served, but now empty, good; but put under the latch without knocking, bad. *Barnes*, 278, 403, 411.]

[If notice is not given till after two terms from return of the writ, (tho' declaration was in time,) it is irregular. *Barnes*, 291.]

[If defendant's attorney cannot be found, notice to the party is sufficient. *Barnes*, 307.]

[In bailable action, notice of declaration *de bene esse* is not necessary. *Barnes*, 301.]

[If judgment is entred for want of plea in four days, and there has been no notice of declaration, tho' special bail put in, accepted to, and justified, and afterwards plea of coverture, judgment shall be set aside. *Simmonds v. Shannon*, *M.* 11 G. 3. 3 *Wils.* 147.]

[Judgment was signed on the 2d of November, plaintiff filed common bail on the 3d, and a rule was given to shew cause why the judgment should not be set aside for irregularity. The rule was, however, discharged, upon its being stated by the master to be the constant practice to sign judgments on the 2d of November, before the *effoin* day, in all cases where common bail is filed between the 2d and the 6th of November. *Wansley v. More*, *B. R. M.* 33 G. 3. 5 *T. Rep.* 65.]

[Notice to plead in four days, instead of eight, is bad, though plaintiff stays eight. *Barnes*, 302.]

[Notice to plead *within the first four days of term*, good; and the days inclusive. *Barnes*, 303.]

[If rule to plead before notice of declaration, judgment bad. *Barnes*, 248.]

[Demand of a plea on declaration, not sufficient; it must be in writing after rule given. *Barnes*, 276.]

[In *B. R.* judgment may be signed for want of a plea, at any time after twenty-four hours from the time of the plea demanded. *Dyche v. Burgoyne*, *B. R. M.* 27 G. 3. 1 *T. R.* 454.]

[And this is the rule whether the time for pleading be or be not expired when such demand is made. *Bowles v. Edwards*, *B. R. M.* 31 G. 3. 4 *T. R.* 118.]

[If a plea be demanded on a *Saturday*, the defendant has twenty-four hours to plead, after the demand, exclusive of *Sunday*. *Solomons v. Freeman*, *B. R. H.* 32 G. 3. 4 *T. R.* 557.]

[And



[And a demand of plea before the defendant has appeared, or the plaintiff filed common bail for him, is a nullity. *T. R. 835.*]

[Declaration left before appearance must be marked *de bene esse*, or judgment bad. *Barnes, 257. 310.*]

[Where the declaration, filed in the office before defendant's appearance, was indorsed, filed conditionally, and judgment afterwards signed for want of a plea, the court held it regular, though the notice, served on the defendant, was of a declaration generally. *Cort. v. Jacques, B. R. M. 39 G. 3. 8 T. R. 77.*]

[Writ returnable in *Easter*, judgment signed, and set aside for defective notice in *Trinity*; proper notice in *Michaelmas*, judgment shall be set aside; for the declaration (*i. e.* the notice) is too late. *Barnes, 291.*]

[In real and mixt actions, common rule to plead is not sufficient; there must be a peremptory. *Barnes, 260.*]

And such rule does not expire till four days inclusive are past, and it shall not be given after three days from the end of any term. *C. Att. 295.*

[If process is returnable 15th November, declaration with notice to plead in eight days left in the office 24th November, and defendant does not plead nor file common bail, and plaintiff files common bail, and signs judgment six weeks after, it is well. He might have signed it immediately after the eight days. *Shadwell v. Angel, M. 30 G. 2 B. M. 55.*]

[No proceedings having been had for above a year, the plaintiff, two days before *Hilary Term*, gave notice of his intention to proceed. Two days after the term he served a rule to plead, and the same vacation judgment was signed for want of a plea, which was held to be regular. *Milbourne v. Nixon, B. R. T. 27 G. 3. 2 T. R. 40.*]

[Plea, though with notice of set-off, cannot be delivered in the country. *Barnes, 251.*]

[Plaintiff may sign judgment for want of plea, if tender pleaded, and money not brought in, though defendant has signed *non prof.* for want of replication. *Barnes, 252.*]

[If defendant do not rejoin, the plaintiff may strike out the previous pleadings, and enter judgment as for want of a plea. *Petrie v. Fitzroy, B. R. H. 33 G. 3. 5 T. R. 152.*]

[If *nil debet* pleaded to a promissory note, judgment may be signed. *Barnes, 257.*]

[So, if plea by attorney of another court. *Barnes, 259.*]

[Or, plea in abatement after rule out. *Barnes, 331. Brandon v. Payne, B. R. E. 27 G. 3. 1 T. R. 689.*]

[Tho' no rule to plead had been regularly served. *Ibid.*]

[To an action of debt on bond, the defendant pleaded *solvit ad diem*, and entered it in the general issue book; the plaintiff was thereby enabled to sign judgment as for want of a plea, it being considered as a waiver of the imparlance to which the defendant was entitled. *Lockhart v. Mackreth, B. R. T. 34 G. 3. 5 T. R. 661.*]

[Or, if plea is not delivered in form, though a note on stamp (*I plead nil debet*) was sent. *Barnes, 239.*]

So, if the defendant pleads the general issue, but his attorney refuses payment for the issue delivered. *1 Sal. 5.*

[The plaintiff does not waive his right of signing judgment for not paying the issue money, by giving notice of trial after demanding it. *Jones v. Bryant*, B. R. M. 34 G. 3. 5 T. R. 400.]

[A plaintiff pauper is not entitled to the issue money; and if he sign judgment because the defendant does not pay it, the court will set aside the judgment. *Codron v. Hayman*, B. R. H. 34 G. 3. 5 T. R. 509. *Vide infra*, (M 4.)]

[If declaration is left in the office *de bene esse*, and notice given, defendant must take it out and pay for it, or plaintiff may refuse plea and sign judgment. *Keeling v. Newton*, T. 21 G. 2. 1 Wilf. 173.]

[Judgment may be signed for non-payment of copy of which *oyer* is prayed. *Barnes*, 238.]

So, if the defendant pleads a plea merely void or frivolous. *Semb.* 1 *Sand.* 318.

Or, pleads a matter which would not amount to a justification, if it had been well pleaded. *Mod. Ca.* 10. R. 1 *Sal.* 173.

So, if the defendant justifies in trespass by a void warrant, and traverses the taking in the place alleged; after a verdict for the plaintiff, there shall be judgment for him upon the confession, and a writ of inquiry shall issue; for it cannot be on the verdict, where the issue was immaterial. R. 1 *Sal.* 173.

But where the defendant pleads a defective plea, there shall be judgment against him upon the plea, and not upon *nihil dicit*: as, if A. pleads to debt upon a bond payment at such a day, (which was after the day limited by the bond,) tho' he confesses no payment within the time, yet the judgment shall be on the plea, for it is not an express confession. R. *Cro. El.* 823.

So, if A. pleads that B. *dicit*, &c. yet being entred as a plea, tho' it was but as a tale of B.'s, the judgment shall be on the plea, and not on *nihil dicit*. R. *Yel.* 38.

So, if the defendant pleads a thing which would have been a good justification. *Mod. Ca.* 10. R. 1 *Sal.* 173.

If the plaintiff, when the declaration is delivered, underwrites that the defendant shall not be required to plead, till a deed, will, or letters of administration shewn, there shall not be judgment for want of a plea, till they are shewn. C. *Att.* 296.

[If agent gives time, the country attorney cannot sign judgment till it is out. *Barnes*, 256.]

So, the defendant need not plead till *oyer* of the condition, *deced*, &c. and a copy thereof delivered. P. *Reg.* 417.

[Judgment shall be set aside, if perfect *oyer* has not been given. *Barnes*, 363.]

[If defendant having had time to plead, pleading an issuable plea, pleads a bad plea, (as *nil debet*, to *case* on a promissory note,) it is not a breach of the order, for it will be good after verdict, or plaintiff may have judgment on demurrer. *Baily v. Edwards*, M. 9 G. 2. B. R. H. 179.]

[Judgment cannot be signed till summons to shew cause why time, &c. is discharged, tho' defendant's attorney did not attend. *Barnes*, 240. 255.]

[On order for two days' time, judgment cannot be signed till the third day in the afternoon. *Barnes*, 266.]



[Time to plead under a judge's order is reckoned *inclusive* of the day of the date of the order, but *exclusive* of the day on which it expires. *Kay v. Whitehead*, C. P. E. 32 Geo. 3. 2 H. Bl. 35.]

[Tho' a rule to plead expire on a *dies non juridicus*, *ex. gr.* the purification, the defendant is bound to plead on or before that day; and if he do not, judgment may be signed against him on the next day. *Mesure v. Britten*, C. P. H. 36 Geo. 3. 2 H. Bl. 616.]

[On a rule to plead by a particular day, that day is construed to continue till the office open next morning. *Oxley v. Bridge*, B. R. H. 19 Geo. 3. Dougl. 67.]

[On a rule to plead, &c. in four days, if the defendant delay till the morning of the 5th day, the plaintiff may sign judgment. *Hafelar v. Ansell*, B. R. T. 19 Geo. 3. Dougl. 197.]

[On a rule to plead, reply, &c. in four days, if the party on whom the rule is made delay complying with it till the morning of the 5th day, the adverse party may refuse to receive it, and sign judgment. *Thomson v. Ryall*, B. R. H. 31 Geo. 3. 4 T. R. 195.]

[If time to plead be granted to a defendant, who is then dead, (unknown to attornies,) and at the expiration of the time judgment is signed, it shall be set aside. *Sibbet v. Ruffel*, M. 9 G. 2. B. R. H. 183.]

[If defendant dies after the rule to plead is out, but before time given by judge's order is expired, the suit abates; and interlocutory judgment, and all proceedings thereon, shall be set aside as irregular. *Wallup v. Irwin*, H. 25 G. 2. 1 Wilf. 315.]

[Where bail is filed, plea must be demanded in writing, tho' notice to plead be on the back of the declaration, otherwise judgment will be set aside with costs. *Nott v. Oldfield*, T. 19 & 20 G. 2. 1 Wilf. 134.]

[If defendant has time to plead on the usual terms of pleading an *issuable* plea, &c. and pleads 23 H. 6. c. 10. (against sheriff's taking bonds *colore officii*, &c.) and that this bond was taken for ease and favour, &c.—it is within the order; and judgment signed for want, &c. shall be set aside with costs. *Dearden v. Holden*, P. 31 G. 2. 1 B. M. 605.]

[Judgment because defendant pleads in abatement, without taking out the declaration, is irregular. *Barnes*, 250.]

[Judgment cannot be signed for want of new plea after declaration amended; defendant need not plead *de novo*. *Barnes*, 273.]

[The rule to plead to an amended declaration is a four day rule. *Barton v. Moore*, B. R. M. 39 Geo. 3. 8 T. R. 87.]

[Judgment on a declaration, intituled of a wrong term, is void. *Barnes*, 274.]

[If outlawry is pleaded in bar, and not as a dilatory, judgment signed because it is not *sub pede sigilli*, shall be set aside. *Barnes*, 241.]

So, judgment shall not be entred, if a plea be delivered at any time after the rule expired. *Pr. Reg.* 406.

So, if an action has depended four terms without prosecution, there shall not be judgment without a term's notice given to plead. *Pr. Reg.* 411.

So, after judgment, if the plaintiff's attorney consents to waive it, he shall be bound so to do, tho' his client refuses. 1 Sal. 86.

[Judgment

[Judgment signed by mistake may be waived, and new rule and judgment, without leave. *Barnes*, 251.]

So, if judgment be signed for want of a plea, and the defendant offers an issuable or fair plea without delay, it shall be discharged on payment of costs. *Sal.* 518.

[The court will set aside a regular judgment on affidavit of merits, tho' bankruptcy is intended to be pleaded. *Evans v. Gill*, C. P. T. 37 Geo. 3. 1 *Bos. & Pul. Rep.* 52.]

[The court will not set aside a judgment, so as to allow the defendant to plead the statute of limitations. *Willett v. Atterton*, B. R. T. 22 Geo. 2. 1 *Bl.* 35.]

[Judgments are frequently set aside on costs, pleading issuably, and taking short notice. *Barnes*, 242, 243. 250. 253. 256. 260. 271. 303.]

[Motion to set judgment aside ten days after signing, too late. *Barnes*, 247.]

[If judgment is signed because coverture is *improperly* pleaded, it shall be set aside. *Barnes*, 246.]

[If several pleas, and issue joined on some, judgment by default cannot be entered in the other till those are tried. *Barnes*, 269.]

[Judgment cannot be signed against casual ejector for want of plea in form, if tenants have appeared, entered into common rule, and sent note of not guilty, unless new declaration against tenants had been delivered. *Barnes*, 270.]

[There must be the same notice and time to plead on declaration after exigent superseded as after any other process. *Barnes*, 271.]

[On issue joined on *nul tiel record*, rule for judgment, if final, must be unless cause in four days; if interlocutory, four days not necessary. In proceedings by original, a general return day is given to bring in record, and defendant is called at rising of court; if he fails, rule unless cause on the appearance day, and record may then be brought in; but by bill against attorney, the day given is a day certain, and record cannot be brought in after, and at rising of court they will appoint the day for judgment *nisi*. *Barnes*, 265.]

[Motion to stay proceedings for irregularity in process, or notice of it, must be before judgment. *Barnes*, 269. 296.]

[And for irregularity in notice of declaration, two days before inquiry is to be executed. *Barnes*, 255.]

[Copies of process must be annexed to the affidavits to stay proceedings. *Barnes*, 298.]

[If defendant, after having craved *oyer* of a deed, do not set forth the *whole* deed, plaintiff may sign judgment as for want of a plea. *Wallace v. Cumberland*, B. R. T. 31 Geo. 3. 4 T. R. 370.]

## (F) Replication.

(F 1.) To whom it shall be delivered.

**A** Replication is the plaintiff's reply to the defendant's plea, and ought to be delivered to the defendant's attorney. *C. Att.*

40, 41.



## (F 2.) In what Manner.

If the replication be special by traverse or otherwise, it must be under a serjeant's or counsel's hand. *C. Att.* 40.

[Replication of *nul tiel record* must (in *C. B.*) be signed by a serjeant, *R.* (all pleas except general issues *D.*) especially if the plea was signed by a serjeant. *Simson v. Neale*, *T.* 30 & 31 *G.* 2. 2 *Wils.* 74. *Barnes*, 365.]

## (F 3.) At what Time.

If the defendant pleads, the plaintiff must reply in the next term. And if he does not on the day given, he will be nonsuited. *Latch*, 129.

But he cannot be compelled to reply the same term, in which the defendant pleads. *Latch*, 129.

## (F 4.) The Form of a Replication.

The replication ought to answer the whole plea, otherwise it is a discontinuance. 1 *Sand.* 338. *Vide ante*, (E 1.)

[If the plea admits a non-performance by offering an excuse, it is sufficient if the replication meets the plea, and falsifies the excuse, in all cases, (except only an award. *Attorney-General v. Elliston*, *T.* 5 *G.* in *Sc.* *Str.* 191.)]

The replication ought to ascertain the matter to which it replies: as, *assumpsit* on several promises, the defendant pleads *non-age*, the plaintiff replies, that part of the goods were for necessary food, part for clothes; it is bad, if he does not shew what part was for the one or the other. *R. Lut.* 241. [*Vide* 1 *T. R.* 40.]

[To plea of *plene administravit* except 10 *l.* replication praying judgment for the 10 *l.* damages, and "further, that on the day of suing original defendant had goods of testator to the value of the residue of the debt, over and above the 10 *l.*" is good. *Lockyer v. Coward*, *P.* 10 *G.* 3. 3 *Wils.* 52.]

But if there are several pleas, and the plaintiff replies *quoad separabilia placita prædicta*, it is good, tho' he does not make a several replication to every plea in particular. *R.* 1 *Sid.* 39.

And, if the plaintiff by replication shews several matters, and begins his replication *præcludi non quia quoad*, &c. *dicit*, and makes a general conclusion to the whole; yet they are several replications as well as if he had said *quoad*, &c. *præcludi non* to every matter. *R.* 1 *Sand.* 337. *But Sanders semb. cont.*

In *formedon*, if the defendant pleads several fines, the demandant may say that the several fines were without proclamations, and need not reply to every bar particularly. *R. Dy.* 182. *a.*

And if there are several replications, or pleas, and the rejoinder or replication says *quod placitum prædictum*, in the singular number, yet it is good; for it is *verbum collectivum*. *R. cont. Yel.* 65. *R. acc.* 1 *Sand.* 338. *But Sanders semb. cont.*

So, if there are several pleas, and the plaintiff makes one replication to all, it is good: as, *de son tort* to the several pleas. *R.* 1 *Lev.* 124.

Yet,

Yet, a demurrer *quoad separalia placita predict.* A. and B. who plead severally, is bad; for he ought to demur severally. R. 1 Lev. 139.

[In debt on bond to perform articles, the plaintiff cannot reply new matter in the deed, but must set it out upon *oyer*. *Sibbs v. Clough*, M. 6 G. Str. 227.]

[If defendant pleads that the ditches, ways and passages, were so filled with water that he could not carry off his tithes, and plaintiff replies, that the ditches, ways and passages, were not so filled, it is good, tho' in the conjunctive. *South v. Jones*, M. 6 G. Str. 245.]

[It is good if it alleges plaintiff should not be barred from having his action aforesaid, tho' it doth not say, in this court. *Gardiner v. Jessop*, H. 30 G. 2. 2 Wils. 42.]

(F 5.) How it shall conclude.

So, a replication shall conclude with praying debt and damages. R. Cro. El. 256. Adm. 1 Sand. 98.

And therefore a replication, concluding *unde petit judicium* if the plaintiff *ab actione precludi debet*, seems bad on a special demurrer. Ray. 182.

Yet, where the plaintiff prays judgment and his debt, it is sufficient, and damages shall be given as incident. R. 1 Lev. 222.

So, in debt, if the plaintiff prays judgment and damages, omitting the debt, it will be good; for when the court gives judgment, it shall be for the whole. R. upon a special demurrer. 2 Lev. 19.

But a bad conclusion, generally, is only form. D. Hob. 321.

And therefore not praying damages shall be aided on a general demurrer. R. 1 Sand. 98.

[If replication begins wrong, and concludes right, it is good; for the conclusion makes the plea. *Talbot v. Hopwood*, P. 5 G. 2. C. B. Fort. 335.]

[Wherever a traverse is added, there must be an averment. *Baynham v. Matthews*, T. 4 G. 2. Str. 811.]

[Unless it deny the whole substance of the plea, and then it must conclude to the country. Doug. 95. n.]

[In an action on a bill of exchange, if there is a plea of an usurious agreement, and that the bill was given in consequence of such agreement, the plaintiff may traverse the corrupt agreement and conclude with a verification. *Smith v. Dovers*, B. R. T. 20 G. 3. Doug. 428.]

[When the whole of the matter of the plea is denied in the replication, it must conclude to the country; but when a particular fact alleged in the plea is selected and denied, then the replication must conclude with an averment. By Buller J. *Ibid.*]

[If defendant plead to debt on bond that plaintiff won money of him at cards, and that the bond was given for securing payment of it; to which the plaintiff replies, that it was given for the securing the payment of money justly due, and not for securing the payment of money won, the replication may conclude either to the country or with an averment. *Hodges v. Sandon*, B. R. E. 28 Geo. 3. 2 T. R. 439. Vide *Baynham v. Matthews*, B. R. T. 4 Geo. 2. 2 Str. 871. *Robinson v. Rayley*, B. R. E. 30 Geo. 2. 2 B. R. 317. *Sandford v. Rogers*, C. P. H. 33 Geo. 2. 2 Wils. 113.]



(F 6.) Must be conformable to the Count.

So, a rejoinder to the bar. *Vide post.* (H).

The replication ought to be conformable to the count: and therefore in trespasss for a wrongful taking and detaining in prison, if the defendant justifies by process, &c. and the plaintiff replies that a *super-fedeas* afterwards issued, after which he detained him, it will be bad; for by his replication he does not maintain the wrongful taking, but only the detention. *R. Cro. El.* 404.

In trespasss, if the defendant pleads *his freehold*, and the plaintiff replies, *de son tort the defendant committed the trespasss*, but omits the carrying away of the posts in the declaration, it is bad. *R. Lut.* 1402.

Debt for 80*l.* on bond, the defendant pleads that it was given for money won at play; replication that it was not for money won at play, is bad; for he ought to say no part of the money was won at play. *R. 2 Mod. Ca.* 57, 58.

[In false imprisonment on 12 *G.* if defendant pleads process of an inferior court, and plaintiff replies the debt was 5*l.* and no affidavit made of the debt, it is bad; for the case of an affidavit in an inferior court is dropt in the act. *Rycraft v. Calcraft, Fort.* 344.]

(F 7.) *Departure, what shall be. If the replication, &c. does not maintain the declaration, &c.* So, if a replication departs from the declaration, or a rejoinder from the plea, it is bad. *Co. Lit.* 303. *b.*

Departure is, when a replication contains subsequent matter, which does not maintain or fortify the matter in the declaration. *Co. Lit.* 304. *a.*

As, if the defendant in trespasss intitles himself by descent, the plaintiff replies a feoffment by the defendant himself, if the defendant rejoins that the feoffment was upon condition, and he entred for the condition broken, this is a departure. *Pl. Com.* 7. *b.* *Co. Lit.* 304. *a.*

So, if the defendant in covenant pleads performance, generally, and the plaintiff assigns a breach in the not doing of such an act, and the defendant rejoins that he offered to do it, this is a departure; for offer and refusal is not the same as a performance. *Co. Lit.* 304. *a.* *Cro. Car.* 76, 77.

So, if a feoffment by *A.* be pleaded, and the plaintiff replies that *A.* disseised him, and then enfeoffed, and he re-entred, and the defendant rejoins that after the feoffment the plaintiff released, this is a departure; for it is matter subsequent. *Pl. Com.* 105. *b.*

So, in trespasss, if the defendant justifies the distraining a hide for a customary payment, and the plaintiff replies that he tanned the hide after the distress, and the defendant rejoins that it was to prevent its rotting, it is a departure. *R. Cro. El.* 783.

So, in trespasss, if the defendant justifies by a warrant, and the plaintiff replies that after the warrant, (*viz.*) such a day, he did the trespasss, and so varies from the time in the declaration, it is a departure. *R. Cro. Car.* 228. *per two J.* *Cro. Car.* 246. 334. *Vide post.* (F 11.)

So,

So, if he justifies by a deed dated 1 May, and in the rejoinder says it was *primo deliberat. 9 Maii.* R. 3 Lev. 349.

Or, varies in the date of a bond. 1 Sal. 222.

If defendant pleads that the ship went from London to B. without deviation, and from B. to London, but was lost in *voiage predicto*; if the plaintiff shews a deviation to Jamaica, and the defendant says that she was impressed to Jamaica, it will be a departure. R. Skin. 345.

So, in debt on a bond to perform an award, if the defendant pleads *no such award*, and the plaintiff shews the award and assigns a breach, and the defendant rejoins that the award is bad, this is a departure. R. Ray. 94. 1 Sid. 180. R. 2 Rol. 692. l. 40.

So, if the defendant rejoins *that the award was not delivered, &c.* R. 2 Sand. 184. 1 Lev. 300.

Or, *not made of all controversies.* 1 Lev. 127. [R. on Demurrer. *Harding v. Holmes*, H. 19 G. 2. 1 Wilf. 122.]

So, on a bond to indemnify, if the defendant pleads *non damnificatus*, and the plaintiffs, by replication, shew that they are damnified by maintaining his bastard, rejoinder, *that he offered to maintain*, is a departure. R. 2 Sand. 84. Vide 1 Sand. 117.

So, on a bond to perform covenants, which was to make a fence when he cut down the wood, the defendant pleads that he did not cut down any wood, and the plaintiff replies that he cut two acres and did not make a fence, and the defendant rejoins that he made a fence; this is a departure. R. Dy. 253. b.

If a bond be to pay all charges to an attorney for such a suit, and the defendant pleads payment, and the plaintiff shews such a sum not paid, and the defendant rejoins that he had no bill of it, this is a departure. R. Lut. 422.

Or, if the defendant rejoins that the plaintiff did not name a place for the payment of it. R. 2 Mod. 31.

[Debt on bond, with condition to execute the office of overseer singly without plaintiff's assistance; defendant pleads, that he did execute singly without plaintiff's assistance; plaintiff replies, that he did not execute singly without plaintiff's assistance; defendant rejoins that plaintiff voluntarily took on him the office without defendant's request, and that he did it without his request; it is a departure. *White v. Clever*, M. 13 G. Fort. 333. Lord Raymond, 1449.]

If a bond be to perform covenants, and the defendant pleads performance, and a breach being assigned for non-payment of rent, rejoins that he was expelled. R. Ray. 22. 1 Sid. 77.

Or, if he rejoins, that he has paid so much rent and so much for taxes, which makes up the whole demand for rent. R. 1 Sal. 221.

So, in *replevin*, if the defendant avows for *damage feasant* in his freehold, and the plaintiff pleads that he leased to B. for three years, and the defendant replies that B. made a lease to him for part of the years, it is a departure. R. 1 Rol. 387.

[*Replevin* for taking the plaintiff's goods and chattels, to wit, a lime-kiln: avowry for rent, plea in bar that the lime-kiln was affixed to the freehold; and holden bad by the court, because a departure from the declaration. *Niblet v. Smith*, B. R. H. 32 G. 3. 4 T. R. 504.]



In debt on a bond to deliver plate won at a horse race, if it appeared before *A.* in three months that it was not his own horse, the plaintiff averred that it appeared before *A.* within three months that it was not the defendant's own horse, the defendant pleaded that it was his own horse, the plaintiff replied that it appeared to *A.* that it was not, the defendant rejoined that it was, and that it did not appear to *A.* that it was not; this is a departure from the bar. *R. 3 Lev. 241.*

If the defendant by bar prescribes for a park within a forest inclosed *ad voluntatem suam*, and by rejoinder says it was inclosed, so that deer of the forest cannot get in, it will be a departure. *Bridge, 25.*

[If in action on the case on promise defendant pleads infancy, plaintiff replies it was for necessities, and defendant rejoins, an account stated *quodq. superinde prad. quer. exoneravit* defendant; it is a departure. *Hillier v. Plympton, P. 7 G. Str. 422.*]

[If the plea is, no *ca. fa.*, and the rejoinder, *erroneè emanavit*, it is a departure. *Hyder v. Warren, T. 3 & 4 G. M. 13 G. Fort. 333. Ld. Raym. 1449.*]

[So, if to *sci. fa.* on recognizance of bail defendant pleads no *ca. fa.* against principal, replication there was, rejoinder that it did not lie four days in the sheriff's office, is a departure. *Elliot v. Lane, M. 26 G. 2. 1 Wils. 334.*]

[Trespass for impounding plaintiff's mare; plea, *damage feasant* by eating and spoiling the grass; replication, right of common; rejoinder, the mare was mangy, is a departure. *Semb. Palmer v. Stone, T. 32 & 33 G. 2. 2 Wils. 96.*]

[Defendant in his plea justified taking cattle *damage feasant*, and afterwards rejoined that they were taken *surcharging* the common. This was holden to be a departure. *Ellis v. Rowles, C. P. M. 24 Geo. 2. Willes, 638.*]

[If defendant justifies in assault and imprisonment, under a *ca. ad respond.* and plaintiff replies, defendant released him, and afterwards imprisoned him, and prays judgment, because defendant has confessed the trespass; this is naught, and plaintiff should have made a new assignment. *Scott v. Dixon, P. 26 G. 2. 2 Wils. 3.*]

[To an action of debt on a bond, the defendant pleaded in bar the subsequent intermarriage of the obligor and obligee; the plaintiff replied that the bond was made in contemplation of a marriage to be had and solemnized between her and the obligor, and with an intent, that in case the marriage should take effect, and the plaintiff should survive him, the plaintiff should have the full benefit and effect thereof. And the replication was holden good on demurrer. *Milbourn v. Ewart, B. R. M. 34 Geo. 3. 5 T. R. 381.*]

[To an action of debt on a bond to secure an annuity, the defendant pleaded that no *such* memorial was enrolled as is required by the statute; the replication stated that a memorial was enrolled, containing the particulars which the statute directs; the rejoinder alleged, that the memorial in the replication mentioned did not truly set forth the consideration on which the annuity was granted. This was clearly a departure from the plea. *Præd v. Cumberland, B. R. E. 32 Geo. 3. 4 T. R. 585. Ex. Ch. H. 34 Geo. 3. 2 H. Bl. 380.*]

[Debt

[Debt on bond, given by defendant on his marriage, with condition that he would permit his intended wife, either during the marriage, or by will, to dispose of 50*l.* out of his personal estate: plea, that defendant had not prevented his wife disposing of that sum; replication, setting forth a particular disposition of the money by the wife, a request on defendant to pay, and a refusal by him; rejoinder, that defendant had not any personal estate, out of which he could pay the 50*l.*; and holden on demurrer that it was bad, because it was a departure from the plea. *Coffens v. Coffens*, C. P. 11 Geo. 2. *Willes's Rep.* 25.]

(F 8.) *If it maintain a common law claim by a statute.*] So, if the plaintiff in his declaration claims an estate by the common law, and maintains it in his replication by an act of parliament, this is a departure. *Co. Lit.* 304. a.

[In debt on bond by sheriff against his bailiff to pay him 20*d.* for every defendant's name in every warrant in mesne process, defendant pleads he had paid it, plaintiff replies that he had not paid it for *A.*; defendant rejoins *stat.* 23 H. 6. and 3 G. it is a departure; for pleading he had paid, and rejoining he ought not to pay; and for pleading common law plea, and rejoining a statute. *Balantine v. Irwin*, M. 4 G. 2. C. B. *Fort.* 368.]

So, if a man avows, for that *A.* being seised in fee granted to him a rent, and the defendant pleads, *nothing in the tenements at the time of the grant*, and the plaintiff rejoins that *A.* was *cessuy que use* in fee, which use is now executed by the statute of uses; this is a departure. *Pl. Com.* 105. b.

So, if a defendant in trespass pleads a lease for fifty years, and the plaintiff replies, that the lease was void by a statute; a rejoinder, that a proviso in the said statute affirmed it for twenty-one years, is a departure. *R. Pl. Com.* 105. b.

So, in trespass, for impounding his cattle, if the defendant pleads that he impounded pursuant to the statute, and the plaintiff replies that he impounded in another county, it is a departure. *R.* 3 *Lev.* 48.

Or, if the defendant justifies by a distress for rent, and the plaintiff replies that he used and sold them, to which the defendant rejoins, that he sold the distress pursuant to the statute 2 W. & M. it will be a departure; for it should have been so alleged at first. *Semb. Lut.* 1425.

In *formedon* the tenant pleads a fine by tenant in tail, the demandant says, *partes finis nihil habuerunt*; rejoinder, that the tenant in tail was seised of the use, is departure. *Dy.* 291.

To an information for refusing an office, the defendant pleaded, that he was not qualified by not receiving the sacrament within a year; the attorney-general replied, that he ought to have received it; the defendant rejoined, that by the act of toleration, 11 W. & M. he was excused; this is a departure. *R.* 1 *Sal.* 168.

Otherwise, if the statute maintains the declaration. *Vide post.* (F 11.)

(F 9.) *Or, custom.*] So, if he entitles himself by common law, and afterwards maintains it by a custom, it is a departure. *Co. Lit.* 304. a.  
As,



As, if he pleads a feoffment, and the plaintiff replies, *within age*, and the defendant rejoins, that by the custom there an infant of the age of fifteen years may make a feoffment. *D. 3 Leo. 40. Otherwise in Kent. 1 Lev. 81.*

But it is otherwise, if the custom be alleged only in maintenance of the declaration: as, in covenant against an apprentice, if the defendant pleads *within age*, and the plaintiff replies, that by the custom of *London* an infant may bind himself an apprentice, this is no departure. *Semb. Cro. El. 653. Semb. cont. 1 Lev. 81.*

(F 10.) *Or, by matter tantamount.]* So, if the defendant entitles himself to an estate, generally, as, by a feoffment in fee, he cannot maintain it by other matter *tantamount*, as, by lease and release, &c. *Co. Lit. 304. a.*

If he pleads *not guilty*, he cannot by rejoinder say that he was pardoned. *Hob. 271.*

Departure was fatal on a general demurrer.

But now, since the *st. 4 & 5 Ann. 16.* which says, the judges shall give judgment according as the very right of the cause shall appear to them, without regarding any omission or defect in any pleading, there ought to be a special demurrer; for, notwithstanding such departure, the whole matter appears, whereon the court may give judgment. *Per C. B. T. 7 Ann.*

(F 11) *What shall not be a departure.]* But matter which maintains and fortifies the count or bar is not a departure; as, if the tenant in assize pleads a feoffment by *A.* and the demandant replies that *A.* disseised him, and then enfeoffed the tenant, and afterwards he re-entred: rejoinder, that the demandant released to *A.* before his feoffment, is no departure. *Co. Lit. 304. a. Pl. Com. 105. b.*

Otherwise, if the release was after the feoffment. *Vide ante, (F 7.)*

So, if the plaintiff declares on a lease, generally, and the defendant pleads, *nothing in the tenements*, if the plaintiff replies, that the first lease was by indenture, this is no departure. *Semb. Leo. 156. 3 Leo. 203.*

So, if the plaintiff in his declaration shews a charter for discharge of toll, and the defendant pleads a resumption of all liberties by statute, the plaintiff may reply that they are revived by a subsequent statute; and this is no departure. *R. Cro. Car. 257. Tel. 13.*

So, in an action for practising physic, contrary to the charter 10 *H. 8.* confirmed by the *st. 14 H. 8.* if the defendant pleads the *st. 34 H. 8. 8.* it is no departure, if the plaintiff replies that by the *st. 1 Mar. 9.* the charter 10. and *st. 14 H. 8.* were confirmed, notwithstanding any other statute, &c. to the contrary. *R. Cro. Car. 256. R. 2 Cro. 121.*

On an action on a statute, if the defendant pleads that it was repealed, the plaintiff may say that it was revived by another statute. *1 Lev. 81.*

So, if the defendant pleads that it was expired, the plaintiff may say that by another statute it was made perpetual. *Ibid.*

If, in trespass, the defendant justifies for a distress *damage feasant*, the

the plaintiff may say that he afterwards converted to his own use; for this shews the taking to be a trespass *ab initio*. R. 1 Sal. 221.

So, in trespass for taking his horse, if the defendant justifies as a stray, replication, *that he used it*, is no departure. R. 2 Cro. 147.

In waste against a lessee, without saying by indenture, if the defendant says *nil habet in tenementis*, replication, *that he leased by indenture*, is no departure. R. 1 Leo. 156.

So, in debt on bond, if the defendant pleads performance, the plaintiff replies that the covenant was to account for all money received, and that he received such a sum, the defendant rejoins that he was robbed of that sum; this is not a departure. R. 1 Vent. 121. 2 Lev. 5.

[If on bond to indemnify from tonnage due to A., defendant pleads *non damnificat.*, and plaintiff replies that A. distrained for said tonnage, and defendant rejoins that nothing was due to A. for tonnage; it is no departure. *Owen v. Reynolds*, M. 5 & 6 G. 2. Fort. 341.]

[In debt on bond, conditioned that A. shall not run away during his apprenticeship; defendant pleads A. did not run away; replication that A. was bound for seven years, and ran away before the end of them; rejoinder, that it was only for five years; this is not departure, but an explanation or fortification of the bar. *Long v. Jackson*, M. 27 G. 2. 2 Will. 8.]

So, if the plaintiff in his replication varies from his count in a thing not material, it is no departure: as, in *assumpsit*, if he alleges a promise twenty years past, and, when the defendant pleads the statute of limitations, replies, *assumpsit infra sex annos*; for the time of the promise in the declaration was not material. R. 1 Lev. 110. *per three J. Cro. cont. Cro. Car. 334. Vide infra. [Cole v. Hawkins, H. 3 G. Str. 21. Matthews v. Spicer, T. 2 G. 2. Str. 806.]*

[Otherwise, in case of a promissory note. *Stafford v. Forcer*, P. 1 G. *Ibid.*]

[If to *assumpsit* laid on 26th March defendant pleads tender on 2d April, and plaintiff replies that before the tender, *scil.* 12th February, he sued a *lat.*, it is well. *Spicer v. Matthews*, M. 4 G. 2. Judgment of B. R. affirmed in C. Sc. Fort. 375.]

So, if he alleges a promise in the parish and ward of Cheap, and afterwards in his replication says that it was at A. beyond the seas, *viz.* in the parish and ward aforesaid. R. 1 Lev. 143. 1 Sid. 228.

In *assumpsit* by an executor, upon a promise to pay a collateral sum on request, if he alleges *quod licet requisit. per testat.*, and specially requested by the executor, he did not pay, and the defendant alleges that the testator requested, and the action was not brought within six years after, the plaintiff by his replication may say the testator did not request; for *licet requisit. per testat.* in the declaration is not material. R. Hard. 41.

In debt against an administrator generally, if the defendant pleads *no assets by sale of lands*; replication that he has assets is no departure. R. 2 Cro. 140.

So, if defendants sever in plea, the plaintiff may vary from his count, and it will not be a departure: as, in ejectment, supposing an ejectment, supposing an ejection by six defendants, if one pleads

not



not guilty, and the others plead specially, the plaintiff may reply to the others, supposing the ejection by them only. *R. 2 Leo. 199.*

Otherwise, if one makes default or dies, and does not sever himself by plea. *2 Leo. 199.*

So, a departure, when it is of necessity, is no prejudice: as, if a man counts of a gift in tail, he may maintain it by a recovery in value in his replication; for he cannot have another count. *Co. Lit. 304. a.*

In trespass for an assault at *H.*, the defendant pleads *molliter manus imposuit* in removing him off his ground at *A.*, plaintiff replies that he had a way in the ground of the defendant at *A.* &c. it is no departure; for the place is not material, and therefore he may maintain the trespass in another place. *R. Lut. 1437.*

In trespass, 1 *May*, the defendant justifies the same day, the plaintiff may assign trespass on another day, and it will not be a departure; for the day is not material. *Per Holt, 1 Sal. 222. Mod. Caf. 115. 120.*

So, in any personal action, where the time is not material. *R. 1 Sal. 223.*

In replevin in *alta via regia*, the defendant justifies *damage feasant*, the plaintiff replies that he has a way there *tam equestre, quam pedestre*, it is not a departure; for the mention of *via regia* was not material. *R. 1 Sal. 222.*

#### (F 12.) When the Replication shall ascertain the Count.

Where the writ and count are general, the certainty shall be shewn by the replication: as, in assize. *Pl. Com. 84. a.*

So, in *assumpsit*, to give as much as he agreed to give to *A.*, if the defendant says that he did not agree to give any thing to *A.*, the plaintiff by his replication must shew with whom he agreed. *R. Yel. 17.*

So, in *assumpsit*, in consideration that he promised to pay all *A.*'s debts, it is sufficient, tho' he does not shew what debts, and to whom he paid; for if the defendant pleads that he has not paid such a debt, the certainty shall be shewn in the replication. *Yel. 18.*

#### (F 13.) When it shall make a Title.

So, in real actions, where the writ and count are general, the demandant must make a title by his replication: as, in *formedon*, on a feoffment to the use of the father of the demandant in tail, before the *st. 27 H. 8.* brought after the statute, the demandant may declare generally, and, on *ne dona pars* pleaded, shew the special matter in his replication. *Bro. Formedon, 49.*

So, in trespass, if the defendant pleads in bar, and the plaintiff traverses the point in bar, which is found for the plaintiff: yet, if he appears not to have the possession, the plaintiff shall not have judgment, if he does not make a title by his replication. *Poph. 2.*

[If plaintiff declares on possession, (which is only good against a wrong-doer,) and defendant pleads *liberum tenementum*, plaintiff must shew a title in the replication. *Vernon v. Goodriche, Str. 5.*]

But where a title need not be shewn to maintain the action, there, tho' the defendant confesses and avoids the plaintiff's title, it is sufficient

cient for the plaintiff to traverse or deny the matter alleged by the defendant, without shewing any title by his replication. *Cro. El.* 288. 671. [*Goslyn v. Williams*, T. 5 G. Fort. 378.]

As, in ejectment or trespass, if the defendant pleads title in *A.*, who was disseised by the plaintiff or his lessor, and afterwards re-entred, the plaintiff may traverse the disseisin, without making a title at large to himself or his lessor. *R. Cro. L.* 891.

So, if he pleads title in *A.* who demised to the defendant, and gives colour to the plaintiff by a feoffment to him by *A.* which passed nothing, the plaintiff may traverse the demise without making title; for the bar by the colour given admits possession in the plaintiff, if there was not a demise. *R. Popb.* 1.

(F 14.) When it shall assign a Breach.

So, in debt on a bond for non-performance of an award, if the defendant pleads *no such award*, it is not sufficient for the plaintiff in his replication to shew the award, but he must also assign the breach. *R. 1 Sand.* 102. *Cro. El.* 320. *R. Yel.* 25. *Cro. El.* 899. *Adm. Yel.* 78. *R. Yel.* 152, 153. *Hob.* 198.

So, if the defendant pleads what is tantamount to *no such award*; as, that two arbitrators did not make the award, but an umpire made it. *Semb. Lut.* 529. *R. 2 Cro.* 220.

So, in all cases, where the defendant's plea does not admit a breach. *Sho.* 214.

So, in *quare impedit*, if the bishop pleads that he claims nothing but as ordinary, and that the plaintiff did not present within six months, by reason of which he presented by lapse, and the plaintiff replies that he presented *A.* within six months, he ought also to say the bishop refused him, otherwise the disturbance alleged is not complete. *Semb. Hob.* 198.

So, in debt on a bond to pay the charges in such a suit, if the defendant pleads payment, the plaintiff by his replication must shew a breach, it being a bond to do a collateral act. *Adm. Lut.* 422.

[In debt on bond to save harmless from money, plaintiff shall be obliged to pay, or from suits, &c. defendant pleads *non damnificat*. Replication, that plaintiff was obliged to pay, and did pay, without saying how he was obliged, is good. *Simmons v. Langborne*, H. 27 G. 2. 2 *Wils.* 11.]

[Debt on bond conditioned to indemnify plaintiff from all claim of dower of *A.* a widow now married to *B.*, and from all charges that may arise from such claim; plea, that defendant had indemnified plaintiff, replication that *B.* married *A.*, and brought bill in Chancery for arrears of dower, and that plaintiff had answered and expended 8*l.* 10*s.* costs. *R. good on special demurrer. Challoner v. Walker*, P. 31 G. 1. 1 *B. M.* 574.]

If on a bond to pay *quamdiu* he enjoyed such an office, the defendant says that he enjoyed it for the life of *B.*, and paid the whole time, plaintiff may reply that he did not pay for that time, or that he enjoyed it *diutius*; but then he ought to assign a breach that he did not pay. *R. 1 Mod.* 227.

In debt on a bond for performance of covenants, if the defendant pleads performance, the plaintiff, in his replication, must assign a breach. *Hob.* 14.

[In



[In debt on bond to perform articles, the breach must be as particular as the covenant. *Stibbs v. Clough*, M. 6 G. Str. 227.]

So, the breach assigned must be certain, and cannot be so general as in a declaration in covenant; and therefore that he sold to A. and others several times between such a day and such a day, is not sufficient in a replication. *Semb.* 1 Sal. 140.

So, the breach must be sufficient. *Semb.* Sbo. 213.

[In debt on bond to perform award, and plea no award, if plaintiff replies an award to pay 16 l. 10 s. and costs, and thereupon to give mutual general releases, and assigns for breach the non-payment of the 16 l. 10 s. only, it is good. *Fox v. Smith*, M. 6 G. 3. 2 Wilf. 267.]

[Award to pay 4 l. 15 s. and costs in an inferior court, and to give releases, breach for not payment of 4 l. 15 s. good; for the award was good for that, tho' void for the costs, and the releases make final end. *Addison v. Gray*, H. 6 G. 3. 2 Wilf. 293.]

[Debt on bond, conditioned that A., agent of a regiment, should pay all the money he receives from the paymaster for the use of the regiment, to the officers and soldiers; plea that he had paid, &c. replication that he had received 1400 l. which he had not paid, is good; for it is but one breach. *Cornwallis v. Savery*, P. 32 G. 2. 2 B. M. 772.]

And if the plaintiff does not assign a breach, when he ought, it is fatal on a general demurrer. *D. Hob.* 233. 198.

So, if he assigns a bad breach.

And it shall not be aided after verdict. *R.* 2 Sand. 180. *R. Tel.* 153.

(F 15.) When not.

But, if the defendant pleads a plea which, if it be true, will go to the whole, there, if the plaintiff by his replication denies the matter of the plea, he need not shew a breach: as, in debt on a bond for non-payment after notice of his return to *England*, if the defendant pleads that he had not notice, and the plaintiff takes issue thereon, he need not shew in his replication that he did not pay. *R. Cro. El.* 320.

So, on a bond with condition to redeem a mortgage, &c. if the defendant pleads that there was no mortgage, and the issue is taken thereon, the plaintiff need not shew that it was not redeemed. *Per three J. Cro. El.* 899. *Tel.* 25.

So, on a bond to perform on an award, if the defendant pleads *non submit*, or other collateral matter, the plaintiff may join issue thereon, without assigning any breach. *Adm. Lut.* 528. *Tel.* 78. *R.* 1 Sid. 290.

So, if the defendant shews an award, and pleads performance of part only, and issue is taken thereon. *R.* 3 Lev. 24.

If a bond be conditioned for performance of covenants in an indenture, and the defendant pleads *non est factum*. *R.* 1 Vent. 114. 126.

Or, on condition to pay when a ship returns, and the defendant says it did not return, but was lost. *R. Carth.* 116.

So, if there be demurrer to the replication, as well as if issue be joined and found for the plaintiff: as, in debt on a bond, with a condition

condition to pay if a ship returns before such a day, the defendant pleads that it did not return, the plaintiff replies that it did return, and there is a demurrer thereon, and R. that it was good, without saying, *that he did not pay*. *Per Cur. Pas. 2 W. & M. inter Meredith & Allen. Sho. 148. 1 Sal. 138. and the case cont. 1 Sand. 102. 1 Sid. 340. was denied. R. cont. 1 Sid. 340. 1 Sand. 102. but there Sand. makes a quere. R. acc. 1 Lev. 55.*

So, in a *scire facias* on a recognizance to the king, if the defendant pleads a general pardon, whereby the recognizance is discharged, the plaintiff may reply, without assigning a breach. *R. Hard. 377.*

So, in debt on a bond for performance of covenants in an indenture, the defendant shews the indenture, and pleads that there are no covenants therein, the plaintiff upon *oyer* of the indenture may demur, without assigning any breach; for by the *oyer* it appears that the plea was false. *R. 1 Sand. 317.*

(F 16.) Must not be double.

So, a replication ought not to be double; and therefore, if the plaintiff replies, *de son tort demesne absque hoc, that there is no such record*, it is bad. *R. 3 Lev. 243. Vide ante, (C 33.—E 2.)*

[In debt on bond payable 23d March, defendant pleads payment on the 22d; plaintiff replies he did not pay either on the 22d or 23d, or at any time after making the bond, it is ill. *Jernegan v. Harrison, T. 6 G. Str. 317.*]

But, if the defendant pleads several matters as inducement to his bar, and the plaintiff replies to each matter, tho' an answer to one had been sufficient, yet it is not double; as, in an action against an executor, who pleads several judgments, and no *assets ultra*, if the plaintiff gives a several answer to each judgment, it is not bad. *R. 1 Sand. 337. But Sand, cont. 338. R. acc. 2 Sand. 50.*

So, if the plaintiff by his replication counterpleads the defendant's plea, and assigns a breach thereon, it is not double: as, if the defendant pleads no such award, and the plaintiff replies that such an award was made, and that the defendant did not pay, &c. *1 Mod. 227. Vide ante, (F 14.)*

If the defendant pleads that he enjoyed the office for the life of B., and paid during his life, if the plaintiff replied that he enjoyed *diutius*, and did not pay it, it is not double. *R. 1 Mod. 227.*

[If defendant pleads one entire qualification, and plaintiff has several excuses which he cannot plead entire, he may plead them severally; but if he has one matter which goes to the whole, he must plead it entire, and rely upon it. *Humphreys v. Churchman, T. 9 G. 2. B. R. H. 289.*]

[The court will not give leave to reply double, for it is not within the statute. *Horn v. Scarwel, Fort. 335. Barnes, 363.*]

(F 17.) Must be certain.

So, a replication ought to be certain.

And it ought to be more certain than a declaration. *Semb. 1 Sal. 140.*

As to certainty in a declaration and bar, *vide ante, (C 17, 18, 19.—E 5.)*

(F 17.)



(F 17.) *But certainty to a common intent is sufficient.*] But certainty to a common intent is sufficient: as, in trespass for three loads of oats, the defendant justifies for *damage feasant*, the plaintiff replies that *tempore quo et diu antea* he was parson, and took for tithes; tho' he does not say that he was parson at the time of the severance, yet it shall be intended. *R. Cro. Car. 63. Vide ante, (C 24.—E 7.)*

So, in trespass, if the defendant justifies by a devise from *B.*, and the plaintiff says that it descended to him as cousin and heir to *B.* and traverses the devise, it is sufficient without saying how cousin. *R. 2 Cro. 86.*

[In debt on bond, *oyer* of the condition, to prosecute error in the hustings, and pay damages and costs, if judgment affirmed; plea that the writ was prosecuted with effect, and judgment not yet affirmed; replication, that writ was *nonpross'd* in the hustings, good, tho' it does not set forth before whom the hustings were held, nor that the writ was returnable. *Lowfield v. Satchwell, H. 19 G. 2. Wilf. 123.*]

[That defendant has not paid money to the officers and soldiers of a regiment, according to the several proportions of their pay, is sufficiently certain. *Cornwallis v. Saverly, P. 32 G. 2. 2 B. M. 772.*]

[That defendant was attached by writ of privilege is sufficient, without setting forth the return, for it refers to the return whenever it was. *Barnes, 163.*]

(F 18.) *De son Tort Demesne*, when it shall be replied generally.

(F 18.) *If the plea goes merely in excuse.*] If defendant pleads a plea merely in excuse of an injury to the person, or the replication of another, *de son tort demesne sans tiel cause* is a proper replication. *8 Co. 67. a. Crogate.*

As, in an action of trespass for an assault and battery, if the defendant pleads *son assault demesne*. *8 Co. 67. a.*

Or, that the plaintiff entred upon his possession, and he molliter manus imposuit, and if he has damage it was on his own assault. *R. Latch, 128. 221.*

So, in trespass for false imprisonment, if the defendant pleads that the plaintiff broke the peace, and he being a constable, and present, took him to carry him to a justice of the peace. *Bro. de son Tort, 18.*

Or, that he being a constable, took him being a vagrant. *Bro. de son Tort, 20.*

Or, on hue and cry for a robbery. *Bro. de son Tort, 39.*

Or, that he restrained the plaintiff being a lunatic. *Bro. de son Tort, 44. 51.*

That he being rector and the tythes severed, the plaintiff would have carried them away, and in defence of his tythes molliter manus imposuit. *Ec. R. 2 Cro. 224. Yel. 157.*

So, in an action on the case for defamation, if the defendant excuses himself by hue and cry. *8 Co. 67. a.*

(F 19.) *Or justifies by matter of fact.*] So, if the defendant by plea makes a justification, which consists wholly of matter of fact, *de son tort demesne* generally, is a good replication: as, in false imprisonment, if the defendant justifies by process out of the admiralty, hundred, or county court, or other court not of record. *8 Co. 67. a.*

In

In an action for words if the defendant justifies, by reason of a robbery by the plaintiff. 2 Leo. 103. 1 Saund. 243.

In an action for a conspiracy, if the defendant justifies for suspicion of felony, on which the defendant was bound by a justice of peace to prosecute. Win. Ent. 108. Vide Ent. 147.

In trespass, if the defendant justifies the taking for a *beriot*. Bro. de son Tort, 5. 10.

Or, for *effovers*.

In replevin, if the defendant avows for the penalty of a bye-law made within the manor according to the custom. R. 3 Lev. 48. Lev. Ent. 156.

So, by the *st.* 43 El. 2. in replevin if the defendant avows for a distress for the poor's rate.

So, tho' in the plea a matter of record or title be alleged as inducement to the plea. Vide *post.* (F 20, 21.)

(F 20.) When it is not a good Replication generally.

(F 20.) If matter of record be mixt with the fact.] But *sans tiel cause* goes to the whole plea; and therefore where the defendant justifies by matter of record as well as matter of fact, *de son tort* generally, is not a good replication, for then the matter of record will be put in issue; but he ought to say *de son tort*, &c. and traverse the matter of fact: as, in false imprisonment, if the defendant justifies by a *capias* to the sheriff and a warrant to him, the plaintiff ought not to reply *de son tort*, without traversing the warrant. 8 Co. 67. a. R. 3 Lev. 65.

So, in an action for words, if the defendant justifies by reason of perjury in a court of record, it is not a good replication without a traverse. Semb. 2 Leo. 81. 102.

In trespass, if the defendant justifies by a process out of an inferior court of record. Semb. Hard. 6.

So, if the defendant justifies by the custom of a manor, *de son tort*, &c. generally, is not a good replication, but it ought to traverse the custom. R. Hob. 76. Cont. per three J. Lev. acc. 49.

Yet, where the defendant justifies by custom of foldage, *de son tort* is a good replication. Kit. 223. a.

And if the matter of record be only inducement to the plea, *de son tort*, &c. may be replied generally: as, in trespass, if the defendant pleads a presentment in a *swainmote-court*, and that he, as forrester, requested him to answer, and because the plaintiff refused, he took him, *de son tort*, &c. is a good replication; for the presentment is only inducement. D. 2 Leo. 81.

(F 21.) If the defendant claims an interest in or out of the land.] So, if the defendant in his own right claims any interest in the land, *de son tort*, &c. generally, is not a good replication. 8 Co. 67. a. R. 2 Sand. 295. 1 Lev. 307.

So, if he claims an interest out of the land: as, common. R. 8 Co. 67. a. Or, rent. 8 Co. 67. a.

Or, a way or passage over the land. 8 Co. 67. a. R. 2 Cro. 599.

Or, trees cut down on the land. R. Cro. El. 539.

So, if he claims, as servant to another, any interest in or issuing out of the land, &c. it is not a good replication, without traversing the command, where this appears to be material. 8 Co. 67. a.



And so it seems to be intended. *Cro. El.* 14. 540.

And therefore, in replevin, if the defendant, as bailiff, avows for *damage feasant*, and the plaintiff pleads that *A.* was seised of two parts, and by his licence he put his cattle there, *de son tort*, generally, is not a good rejoinder. *R. on Demurrer. Cro. El.* 812.

So, if the plaintiff makes title in his declaration, and the defendant pleads a title in avoidance of the cause of action, or in destruction of the plaintiff's title, *de son tort*, &c. is not good without a traverse: as, in trespass for taking his servant, if the defendant pleads that the father of the servant held of him in *chivalry*, &c. and he took him as his ward, *de son tort*, &c. is not good without a traverse of the seignior. *D. Yel.* 158. *1 Brownl.* 215.

So, in trespass, if the defendant makes title by devise; *de son tort*, &c. is not a good replication. *R. 1 Lev.* 307.

[To an action of trespass for taking and impounding a gelding, the defendant pleaded that the *locus in quo* was called *W.*, of which the bailiffs and burgeses of *S.* were seised in fee, and that the defendant as their servant and by their command took the cattle *damage feasant*. To this the plaintiff replied *de son tort*, generally, and judgment was given for the defendant on demurrer. *Cockerel v. Armstrong, C. P. T. 11 Geo. 2. (Com. 582.) Willes, 99. S. C.*]

[When defendant in an action of trespass justifies in his plea taking the goods as a distress for rent, the plaintiff in his replication must either admit or deny the rent in arrear; replying *de injuriâ suâ*, is bad. *Cooper v. Monke, C. P. H. 11 Geo. 2. Willes, 52.*]

Yet, if the title alleged be only inducement, *de son tort*, &c. may be replied generally: as, in battery, if the defendant pleads that he was seised in fee of a close, and had cut his corn, and the plaintiff came to take away his corn, and he in defence, &c. *de son tort*, &c. is a good replication. *R. Yel.* 157. *R. Latch, 221. 1 Brownl.* 215.

[This replication is bad when it puts several distinct matters in issue. *Cooper v. Monke, C. P. H. 11 Geo. 2. Willes, 52. Cockerel v. Armstrong, C. P. T. 11 Geo. 2. (Com. 582.) Willes, 99. S. C. Bell v. Wardell, C. P. E. 13 Geo. 2. Willes, 202.*]

(F 22.) *If the defendant claims by authority from the plaintiff himself.* So, if the defendant justifies by authority derived mediately or immediately from the plaintiff, tho' he claims no interest, yet *de son tort*, &c. generally, is not a good replication. *8 Co. 67. a.*

As, by the licence or command of the plaintiff. *Kit. 221. b.*

(F 23.) *Or, by authority of law.* So, if the defendant justifies by authority of law: as, to view walle. *8 Co. 67. b.*

So, if he justifies by statute: as where the defendant justified the cutting of leather as a searcher by the *st. 1 Jac. 1. 22. Semb. 2 Rol. 694. l. 10.*

But it was replied. *Bro. Vad. 435.*

(F 24.) *How it shall be pleaded.* If a man pleads *de injuria sua propria*, without saying *absque tali causa*, it is bad. *Semb. 2 Cro. 599. R. 1 Rol. 47.*

But this shall be aided after verdict. *D. 1 Vent. 70. Semb. cons. 1 Sid. 341. Fard. 40.*

So,

So, if the defendant pleads *de injuria sua propria absque hoc quod non est culpabilis*, or nothing in arrear, &c. it will be bad on a special demurrer; for it is a frivolous introduction to the general issue. R. Sal. 583.

But, *de son tort absque tali warranto*, where the defendant justifies by warrant, seems good. Lut. 1460.

And *de son tort* to several pleas, is good: for *absque tali causa* refers to all. R. 1 Lev. 124.

So, if the plaintiff replies, *de son tort*, &c. generally, when he ought not, there shall be a replender.

And *de son tort* generally, when he ought not, will be aided after verdict by the statute of *jeofails*; for it is form only. R. Hob. 76.

R. Ray. 50. R. 1 Brownl. 200.

Yet it was held bad on a general demurrer. 3 Lev. 65.

So, if the plaintiff replies specially, and does not say *de son tort*, &c. where he ought, it shall be aided after verdict by the *st.* 32 H. 8, 30. R. 1 Sid. 445. 1 Vent. 70.

(F 25.) Replication bad in Part is bad for the Whole.

An entire replication, bad in part, is bad for the whole: as, in an action on *indebitatus assumpsit* and *insimul computasset*, if the defendant pleads the statute of limitations, and the plaintiff replies that the money in the several *assumpsits* are due in trade, as merchants, if this should be good as to the *insimul computasset*, yet being bad as to the *indebitatus assumpsit*, it is bad for the whole. Semb. 2 Sand. 127. Vide 1 T. R. 40.

[But this rule cannot apply to any case where the objection is merely on account of surplusage; therefore where the replication states matter sufficient for the plaintiff to maintain his action, tho' it state something afterwards which is inaccurate, the whole is not vitiated. 3 T. R. 374.]

## (G) Traverse.

(G 1.) By what Words it shall be.

THE proper words of a traverse are, *without this*, or, *absque hoc*. R. 1 Sand. 22.

But words equipollent are sufficient, and therefore a traverse by the words, *et non*, is sufficient: as, if the defendant pleads that *A.* was taken by a warrant returnable *die S. post O.E.* *Pur. et non virtute warranti return. die V.*, is a good traverse of a warrant returnable *die V.* R. 1 Sand. 22. 1 Lev. 192.

So, if a replication be *de son tort absque tali warranto*, it seems good, tho' it does not say expressly *absque hoc* that there was such a warrant. Lut. 1460.

So, if there be a traverse of the matter alleged by the other party, without saying *modo et forma prout*, &c. it will be well. Semb. 2 Leo. 5.

Yet, a traverse ought to be by express words and not argumentative: as, if he traverses *absque hoc quod intravit et sic se intrusit*. Tel. 170.

If a traverse be *absque hoc quod est culpabilis aliter aut alio modo*,



this does not extend to the time but only to the matter of fact. *Lut.* 1457.

A traverse ought not to conclude to the country; for it is in the negative. *R. 3 Mod.* 203.

(G 2.) When necessary.

Generally, matter of fact expressly alleged in the court or bar, if it is not confessed or avoided, must be traversed: as, in trover, if the defendant justifies by seizure as a waif, he must traverse the conversion. *R. Mo.* 572. *Per two J. Cro. El.* 693.

In replevin, if the defendant claims common in six acres, and the plaintiff alleges that he had common in forty acres, he must traverse that he had common in six acres only; for it cannot be intended the same common. *R. 1 Leo.* 44.

So, in debt for rent upon a lease of ten acres, if the defendant says that he leased the ten acres, and also a rectory, &c. he must traverse a lease of ten acres only. *1 Leo.* 44.

So, in an action upon the case that the defendant overcharged a warehouse, by means whereof it fell, if the defendant pleads that it was ruinous and therefore it fell, he must traverse that it was overcharged. *Per two J. Manwood cont. Cro. El.* 285.

So, in trespass for the taking of four pigs distrained, one after impounding, the others before, if the defendant pleads tender of amends, he must traverse the impounding; for a tender afterwards is too late. *R. Lut.* 1262.

So, if the defendant justifies the publication of a libel to A, one of those to whom he is charged to have published a libel, he ought to traverse all others to whom he is charged to have published it. *R. 1 Lev.* 241.

[So, in trespass, if defendant justifies at another place than is laid in the declaration, a traverse is necessary. *Benjamin v. Howell, M.* 18 G. 2. *1 Will.* 81.]

So, if the defendant makes a local justification, he ought to traverse all places except that to which the justification extends: as, if he justifies as sheriff, he must traverse all places except his own county. *2 Cro.* 372. *R. Cro. El.* 504.

If he justifies a trespass by a release, &c. at a day precedent, he must traverse all times after. *1 Sal.* 222.

If he justifies as constable, he must traverse all places but his own vill. *Co. Lit.* 282. b.

If, as other officer, all places but those within his authority. *Sav.* 25. 57.

If he justifies a distress for *damage feasant* in A, he must traverse all other places. *Co. Lit.* 282. b. *R. Cro. El.* 705.

Or, a distress for rent, he must traverse all places not demised. *R. 1 Sid.* 293, 294.

So, if he justifies by *molliter manus impositus* for entering his house in A, he must traverse all other places. *R. Cro. El.* 705. *1 Rol.* 19. *R. Lut.* 1437.

So, if he justifies by process out of an inferior court, he ought to traverse all places out of their jurisdiction. *Semb. 1 Rol.* 264, 265. *Lut.* 1563.

So,

So, if he justifies by process, &c. he ought to traverse all times before the *teste*, and after the return. *R. 1 Rol. 406.*

If he justifies as sheriff, &c. he ought to traverse all times before his office or since. *R. 1 Lev. 216.*

And such justification must not be larger or narrower. *Vide post. (G 15, 16.)*

And, if the place or time is not material, the justification must be in the place and on the day alleged in the declaration. *Vide post. (G. 12.)*

So, if a man makes title by feoffment, and the other pleads a prior feoffment, he ought to traverse the last. *Vide post. (G 3.)*

Or, by grant of a copyhold, and the other pleads that the manor came, by reason of the vacancy of a bishoprick, &c. to the hands of the king, who made a prior grant to him, he must traverse the last grant by a copy; for he has not confessed seisin in him who made the last grant, and avoided it. *R. Cro. El. 754. Vide post. (G 3.)*

If the defendant avows for rent granted by *A.* seised in fee, and the plaintiff says that *A.* was seised in tail and died, and the land descended to him, he must traverse the seisin in fee. *Semb. Dy. 312. b.*

If the plaintiff counts that *A.* seised in fee demised for years, &c. and the defendant pleads that before the seisin of *A.*, *B.* being seised devised to him in tail, and that he was seised till *A.* disseised him and leased, &c. if the plaintiff says that the defendant afterwards levied a fine to *A.* he ought to traverse the disseisin. *R. Jon. 402.*

So, if the plaintiff alleges a seisin in fee, and the defendant shews that he had a conditional fee, he must traverse the seisin in fee alleged; for it would be intended an absolute fee. *R. Yel. 140.*

So, if the plaintiff alleges seisin till *A.* died without issue, and the defendant confesses an estate till *B.* died without issue, he must traverse the estate alleged by the plaintiff; for they are different estates. *R. Yel. 140.*

So, if the plaintiff counts of an estate to him and his heirs male, and the defendant of one to him and his heirs female, he must traverse the first estate surmised by the plaintiff. *Yel. 141.*

So, if the plaintiff claims by prescription, and the defendant confesses a title by deed, he must traverse the prescription. *Yel. 141.*

So, if the plaintiff claims a seisin in fee, (which shall be intended in possession,) and the defendant entitles himself to a lease prior to the plaintiff's seisin, (by which it appears he had a fee only in reversion,) he must traverse the seisin of the plaintiff in fee. *Per two J. Cro. cont. Cro. Car. 324. 3 Mod. 319.*

If the plaintiff declares on a demise of two chambers, and the defendant pleads a demise of two chambers and another room and entry therein, he must traverse the demise of the two chambers only. *R. but Sand. thought that the traverse would be more proper on the part of the plaintiff. 1 Sand. 207. Ray. 170. 1 Lev. 263.*

So, in detinue of a chest with charters, if the defendant pleads delivery of a box with charters as a pledge, he must traverse the detinue of a chest.

In disceit against an attorney for appearing without warrant, who



pleads that he appeared only for another defendant from whom he had a warrant, he must traverse the *covin*. *R. Dy. 361. b.*

If the defendant says that *A.* being seised demised to him, and the plaintiff replies that *A.* before enfeoffed him, he must traverse the demise, except where he adds an entry and demise, and afterwards a re-entry. *Cro. El. 754.*

So, if the defendant confesses and avoids the matter of the count, &c. only by argument, he must traverse: as, in debt against an executor, who pleads that he is administrator, he must traverse administration as executor. *Kit. 229. b.*

In debt against an administrator, who pleads that he is executor, he must traverse the dying intestate. *Kit. 229. a.*

In an action upon the statute of labourers, and count that the defendant was a vagrant and refused to serve; if the defendant pleads that he was in the service of *A.*, he ought to traverse, *without this that he is a vagrant*. *Kit. 229. a.*

In partition, if the defendant pleads that he is sole seised, he must traverse that he holds *pro indiviso*. *Kit. 229. b.*

In trespass, the defendant pleads a lease granted by the master and fellows of a college, if the plaintiff replies that at the time of the demise alleged there were no fellows, he must traverse *absque hoc* that the master and fellows demised. *Kit. 229. b.*

If the defendant alleges seisin of a manor, and thereon justifies for a heriot, if the plaintiff replies that *B.* was jointly seised with him, he must traverse *absque hoc* that defendant was sole seised. *R. 2 Mod. 60.*

If the defendant alleges seisin in him of a manor and a fine levied, and the plaintiff replies that he himself was and still is seised, he must traverse the defendant's seisin at the time of the fine. *R. 1 Leo. 77. 1 And. 166. Sav. 86.*

If he alleges seisin in *A.* by whose command he took *damage feasant*, and the plaintiff alleges that the father of *A.* was seised and leased for life to *B.*, under whom he claims, he must traverse the seisin of *A.* at the time of the taking. *Dub. 3 Mod. 318. R. Carth. 165.*

If the defendant alleges seisin in *A.* who devised to his father in tail, who died seised, and that defendant entred and was seised till disseised by the plaintiff, if the plaintiff confesses the seisin and devise, but pleads a recovery and conveyance to himself, he must traverse the disseisin. *R. Cro. Car. 494. Jon. 402.*

If he alleges seisin in *A.* and a demise and grant of the reversion to the plaintiff, to which the plaintiff confesses seisin of a moiety by *A.* and a demise and grant to the plaintiff, who granted to the owner of the other moiety, he must traverse that *A.* was seised of the whole at the time of the demise.

So, tho' the matter of the count or bar be confessed and avoided by the plea in the affirmative, he ought to traverse in the negative, otherwise there can be no issue. *Vide post. (R 3.)*

As, in trespass for taking six beasts, the defendant justifies the taking by agreement, the plaintiff replies that they were other six, he must traverse in the negative, without this that he took the same six. *Kit. 229. a.*

In debt on a bond dated 2 April, and *primo deliberat. 2 May*, the defendant pleads a release 9 April, and that the bond was delivered 2 April, he must traverse *absque hoc* that it was *primo deliberat. 2 May*. *Kit. 229. b.*

In debt on a bond conditioned to deliver an inventory of all the goods of *B.*, the defendant says that he delivered an inventory of such goods which are all, the plaintiff replies that *B.* had such other goods, he must traverse that those named by the defendant are all. *R. Dal. 52.*

So, in all cases the replication must confess and avoid the bar, or traverse it, except where it is matter of law, supposal, or matter that cannot be tried. *1 And. 166. 1 Leo. 77.*

[If plaintiff in his replication makes several averments, which the defendant does not traverse in his rejoinder, to which plaintiff demurs, judgment shall be for plaintiff; for whatever is materially alleged must be traversed, or it is always taken to be admitted. *Nicholson v. Simpson, P. 6 G. Str. 297. Fort. 356.*]

[If a custom is pleaded, and plaintiff replies another custom repugnant to it. *Kenchin v. Knight, M. 23 G. 2. 1 Wilf. 253.*]

[In an action of trespass, the defendant pleaded that an antient messuage and 12 acres of land were immemorially parcel and a customary tenement of the manor of *A.*; and that there is a custom in the manor that, from time whereof, &c. the customary tenant of the said customary tenement, for all the time aforesaid, has had right of common, &c. The plaintiff in his replication traversed the custom, and was admitted upon the trial to prove that the messuage was built within 20 years, and not upon the site of an antient house, tho' the replication seemed to admit the antiquity of the tenement. *Dunstan v. Tresider, B. R. M. 33 Geo. 3. 5 T. R. 2.*]

(G 3.) When not necessary.

(G 3.) *If the party confess and avoid.*] But, generally, if the matter of the count or bar be confessed and avoided, a traverse is not necessary: as, if the defendant justifies as assignee of a term for years of *A.*, if the plaintiff claims by a prior assignment from *A.* of the same term, he need not traverse the assignment to the defendant, for he has confessed and avoided it; for after the assignment to the plaintiff *A.* could not assign to the defendant. *R. Mo. 551. Cro. El. 650. Per two J. three cont. Ow. 142. R. per three J. 6 Co. 24. b. R. Mo. 557. Dub. 2 Vent. 212.*

So, if a man claims a copyhold, and the other party claims by a prior grant, he need not traverse the subsequent grant, but the traverse must be of the prior grant. *R. 2 Cro. 299. Tel. 221. 2 Bul. 1. Vide ante, (G 2.)*

So, if a man claims by patent, the other who has a prior patent need not traverse the last patent, tho' it be not fully avoided; for by possibility the king might have a new title after the first, and before the subsequent grant. *Per three J. Cro. Car. 581.*

So, if the defendant pleads that the plaintiff abated after the death of *A.*, and the plaintiff replies that *A.* devised to him, he need not traverse the abatement. *R. Tel. 151. Vide Lut. 1558.*

Yet if the feoffment of *A.* be pleaded, and the other pleads a prior feoffment from *A.*, he must traverse the last feoffment; for possibly *A.* might gain a new estate by disseisin after the first feoffment. *Dy. 171. Cro. El. 650. 6 Co. 25. a. R. 2 Cro. 681. R. Cro. El. 30. Vide ante, (G 2.)*



So, if there be a suggestion in prohibition of a perpetual unity, if the defendant shews that the abbey was founded within time of memory, he need not traverse the prescription, for it is sufficiently avoided. *R. Yel. 31.*

Otherwise, if the land was in the hands of farmers; for then the prescription must be traversed. *R. Yel. 31.*

So, in *quare impedit*, if the plaintiff counts that *A.* being seised in fee, presented *B.*, and granted the next avoidance to him, &c.; and the defendant pleads that *A.* being seised in fee enfeoffed others to the use of himself for the life of *C.*, and then granted the next avoidance, and that *C.* died, he need not traverse the seisin in fee at the time of the grant, for he has confessed and avoided it. *Dub. Hob. 102.*

So, in a *scire facias* against tertenants, who plead that the cognisor and others were jointly seised, and the cognisor died, &c. if the plaintiff replies a bargain and sale, this avoids the joint seisin; and therefore it need not be traversed. *R. 2 Sand. 28.*

So, in avowry by distress for rent of a third part, if the plaintiff in bar entitles himself to the other two parts in common, he need not traverse the taking in the third part only; for he has confessed and avoided. *R. 2 Vent. 228. 283.*

If the defendant justifies imprisonment by the sheriff's warrant upon a *capias*, and that the plaintiff escaped, whereon he by the same warrant retook him, if the plaintiff replies he escaped with the sheriff's consent, he need not traverse the second taking. *R. 1 Brownl. 197.*

Yet, if there be not a full confession and avoidance, there may be a traverse, tho' it is not necessary: as, in replevin, if the defendant avows a distress in two parts of the land, and the plaintiff makes title to a fourth of the third part, if the avowant conveys to him the two parts also, he may traverse that he was seised of the fourth only. *R. Hob. 80.*

So, in *quare impedit*, the plaintiff counts of a grant of *A.* seised in fee, the defendant shews that he was seised only *pur autre vie*; yet he may traverse the seisin in fee. *Semb. Hob. 103. Mo. 869.*

And to add a traverse is the surest way. *D. Mo. 869.*

[G 4.] *If he justify the whole action.*] So, if he justifies the whole fact; a traverse is not necessary: as, in battery, if the defendant justifies by casualty, he need not traverse *aliter aut alio modo*. *D. Mo. 864. Cro. El. 667.*

[If in trespass for taking and detaining cattle at *A.* defendant justifies for *damage feasant* at *B.*, and that he impounded at *A.*, he need not traverse, *Ryley v. Parkhurst, T. 21 & 22 G. 2. 1 Wilf. 219.*]

[G 5.] *If it be a matter of law.*] So, if a man alleges matter of law in bar or avoidance of another's title, a traverse is not necessary: as, in ejectment, if the defendant pleads a fine to the king and his heirs males of his body, whereby the king entred and was seised in tail, if the plaintiff confesses the fine, and says the king entred and was seised in fee, there need not be a traverse of the seisin in tail; for it is matter of law. *R. Pl. Com. 230. b.*

So, in trover, if the defendant plead a seizure; as, *prisage*, to the king's use, there is no need to traverse the conversion; for he confesses the seizure; and whether it be a conversion is matter of law. *R. Yel. 200.*

So,

So, in trespass, if the defendant pleads a sale in a market, he need not traverse the plaintiff's property. 5 H. 7. 14. a.]

So, if he pleads seizure; as, a waife or wreck. *Ibid.*

So, to an avowry for rent by prescription, if the defendant pleads unity of possession, there is no need to traverse the prescription; for it is matter of law whether unity extinguishes it. *Ibid.*

So, if the defendant pleads that the plaintiff and his blood have been villains time whereof, &c. the plaintiff replies that he is a bastard, he need not traverse the prescription. *Ibid.*

So, in *quare impedit*, if the plaintiff alleges seisin in king Edward, and that he died seised, and the rectory descended, &c.; if the defendant pleads an appropriation by king Edward, he need not traverse the dying seised. R. Pl. Com. 496. a.]

[Yet matter of law, when connected with fact, may be traversed; as, simony. Rast. Entr. 532.]

[Seisin in fee or in tail. Yelv. 140.]

[The right of a county to repair a bridge. 2 Lev. 112.]

(G 6.) Or, a matter of record.] So, if a man alleges a matter of record, there ought not to be a traverse to it; for it cannot be tried by the country: as, in debt upon a recovery in an inferior court of record, if the defendant traverses the recovery, it is bad. R. per three J. 1 Lev. 193.

In *scire facias* against bail in error, who plead *quod judicium pendet indeterminatum*, if the plaintiff traverses it, it is bad; for it must be determined by the record. R. Sal. 521.

(G 7.) Or, not triable.] So, if he alleges a matter of fact, which is not triable: as, an intent or design to make, it is not traversable; because it cannot be tried: as, in waste, if the defendant pleads an assignment, and the plaintiff replies that the assignment was contrary to the st. 11 H. 6. 5. to the intent that the plaintiff should not know against whom to bring his action, and that the defendant continued the possession, traverse that the assignment was not made to the intent, &c. is bad; for he ought to traverse the pendency of the profits. R. 5 Co. 77. b.

So, a traverse, that he used a garden *secundum veram intentionem indenturae*, is bad; for the intent was not traversable. R. 3 Lev. 167.

So, in an action, *quare retinuit canem sciens ad mordendum oves consuet.*, the *sciens* is not traversable, but must be given in evidence. R. 1 Rol. 4. l. 45.

Yet a traverse, that he arrested *virtute warrantii*, is good. Semb. 1 Sand. 23.

So, a traverse of an entry by command, where by inducement the command appears material. R. Cro. El. 463.

So, a plea, that he left money with the plaintiff *ea intentione* that he should pay, is good; for he may traverse *quod non reliquit modo et forma*. R. Skin. 397.

(G 8.) Or, not expressly alleged.] So, a matter not expressly alleged need not be traversed: as, if the defendant pleads a grant, used to be made, of an office to such person or persons as B. pleased, and the plaintiff replies that it used to be granted to one person only, he need not



not traverse to several; for it is not expressly alleged. *R. 10 Co. 59. a. Vide post. (G 13.)*

If the plaintiff alleges that the dean, archdeacon, and chapter of *B.* leased to him, and the defendant pleads that the dean and chapter of *B.* leased to him, *absque hoc* that there is such a corporation as dean, archdeacon, and chapter of *B.*, it is not good. *Semb. Lane, 18.*

So, if a man traverses a matter not alleged, it is bad: as, if a breach of covenant be assigned that he did not pay the salary of an office, and the defendant traverses that he did not receive the profits of the office. *R. 2 Vent. 79.*

So, if the defendant justifies by process out of an inferior court, the plaintiff cannot traverse that the matter arose out of the jurisdiction; for it was not alleged. *R. Lut. 1560.*

So, in trespass for cutting down trees, if the defendant says that the bailiff appointed the taking of trees for repairs, for which he took those trees; traverse, that he did not appoint those, is bad; for this was not alleged. *R. Lut. 1480.*

(G 9.) *Or, if there be a good issue before.]* So, if it be good issue by an express affirmative and negative, there ought not to be a traverse: as, in an *audita querela* to avoid execution on a statute, alleging that *obtulit* the money at the day of payment; if the defendant pleads that at such a day he demanded it, and no one was ready to pay, he ought not to traverse, *absque hoc quod* plaintiff *obtulit*; for there was an issue before. *R. Cro. El. 755.* But it appears that the plea was bad in another point. *Yel. 38. 2 Cro. 13.*

But in order to take issue on a single point, after an affirmative and negative, a traverse may be allowed: as, where the defendant pleads another action depending for the same cause, if the plaintiff replies that they are several causes, *absque hoc* that it was for the same cause, it is good. *R. on a special demurrer, 1 Vent. 101. Ray. 199. 1 Mod. 72.*

#### (G 10.) Of what Things a Traverse shall be.

(G 10.) *Of the most material thing.]* A traverse ought to be of the most material thing and the effect of the bar: and therefore in debt for rent on a lease for years, if the defendant pleads a descent to *A.* who was disseised by the lessor, but after the lease and before any rent due entered, the plaintiff ought to traverse the disseisin, not the descent. *R. Mo. 539.*

So, in trespass, if the defendant pleads that *A.* being seised made a lease to him, the plaintiff shews that after the disseisin of *A.* his father was seised and died seised, and the land descended to himself, he must traverse the lease. *R. Mo. 574. 6 Co. 24. a.*

So, if the surrender of a copyhold into the hands of *A.* the plaintiff's steward be alleged, the plaintiff ought to traverse the surrender, not that *A.* was not his steward. *R. Cro. El. 260.*

So, in *quare impedit*, the most material point ought to be traversed. *D. 1 Rol. 235. R. Lit. 15. R. Cro. Car. 61. 105. 586. R. Vau. 10, Ec. 56, Ec. Lut. 1630.*

In trespass, if the defendant pleads that the land was demised to *A.* who set out his tithes, whereon he, as parson, took them, the plaintiff

plaintiff must traverse the taking as tithes, and not the demise. *R. Jen. 89, 90.*

If the defendant pleads a gift to his ancestor in tail and several descents, whereby the land came to him; if the plaintiff confesses the gift, and alleges a feoffment by the donee, under which he claims, and traverses that the donee died seised, it is bad; for he ought to traverse the last dying seised, for there might be a remitter. *R. Dy. 107. a.*

In debt upon a bond for appearance *Off. Martini*, if the defendant pleads the *fl. 23 H. 6.* and that he was imprisoned by a writ returnable *quinden. Martin*; if the plaintiff replies that he was imprisoned by a writ returnable *off. Mart.*, he ought to traverse the imprisonment by writ returnable *quinden. Mart.* *R. 2 Lev. 175.*

In prohibition, on a libel for the profits of land given for charity, upon suggestion that the land was given to his own use, if the defendant pleads a gift for charity, and traverses the gift to his own use, it will be good. *R. 2 Bul. 20.*

[In prohibition plaintiff declared, suggesting that defendant had no jurisdiction, setting out that the dean and chapter was from a translation of prior and convent, and suggesting that where dean and chapter are of royal foundation, the archbishop has no power. The archbishop pleads, and traverses that the prior and convent is of royal foundation. On demurrer, judgment for defendant. *Fort. 329.*]

But the defendant may traverse any part of the declaration which is material to the plaintiff's title: as, if the plaintiff alleges that *A.* being seised enfeoffed *B.* who died seised, and the land descended to his heir, who demised to him, and afterwards *A.* ousted him and disseised his lessor, and conveyed to the defendant; the feoffment, descent, or disseisin may be traversed. *Dy. 366. a.*

In trespass, if the defendant pleads, that before the trespass *A.* was seised and leased to him, the plaintiff may traverse the seisin or the lease, for both are material to the defendant's title. *6 Co. 42. a.*

So, if he pleads that *A.* being seised enfeoffed *B.*, who enfeoffed *C.* under whom he claims, the plaintiff may traverse seisin or any mesne feoffment, if the defendant does not claim by any mesne conveyance from the plaintiff himself. *6 Co. 24. b.*

So, if he pleads that *A.* being seised in fee conveyed to *B.* in tail, under whom the defendant claims; the plaintiff may say that *D.* being seised granted to *A.* in tail, &c. and may traverse that *A.* was seised in fee, or the conveyance in tail. *R. 2 Cro. 681.*

If he says that *A.* being seised leased to him, and afterwards disseised him and leased to the plaintiff, he may traverse the demise to the defendant, or the disseisin. *R. Cro. El. 798.*

So, if the plaintiff alleges a title when he need not, he gives the defendant the advantage of traversing: as, in replevin, if the defendant avows *damage feasant in Black Acre*, and the plaintiff in bar says he was seised in fee of a close, of which the defendant ought to repair the fences, and for default, &c. the defendant may traverse his seisin in fee. *Per three J. Wind. dubitante, Dy. 365. Vide post. (G 16.)*

In ejectment on the demise of *B.*, if the defendant pleads that *B.* enfeoffed *A.*, and the estate descended to his heir, who demised to him, and then *B.* disseised, &c. the plaintiff may traverse the feoffment to *A.* or the descent, tho' it need not be alleged. *Dy. 366. a.*

In



In replevin, the defendant says that *B.* was seised in fee, which descended to *A.*, and avows for a rent-charge granted by *A.*, the plaintiff says that *B.* was seised in tail, which descended to *A.*, and he granted and died, *absque hoc* that *B.* was seised in fee; the traverse of the seisin in fee by *B.* is good, tho' the seisin by *A.* was more material. *R. 2 Cro. 44. Tel. 54.*

So, also, if two points are material, the defendant may traverse one or the other: as, in trespass, if the defendant pleads that *A.* was seised and demised to him, the plaintiff may traverse the seisin or demise. *R. Hard. 317.*

So, in debt upon a bond for appearance, if the defendant pleads the *st. 23 H. 6. 10.* and that he was arrested by a writ returnable at another day, and the plaintiff replies that it was upon a writ returnable on the first; either the one or the other writ is traversable. *Semb. 1 Sand. 22. 1 Lev. 192. 2 Lev. 174.*

In trespass, if the defendant says that *A.* was seised in fee, and being outlawed, and found by inquisition, &c. the defendant entred upon a *levari*; the plaintiff replies that *B.* being seised demised to him, he may traverse the seisin of *A.*, or that the land was not found by inquisition. *R. Hard. 316.*

In an information for an intrusion, if the defendant says that the king by patent granted to *A.*, who, being seised in fee, enfeoffed the defendant, the attorney-general may traverse the grant or feoffment, but not that *A.* was not seised in fee; for that is the consequence of the grant. *Sav. 58.*

So, if the defendant does not rely on the most material matter, but goes to another point, he gives the plaintiff the advantage of traversing it: as, in an action for disturbance of common, if the defendant pleads that he is lord of the soil, and put rabbits there, and prescribes for a warren, tho' he might justify, as lord, the putting beasts of warren on the common; yet when he goes on and prescribes for a warren, the plaintiff may traverse the prescription. *R. Lut. 108.*

[In trespass, if defendant justifies cutting a beam, whereby tiles are thrown down, and the replication traverses its being previous, it is not *ad idem.*, and therefore bad. *Humphreys v. Churchman, T. 9 G. 2. B. R. H. 289.*]

(G 11.) *What thing is traversable.*] And therefore any fact, which appears to be material, is traversable, tho' it be only suggestion: as, in prohibition, a suggestion of a refusal by the spiritual court of a plea (which ought to be allowed) in a suit there for tithes, or other matter of their cognisance, is traversable, otherwise their jurisdiction in any case might be taken away by such a suggestion. *R. 2 Co. 45. a.*

Otherwise, where the refusal is not the cause of the prohibition. *R. Mo. 425.*

So, any surmise, which takes away the jurisdiction of the court, is traversable. *Cro. El. 511.*

So, place or time, where it appears to be material, is traversable. *Vide ante, (G 2.)—Post. (G 12.)*

And therefore in replevin, a place where, &c. must be assigned; for it is traversable. *R. Hob. 16.*

So, the consideration in *assumpsit* is traversable, where it is executory. *D. Cro. El. 201. Hob. 106. 1 Rol. 43. [Dougl. 21.]*

Other-

Otherwise, if the consideration be executed. *D. Cro. El.* 201. *Hob.* 106. *1 Rol.* 43. *R. 1 Rol.* 401. [*Dougl.* 21.]

So, conveyance to the action, where it appears to be material, is traversable: as, in an action for words, if the plaintiff alleges that he took an oath before the mayor of London, and the defendant said, *you are foresworn*, that he took an oath before the mayor is traversable. *R. Cro. El.* 169. *D. 1 Rol.* 43.

So, where both parties make title by the same person, the conveyance is traversable. *D. 2 Rol.* 362.

So, in replevin, generally, it is not traversable that he is not bailiff, if the defendant makes cognisance as bailiff. *Bro. tit. Bailiff*, 1. 26 *H.* 8. 8. *b.*

Nor, in trespass, if he justifies as bailiff. *33 H.* 6. 3. *Per three* *J.* *1 Rol.* 46. *but Rol. makes a quare.*

Yet, if it appears to be material, it is traversable: as, if it be pleaded, that he did it by the command of another. *R. 1 Leo.* 500.

Or, without the privity of his master. *R. 3 Lev.* 20.

So, that he did it voluntarily, is traversable, where it appears to be material: as, in debt for a fee upon a voluntary acceptance of knight-hood, if the defendant pleads, that he accepted it by the command only of the king, he must traverse that he accepted it voluntarily; for this is the essence of the action. *Semb. Lut.* 381.

So, the intention is traversable, where it appears to be material: as, if a payment to *A.* to the intent that he should pay rent in arrear, be alleged in bar to covenant by *A.* for non-payment of rent in arrear to *B.*, that he paid *A.* to such intent may be traversed. *R. 1 Sal.* 196.

So, if the defendant in trespass pleads *molliter manus imposuit*, it is traversable. *R. Lut.* 1436.

So, a *quie estate* is traversable, where it is material, tho' both parties do not claim from the same person. *Bro. Que Estate*, 8. 11. 35, 36, 37.

[In debt for annuity, the demand is not traversable, tho' there is a covenant to pay if demanded personally; for the grant is substantive, and the covenant is substantive. *Hope v. Colman*, *H.* 4 *G.* 3. 2 *Wils.* 221.]

(*G.* 12.) But traverse of an immaterial thing is bad.] But traverse of a thing not necessary to be alleged, is bad: as, in a *scire facias* for restitution of money recovered by a judgment, which judgment was afterwards reversed, if the defendant pleads payment *absque hoc* that he is *adhuc possessionatus de denar. predict.*, the traverse is bad; for it was not necessary to be alleged in the declaration, that the defendant *fuit adhuc possessionatus inde.* *R. Cro. Car.* 328.

So, in an action for an escape, if the plaintiff alleges that he voluntarily permitted *A.* to escape, and the defendant pleads *fresh pursuit*, he ought not to traverse that the escape was voluntary; for that was not necessary to be alleged. *R. 1 Vent.* 211. 217. *Agr. Lut.* 382.

[If on false imprisonment, defendant justifies under a process *quae est eadem*, &c. and traverses being guilty, *aliter*, &c. it is unnecessary. *Courtney v. Satchwell*, *P.* 12 *G.* *Str.* 694.]

So, in trover for a horse sold, and the money converted to his own use, the defendant ought not to traverse the conversion of the money. *R. Cro. El.* 555.



In *assumpsit* on a charter party, where the agreement is to sail with the first fair wind, he ought not to traverse that he did not sail with the first fair wind; for it is not material: if he performed the voyage, it is sufficient. *Hard. 69.*

So, traverse of a place or county, where it is not material, is bad: as, in trespass, &c. if the defendant justifies at another place or county, and traverses the place alleged, where the place is not material, it is bad; for he must plead his justification in the same place. *Co. Lit. 282. b. 1 Leo. 39. Cro. El. 184. 705. R. Cro. El. 842. R. 1 Rol. 395. 396. Adm. Lut. 1437. 1 Sal. 173. R. Cro. El. 667. R. 2 Mod. 271. Sav. 22, 23.*

So, if he justifies at another day, and traverses the day alleged, where the time is not material. *Semb. Hard. 20.*

So, in trespass, for taking five cart loads of hay, if the defendant justifies for tithes, and traverses that there were five cart loads of hay, it is bad; for the quantity is not material. *R. 3 Lev. 228. Lut. 1315.*

[If the defendant pleads to a bond, that part of the sum, *scil.* 1500*l.* was won by gaming, and plaintiff traverses the 1500*l.* it is bad. *Colborne v. Stockdale, H. 8 G. 2 Str. 493.*]

[If the plea ties up plaintiff to prove the estate alleged in the declaration, when another estate would do, it is bad. *Palmer v. Ekins, M. 2 G. 2. Str. 817. Ld. Raym. 1550.*]

But where place or time is material, every other place or time must be traversed. *Vide ante, (G 2.)*

So, traverse of a thing alleged after a *viz.* or *scil.* is bad. *D. 1 Lev. 245.*

[In an action on a bond the defendant must set forth in his plea the sum really due on the bond, before he is entitled to set off any cross demand on *statute 8 Geo. 2. c. 24. s. 5.*; and such averment is traversable tho' laid under a *viz.*, the averment being material. *Grinwood v. Borrit, M. 36 Geo. 3. 6 T. R. 460.*]

So, in trespass for chasing cattle *ita quod*, one of them died, traverse of what comes after *ita quod* is bad. *R. 1 Lev. 283.*

So, if the defendant alleges a discharge of tithes by unity of possession at the time of the dissolution, a traverse of the discharge is bad, but it ought to be of the unity *ratione cujus fuit* discharged, for a traverse of the discharge is a traverse of the conclusion only. *R. Mo. 534.*

(G 13.) Or, of a *supposal*.] So, a traverse of a thing, which is but *supposal*, is bad: as, if tenant in *mortdancesfor* pleads joint-tenancy with the father of the demandant, he need not traverse that he is sole tenant; for this is only supposed by the writ. *5 H. 7. 13. a.*

So, if the defendant pleads *antient demesne*, he need not traverse that it is *frank fee*; for this is only the *supposal* of the writ. *5 H. 7. 13. b.*

So, in *assumpsit* against an executor, who pleads that his testator was alive at the time of the writ purchased, he need not traverse his death; for it is only supposed by the writ and count. *Lut. 14.*

But matter necessarily included may be traversed: as, if he pleads that *A.* was seised, the plaintiff may allege seisin in *B.*, *absque hac* that *A.* was sole seised. *R. Mod. Ca. 158.*

(G 14.)

(G 14.) Or, *inducement*.] So, a traverse of inducement is bad: as, in debt against an executor, if the defendant pleads a judgment, and the plaintiff replies, that it is satisfied, but is continued by fraud, the defendant cannot traverse its being satisfied. *R. Latch, 111. Hard. 69.*

So, in a *scire facias* against an executor on a *devastavit* returned, if the defendant pleads, *nothing in his hands*, and traverses the *devastavit*, it is bad; for it was inducement only. *R. Hard. 70.*

So, in covenant, if the plaintiff assigns a breach, that the house was burnt and not repaired; it is bad, if the defendant traverses that the house was not burnt; for it was only inducement. *Hard. 70.*

In avowry for rent, if the defendant alleges seisin *in dominico suo ut de feodo talliato*, and the plaintiff in bar to the avowry says, that he was seised for life, he need not traverse the seisin in tail; for it was inducement only. *R. 2 Jon. 110. 1 Vent. 340.*

So, in *assumpsit*, the consideration, tho' it be material, is not traversable. *D. Cro. El. 201.*

Nor, in trover, the conversion. *D. Cro. El. 201. R. cont. Cra. El. 97. for it is the gift of the action.*

But, if the inducement be what entitles the plaintiff to his action, it may be traversed, where the defendant cannot wage his law. *Cro. El. 169.*

[In *quare impedit* the plaintiff having stated his title in the declaration, the defendant pleads his own title in bar, in deducing which, several incidental points are also stated; the plaintiff in the replication sets forth essential matter, which, if true, would fully avoid the defendant's title, but does it by way of inducement to a traverse of one of those incidental points, with which traverse the replication concludes; the defendant in the rejoinder takes no notice of the traverse in the replication, but *traverses the matter of inducement* which precedes it: the rejoinder is good, and may well pass by the traverse in the replication, that *traverse being an immaterial one.* *Thrale v. Barker, C. P. E. 30 Geo. 3. 1 H. Bl. 376.]*

(G 15.) Or, *a traverse more large than necessary.*] So, a traverse larger than can be denied, is bad: as, intrusion, if it be alleged that possessions of the college of the dean and canons of *E. founded apud Westminster*, by dissolution, &c. came to the king, and the defendant intruded, &c. the defendant says, that the foundation was by another name, *absque hoc*, that it was founded *apud Westminster* by the name alleged, it is a bad traverse, because it extends to the place of the foundation. *R. 1 Leo. 39.*

So, a traverse of the surrender of a copyhold to such a steward such a day, is bad; for the day and steward ought not to be part of the issue, but the traverse ought to be of the surrender *modo et forma.* *R. Tel. 122. 2 Cro. 202.*

So, in an action on the case for stopping three lights, traverse, *that he stopped the said three lights*, is bad; for if he stopped any of them, the action lies. *Tel. 225.*

So, in an action on the case for his wages *ab ultima Dec. usque 1 Nov.* it is bad to traverse the service *ab ultima Dec. ad 1 Nov.* for if he served any part of the time, he ought to have his wages for such time. *R. 1 Sand. 269.*

So, on an indictment for using a trade for three months, a traverse that



that he did not use it for three months, is bad; for if he used it only for one month, he ought to be convicted. *Per 1 Sand. 312.*

So, in an action on a policy of assurance, if the traverse be, that *navis et munimenta, &c.* were lost, it is bad, for it ought to be in the disjunctive; for the plaintiff ought to have damages for any part lost. *R. 2 Sand. 206.*

So, in debt on a recovery in an inferior court *tenet. 1 May*, traverse of a recovery at a court *1 May* is bad. *R. 1 Lev. 193.*

So, a traverse of a request at the day or place alleged, is bad; for the addition of the day and place makes it larger than it ought to be. *R. 3 Lev. 41.*

Or, of an assignment of a lease at such a day and place. *R. Litch. 92.*

So, a traverse, *that by indenture A. bargained and sold*, is bad; for it makes the indenture part of the issue. *Semb. Cart. 218.*

In trespass, if the defendant justifies by *molliter manus* to prevent a *rescous* of an execution, in aid and by the command of a bailiff, traverse, that it was to prevent a *rescous* in aid and by command of the bailiff, is bad; for the command is not material. *R. 3 Lev. 113.*

So, in trespass, if the defendant justifies by *molliter manus imposuit* on his entry into the defendant's close in *S.*, and traverses all places except in *S.*, for he ought to say except in the same close. *1 Rol. 19.*

So, in trover, if the plaintiff alleges conversion by the sale of the goods; traverse of the conversion by sale is too large. *R. 2 Leo. 13.*

(G 16.) Or, *more narrow.* So, a traverse, narrower than it ought to be, is bad: as, in an action for words, if the defendant justifies as a counsel at *Westminster*, and traverses the speaking at *S.*, where it was alleged, at any time before or since, it is bad; because the traverse does not go to the day on which the speaking was alleged. *R. 4 Co. 14. b.*

So, in trespass, if the defendant pleads that *27 El.* it was the freehold of *A.*, and traverses the time before, but not the time after; for this ought also to be traversed. *R. Cro. El. 87.*

So, if the defendant justifies by process to the sheriff in another county, *absque hoc*, that it was in the place alleged, it is bad; for he ought to traverse all places, except the county into which the process goes. *R. Cro. El. 860.*

So, if the defendant justifies by a lease to him for one year, and that he demised to the plaintiff for a quarter of a year, and after the end of the quarter took the goods *damage feasant*, and traverses the taking during the quarter of a year, it is bad; for he ought to traverse all times before and after his lease for a year. *R. 2 Sand. 295. 1 Lev. 307.*

So, in an action on the case for a recompence for service, if the defendant pleads that he had *8 l. per ann.* for such a time, and traverses the service *ab inde*, it is bad; for perhaps *8 l. per ann.* was too small a recompence, and by such traverse the service for that time is excluded, and the plaintiff is deprived of an answer to it. *R. 1 Sand. 268.*

So, in *quare impedit* where the plaintiff counts that *A.* being seised in fee granted to him, &c. if the defendant pleads that *A.* was seised only

only for the life of *B.*, who died before avoidance, &c. and the plaintiff maintains his count, and traverses that *A.* was seised for the life of *B.*, it is bad; for he ought to traverse that *A.* was seised *modo et forma*; for if he was seised for another's life only, be it for the life of *B.* or any other, the plaintiff's title is avoided. *Semb. Hob. 105.*

But if a traverse be narrower than it ought, and this tends only to the disadvantage of the defendant, or of him who takes it, it is good: as, in trespass, if the defendant justifies by a precept out of an inferior court, and traverses all times before the delivery, and after the return of the precept; yet it is good, tho' he might have traversed before the *teste*; for this is to the defendant's disadvantage. *R. 2 Lev. 81.*

So, a man, by a precise allegation of an estate, may give an advantage of traversing it precisely, tho' such particular estate is not necessary; as, if *A.* alleges that he, being seised in fee, put his cattle into the close, the defendant may traverse the seisin in fee; tho' any estate for life, or years, at will, or licence of the owner, would enable him to put his cattle there. *R. Dy. 365. a. Vide ante, (G 10.)*

[In trespass, if the defendant justifies under a prescriptive right to a duty, and the like right to distrain for it, and replication traverses the duty, without traversing the right to distrain, it is well enough. *Griffith v. Williams, M. 26 G. 2. 1 Wils. 338.*]

(G 17.) Traverse upon a Traverse.

(G 17.) *Shall not be allowed when the first traverse is material.*] If there be a traverse of a point apt and material to the plaintiff's title, he cannot refuse it and tender another traverse: as, if the plaintiff in *quare impedit* counts that the advowson was granted to *A.* and *B.* for years, that *B.* survived and granted to the plaintiff, whereby, &c. the defendant pleads that *A.* survived and granted to him the next avoidance, *absque hoc* that *B.* survived, the plaintiff cannot waive the traverse of the survivorship, and traverse the grant of the next avoidance. *R. Hob. 105.*

So, if he counts of a seisin in fee in *B.* who granted, &c. the defendant shews a seisin *pur autre vie*, and traverses the seisin in fee; the plaintiff cannot waive the traverse, and traverse that he was seised *pur autre vie*. *Semb. Hob. 104, 105. Mo. 869.*

So, a man cannot take a traverse upon a traverse in any case where the first traverse is material. *D. Vau. 62.*

So, generally, the king cannot take a traverse upon a traverse, if the first traverse goes to the king's title, which does not appear upon record. *Vau. 62.*

[To trespass for fishing in the plaintiff's fishery, defendant pleaded that the place was an arm of the sea, in which every subject had a right to fish: the plaintiff, in his replication, claimed an exclusive right by prescription, traversing the general right. It was holden that the defendant ought to take issue on the traverse, and ought not to traverse the prescriptive right claimed by the plaintiff; for the first traverse is a material one, and will put in issue the true question in dispute between the parties. *Orford v. Richardson, B. R. M. 32 G. 3. 4 T. R. 437.*]



[The first traverse was holden bad, and that the defendant might well pass it by in the rejoinder, and traverse the prescriptive right of the plaintiff stated in the replication. *Richardson v. Orford, Exc. Ch. T. 33 Geo. 3. 2 H. Bl. 182.*]

(G 18.) *But traverse after a traverse is allowed.*] But a traverse after a traverse may be allowed; as, in trespass, in such a county, the defendant pleads a concord for trespass in every other county, and traverses the county, the plaintiff may join issue on the county, or traverse the concord. *Co. Lit. 282. b. R. Mo. 428.*

So, in trespass such a day, if the defendant pleads a licence such a day, and traverses all days before or since, the plaintiff may traverse the licence. *Hob. 104.*

So, if he pleads a feoffment, and traverses all days, before the plaintiff may traverse the feoffment. *Ibid.*

Or, a release, and traverses all days since, the plaintiff may traverse the release. *Ibid.*

So, if he pleads by a recovery and execution in *Sandwich*, and traverses the place, the plaintiff may traverse the record of the recovery. *R. Mo. 350. Popb. 101. Hob. 104. Lut. 1438.*

So, in debt on a specialty for payment of 200 *l.* if he did not marry the plaintiff, and refusal alleged, if the defendant pleads that the plaintiff refused first, and traverses *absque hoc*, that he refused before the plaintiff refused, the plaintiff may traverse a tender by the defendant to marry. *R. Carth. 99.*

So, in all cases where the traverse in the bar takes away the time or place alleged in the declaration, the plaintiff has his election to join issue on the traverse, or to traverse the inducement to the traverse alleged by the defendant. *R. Cro. Car. 105.*

But when the bar concludes with a traverse to the plaintiff's title, he must maintain his title, and cannot traverse the inducement to the traverse: as, in *quare impedit*, if the plaintiff declares that *B.* seised in fee presented, &c. the defendant alleges title in the king by inquisition, and traverses the seisin in fee, the plaintiff cannot traverse the inquisition. *R. Cro. Car. 105. Semb. Lut. 1630.*

Yet if upon the pleading it appears that the first traverse to the plaintiff's title is immaterial, the plaintiff may traverse the inducement to the traverse by the defendant: as, in *quare impedit*, the plaintiff declares of a seisin in *A.* who conveyed to *B.* who conveyed to the plaintiff; the defendant pleads, that before the conveyance to the plaintiff, the church became void, and *B.* presented him, and traverses the avoidance after the conveyance to the plaintiff; the plaintiff may say, that the church became void after the conveyance to him, and that *C.* presented the defendant, and traverse that the defendant was in by the presentment of *B.* *Semb. Lut. 1632.*

(G 19.) *So, traverse upon a traverse, when the first is immaterial.*] So, if the first traverse be not to the point of the action, a traverse on a traverse may be allowed: as, in waste for cutting down and selling trees, the defendant pleads that he used them for repairs, and traverses the selling, the plaintiff may waive this, and traverse the using in repairs: for the first point was not material to the action, it was surplusage in the declaration, and ought not to have been traversed,

traversed, and the plaintiff might have demurred on the traverse. *Hob.* 104.

So, in debt on a bond for appearance *die S. pro. post Off. Pur.* the defendant pleads an arrest upon a warrant returnable *die V.* and the *stat. 23 H. 6. 10.* the plaintiff replies an arrest by a warrant returnable *die S.* and traverses the warrant returnable *die V.* the defendant may afterwards traverse the warrant returnable *die S.* for this only is material and to the point of the action. *R. per three J. 1 Sand. 22. 1 Lev. 192.*

In *quare impedit*, if the plaintiff says *A.* was seised in fee and presented *B.* and granted the next avoidance to the plaintiff, the defendant says that *C.* was seised before *A.* and granted to *A.* for the life of *D.* who presented *B.* and then granted the next avoidance to the plaintiff, *absque hoc quid A. tempore concessionis* was seised in fee, the plaintiff may traverse the seisin for the life of *D.* *Hob.* 101.

[So, in prohibition, for that defendant had petitioned the court of common council who had no jurisdiction, which belonged to the court of mayor and aldermen, the defendants plead, that the common-council have the jurisdiction, *absque hoc*, that the jurisdiction is in the court of mayor and aldermen; the plaintiff replies, that the common-council have it not, and concludes to the country; defendants demur, for that is a departure, and plaintiff ought to have taken issue on the traverse. But *per Cur.* the first traverse was immaterial. Judgment *pro quer.* *King v. Bolton, M. 5 G. Afterwards affirmed in parliament. Str. 117. Fort. 349.*]

So, the king may take a traverse upon a traverse, tho' the first traverse be to the point of the action, where the title, upon which the king sues, appears by the office or other matter of record; for the office, &c. is a sufficient title for the king, which he shall not lose, if the defendant does not appear to have a better. *Vau. 62.*

So, on an indictment for not repairing a bridge, if the defendants plead that *A.* ought to repair, and traverse that the county ought, the attorney-general may reply that the county ought, and traverse that *A.* ought, and if it be found that *A.* ought not, the defendants shall be found guilty. *R. 2 Lev. 112.*

#### (G 20.) Inducement to a Traverse.

A traverse ought to be introduced with a proper title or inducement. *Semb. Cro. El. 671. 2 Cro. 86.*

And, if there be no inducement to the traverse, the issue will be a negative pregnant. *Semb. Hob. 321.*

And the inducement ought to be sufficient in substance: and therefore in prohibition upon a suggestion of a discharge of tithes, if the defendant pleads an agreement between the master of the hospital of *B.* and the abbot, that the lands shall be discharged only in the hands of the abbot, and traverses the discharge, the inducement is bad; for it does not shew any title in the master of the hospital to the tithes, or how he could make such agreement. *R. Cro. Car. 266.*

So, if the defendant in his inducement to the traverse shews a defective title, the inducement is bad. *R. Cro. Car. 336.*



As, if in bar to an avowry for rent by the assignee of a reversion, the plaintiff shews a devise for sale, if the goods are not sufficient for the payment of debts, and a sale to him before the assignment, and traverses the descent to the assignor, it is not good, if he does not shew the condition precedent well performed, viz. what debts and what goods there were, whereby the court may judge that they were not sufficient. *R. Yon. 328.*

So, a man cannot make a part of his plea an inducement to a traverse of the residue of the declaration: as, in an action on the case for stopping three lights, if the defendant justifies for two *absque hoc* that he stopped three, the traverse is bad, for the inducement goes only to part of the declaration. *R. Yel. 225.*

So, in an action on the case for recompence for his service, if the defendant pleads that he served to such a day, and then departed, *absque hoc*, that he served to the time in the declaration, it is not good; for he makes one part of the service an inducement to the traverse of the other. *R. 1 Sand. 268.*

So, in a *scire facias* against bail in error, who plead a judgment depending, not determined, the plaintiff cannot reply that the judgment is affirmed, *absque hoc quod pendet indeterminat.* for this makes a material part of the plea inducement to the traverse. *R. Sal. 520.*

But inducement to a traverse does not require so much certainty as another plea; because, generally, it is not traversable. *R. Cro. Car. 442.*

When it is traversable or not, *vide ante*, (G 18.)

And therefore if he makes title as cousin and heir, and traverses the devise, it is sufficient, tho' he does not say how he is cousin. *R. 2 Cro. 86.*

(G 21.) *When an inducement is not necessary.*] But in ejectment on the demise of *A.* the defendant pleads that the king, being seised in fee, granted to *B.* for life, who demised to *A.* and died; the plaintiff maintains his declaration, and traverses the demise to *A.* for the life of *B.*; this is good without any title or inducement; for a title is not necessary in ejectment or trespass, and the plaintiff traverses the matter, which destroys his title. *R. Cro. El. 671.*

So, in ejectment on the demise of *A.* if the defendant pleads that before the seisin of *A.*, *B.* was seised and demised to him for years, whereby he was possessed till *A.* disseised *B.* and demised to the plaintiff; replication, that *A.* was seised in fee, with a traverse of the disseisin, is good without more title or inducement. *R. Cro. El. 890.*

(G. 22.) When the Defect of a Traverse shall be aided.

Default of traverse where the plaintiff has not fully confessed and avoided, is only form, and aided upou a general demurrer. *Per And. 1 Leo. 44. R. cont. per three J. Rodes acc. 1 Leo. 80, 81. R. acc. Cro. Car. 324. Dub. 3 Mod. 319.*

So, if a man takes a traverse, where there is a full confession and avoidance, this makes the plea double, but is aided, as duplicity, on a general demurrer. *Semb. Yel. 151. Semb. Cro. Car. 61. R.*

*2 Vent,*

2 Vent. 213. R. Lut. 1558. Agreed Lut. 1560. Semb. 2 Sand. 50.  
R. Carth. 166. *Vide ante*, (E 2.)

Yet, it will be bad on a special demurrer. R. Lut. 1457.

So, a traverse of a point, not the *most* material, if it is material, will be aided after verdict. R. Yel. 54.

So, a traverse of an immaterial point. Semb. Cro. Car. 328.  
Semb. 3 Lev. 228.

And now, by the *st.* 4 & 5. An. 16. no exception shall be for an immaterial traverse, unless shewn for cause of demurrer.

So, a bad and improper traverse. 1 Sand. 268. R. after verdict.  
Cro. El. (456.) R. Cro. El. 161.

So, a traverse too large. Cont. per three J. two acc. Yel. 122.

Or, too narrow. R. 2 Sand. 5. R. Carth. 165, 166.

So, a traverse after a traverse. Semb. 1 Sand. 21.

So, want of an inducement to a traverse. Hob. 316. 321.

So, want of a traverse not essential, shall be aided by pleading over to other matter. R. 2 Jon. 111.

But defect of a traverse, where there are two affirmatives, is not aided on a general demurrer; for, by default of an issue, the right cannot appear to the court. Hob. 233.

[So, in trespasss for breaking his wharf and rail, defendant pleads that *A.* being seised of houses, he and all those, &c. had the use of that wharf, and justifies under him, that he could not use it, and by his orders he broke, &c. plaintiff replies *de injur. sua propria absque tali causa*, he did said trespasss; and then goes on *absque hoc*, that *A.* and all those, &c. ought to have the use of said wharf; and judgment for defendant on demurrer; for the traverse is double, first traversing all the matters in the plea, and then the prescription. *Rains v. Orton*, H. 10 G. Fort. 379.]

[In trespasss, for false imprisonment on the 1st October, and from thence for seven months, defendant pleads outlawry and warrant, by which plaintiff was taken at York, and continued in prison, which arrest and imprisonment *sunt ead. insult. et imprisonam*, &c. *absque hoc*, quod culp. in Middlesex seu alibi out of York, or at any time before the delivery of writ, or after the return; and judgment for plaintiff, on demurrer; for *que est ead. transgressio* is good without traverse; and he says it is the same imprisonment, viz. for seven months, and yet in the traverse leaves out all the time between the delivery and the return. Affirmed in *B. R. Carvil v. Manly*, 9 G. Fort. 379.]

[In trespasss, for false imprisonment 1st April, defendant justifies by a precept from the sheriff's court, he took him 20th March before, which is the same assault and imprisonment, *absque hoc*, that he was guilty before granting, or after return, or out of the jurisdiction. Judgment for plaintiff, for the traverse is double, *que est ead. transgressio* is a traverse, and then another, *absq. hoc*. *Courtney v. Satchwell*, P. 12 G. Fort. 389.]

So, if a traverse be necessary to make a good bar, the omission will be fatal on a general demurrer. R. 2 Mod. 66.

So, if the replication does not traverse the matter of the bar, which is not fully confessed and avoided, the defect shall not be aided by a general demurrer. R. 1 Lib. 80, 81. 1 And. 169. Sav. 88.



## (H) Rejoinder.

**A** Rejoinder is the defendant's answer to the replication.

And ought not to depart from the bar. *Co. Lit.* 303. b.

What will be a departure, *vide ante*, (F 7, &c.)

And therefore, if the rejoinder does not support the bar, it will be bad on demurrer. *2 Mod. Ca.* 343.

[If to *assumpsit* defendant pleads tender before exhibiting the bill, plaintiff replies a *latitat* sued out before the tender, defendant rejoins, admitting the promise before exhibiting the bill, but denying the promise before the issuing the *latitat*, it is good; for plaintiff here considers the *latitat* as an original writ. *R. on demurrer. Wood v. Newton, M.* 20 G. 2. *Wils.* 141.]

If the plaintiff makes several replications, the defendant must rejoin severally to every replication. *R. 1 Sand.* 337.

[The court will not give leave to rejoin double, for it is not within the statute. *Warren v. Iwie, T.* 5 G. 2. *Str.* 908.]

If the rejoinder denies the several matters alleged in the replication, it is sufficient that it concludes to the country at the end, without putting the matters in issue severally. *R. Lut.* 241. *Vide ante*, (E 28, &c.—F 5.)

## (I) Surrejoinder.

**A** Surrejoinder or *quadruplicatio* is the plaintiff's reply to the defendant's rejoinder.

## (K) Rebutter.

**R**ebutter is so named from *rebutter*, which signifies to repel. *Co. Lit.* 303.

## (L) Surrebutter.

**A** Surrebutter is the reply to the rebutter.

## (M) When Judgment shall be.

(M 1.) Upon a bad Count.

**W**hen for default, *vide post.* (Y 1.)

When upon *nil dicit*, *vide ante*, (E 42.)

Or, upon confession, *vide post.* (Y 2.)

[Though a plaintiff or defendant pray a wrong judgment, the court must give such judgment as the party is entitled to. *Rayner v. Pointer, C. P. E.* 16 Geo. 2. *Willes*, 410.]

[And therefore if the defendant, in a demurrer to a declaration, pray judgment of the declaration and that it may be quashed, and the plaintiff join in demurrer, and the declaration be good, the court will give judgment in chief in favour of the plaintiff. *Ibid.*]

If pleading be bad, judgment shall be against him who made the first default: as, if a count or declaration be bad, there shall be judgment against the plaintiff, tho' the bar is insufficient; as, if debt be by an administrator *durante minore etate*, or an executor after the ex-  
ecutor

ecutor has obtained his full age, tho' the plea in bar be insufficient; yet there shall be judgment against the plaintiff, for it appears he has no cause of action. *R. 5 Co. 29. a. [4 T. R. 224.]*

[So, if two inconsistent counts are joined in a declaration, the plaintiff cannot have judgment. By *Buller J. Rex v. Cambridge, E. 28 Geo. 3. 2 T. R. 461.*]

But if it appears that the plaintiff has no cause of action by the plea only and not by the declaration, and the plea is defective and bad, the plaintiff shall have judgment: as, in trespass *quare clausum fregit & deiecit* his hurdles affixed to his freehold, if the defendant pleads that the place where, &c. is *communis platea* and prescribes for setting stalls there, &c. but the prescription is bad, the plaintiff shall have judgment; tho' he has no cause of action, if it was *communis platea*. *R. 1 Lev. 184.*

The judgment ought to be entred, *ideo consideratum est per Cur. quod, &c.*

But if the judgment be (where the jury find damages to 38 l. *quod recuperet damna sua predicta per jur. assess. ad 37 l. nec non, &c.* it will be well; for the words *per jur. assess. ad 37 l.* shall be surplusage. *R. Jon. 171.*

If there be judgment on a bad count upon a demurrer on motion in arrest of judgment, it shall be, *quod plaintiff nil capiat quia narratio insufficiens. Mod. Ca. 15.*

If the defendant or plaintiff pleads over, he shall not afterwards, take advantage of any defect in the plea of the other party, which would be aided on a general demurrer. *Per Holt, Sal. 519.*

#### (M 2.) Upon a bad Plea.

[If the plea is naught, and the replication likewise, and the defendant demurs, judgment shall be for the plaintiff; for the first fault was in the plea. *Woodward v. Robinson, P. 6 G. Str. 302. Vide Dougl. 94. (91.)* to the same effect.]

So, if the plea be defective, and the plaintiff makes an idle replication, but the defendant does not rely thereon, there shall be judgment against the defendant. *4 Co. 84. a. Cro. El. 815.*

So, if the plaintiff's replication be double. *R. 3 Lev. 244.*

So, if to a debt upon a bond to stand to an award, if made *super vel ante 7 Maii*, and, if not, to an umpirage, the plea be, that no award was made *ante 7 Maii*, without saying, *vel super*, if the plaintiff replies, that there was an umpirage, but assigns an insufficient breach, there shall be judgment for the plaintiff; for the plea was not cured by the replication. *Per three J. Keeling cont. 1 Sid. 336.*

[If on debt on bond payable 23d March, defendant pleads payment on the 22d, and plaintiff replies, he did not pay either on the 22d or 23d, or at any time after making the bond, and defendant demurs for duplicity, judgment shall be for plaintiff; for the plea is ill first, and if plaintiff had gone to issue upon the plea, the verdict must have been set aside. *Jernegan v. Harrison, T. 6 G. Str. 317.*]

So, if the plea does not answer to the whole declaration, whereto the plaintiff demurs, there shall be judgment against the defendant for his bad plea, and not against the plaintiff for the discontinuance. *R. 1 Rol. 406. Cont. 1 Rol. 176. R. 2 Bul. 298.*

So, if the plea be insufficient in substance, or confesses the point of the



the action, there shall be judgment against the defendant, tho' the replication be immaterial and the defendant demurs to it. *R. 8 Co. 120. 133. b. R. 9 Co. 110. b.*

As, if the plea be uncertain. *R. Poph. 209.*

So, tho' issue joined and verdict for the defendant. *Hob. 56. [Broadbent v. Wilks, C. P. T. 16 Geo. 2. Willet, 360.]*

For the court will judge upon the whole record, and therefore where the verdict concludes *si sic*, &c. for the defendant or for the plaintiff; yet the defendant or plaintiff shall not have judgment, if it appears on the whole record that he has not a title. *R. Mo. 125. R. Mo. 269. Vide post. (8 38. 40.)*

[If defendant by his plea sets out a bad title to an office, it amounts to a confession of the usurpation, tho' he denies it, and the court will give judgment against him. *Rex v. Phillips, M. 7 G. Str. 394.*]

[If the plea makes the place where the bail bond was given material, it is naught, and there shall be judgment for the plaintiff. *Burgardine v. Preston, P. 8 G. Fort. 365.*]

[If plaintiff in an action on a bail bond sets out that the bond was to appear at the return of the writ, and defendant pleads the *stat. H. 6.* and says, it was a bond made for ease and favour; it is a bad plea, for he ought to have traversed the condition set out by plaintiff; and here are only two affirmatives, which cannot make an issue. *Piedle v. Christmas, P. 12 G. Fort. 365. Vide Doug. 94. (91.) a similar case.*]

So, if the plea is bad, and issue found thereon for the plaintiff, there shall be judgment against the defendant, tho' it does not appear that he is chargeable: as, in debt against an executor, who pleads another judgment *at a day to come*, and issue, that it was *per fraudem*, is found for the plaintiff, tho' it be impossible, yet the plaintiff shall have judgment. *R. Cro. Car. 25.*

So, if the defendant by his avowry destroys the plaintiff's title, but gives him another title, there shall be judgment for the plaintiff: for upon the whole record it appears the plaintiff has title. *R. 8 Co. 93. a.*

So, if the defendant pleads a good plea in bar, but the plaintiff avoids it by his replication, there shall be judgment for the plaintiff. *R. Lut. 1380.*

[If matter that ought to have been pleaded in abatement is pleaded in bar, it is bad. *White v. Willes, P. 32 G. 2. 2 Wils. 87.*]

[So, if executor sued as administrator pleads his being executor in bar, and not in abatement, and plaintiff demurs, plaintiff shall have judgment. *Stocker v. Heath, P. 8 G. 2. B. R. H. 104.*]

[In trespass for impounding a mare, if the defendant justifies for that the mare was mangy, it must allege that she was so when put in, or that plaintiff had notice of it before the distress, or it is bad. *Semb. Palmer v. Stone, T. 32 & 33 G. 2. 2 Wils. 96.*]

[To trespass for entering close, treading down the grass there, and eating other grass with cattle; if defendant pleads not guilty to the whole, and as to entering and treading, justifies on two prescriptions, and there is a verdict for plaintiff on the general issue, and for defendant on the other; plaintiff shall have judgment; for eating the grass is not covered by the justifications. *Knight v. Lillo, T. 31 G. 2. 2 Wils. 81.*]

(M 3.) Upon a bad Replication.

But, if the plaintiff does not demur to the defendant's defective plea, but replies, and by his replication shews that he has no cause of action, there shall be judgment against the plaintiff: as, in debt on a bond, if the defendant pleads performance, and the plaintiff alleges an insufficient breach, there shall be judgment against him, tho' the plea was defective. *R. 2 Cr. 133. 8 Co. 133. b. R. 609. R. Hob. 14.*

So, in an action for an escape, if the bar is defective, but the replication shews no cause of action, there shall be judgment against the plaintiff. *R. 3 Cr. 52. b. R. 8 Co. 170. b. R. 8 Co. 133. b. Poph. 41, 42.*

So, in ejectment. *R. Hob. 128.*

And where the replication shews that the plaintiff has no cause of action, it shall not be aided by a rejoinder which tenders issue upon another point and admits a cause of action. *1 Lev. 195.*

Yet, where the replication is imperfect or defective in the manner of pleading, it shall be aided by a rejoinder, which admits the thing mispleaded, and tenders issue on another point. *R. 1 Lev. 195.*

[If there is a bad replication, of which the defendant gives notice, and plaintiff goes on to trial, and has verdict without defence, it shall be set aside. *Barnes, 457.*]

(M 4.) At what Time Judgment shall be signed.

[Plaintiff is not obliged to proceed to final judgment next term after trial; therefore if verdict in *Hil. vac.* defendant renders himself in *Easter*, and plaintiff might have signed final judgment, but does it not till *Trinity*, and in Michaelmas charges defendant in execution, it is well, and defendant is not entitled to *superfedeas*. *Pierce v. —, H. 24 G. 2. 1 Wilf. 297.*]

So, if a cause rests four terms, without any proceeding, judgment shall not be signed without a term's notice. *Mod. Ca. 18.*

So, judgment shall not be signed after a verdict or writ of inquiry, till four days exclusive. *R. 1 Sal. 399.*

[The court will give leave in the first instance to enter up judgment on a verdict reduced by an award. *Higginson v. Nesbitt, C. P. M. 38 Geo. 3. 1 Bsf. & Pull. 97.*]

So, there cannot be final judgment in real or mixt actions without a peremptory rule on motion. *R. 1 Sal. 399.*

[On a rule for plaintiff's attorney to bring in the roll, it cannot be delivered by the counsel to the clerk of the papers, the attorney must file it himself. *Whiter v. Groombridge, P. 8 G. 2. B. R. H. 104.*]

[The court will not order plaintiff's attorney to bring in and enter up judgment, on the motion of a stranger, tho' in order that it may be used as evidence on a penal statute. *Hudson v. Smith, M. 11 G. 2. 22.*]

But in personal actions judgment may be signed without motion. *1 Sal. 399.*

So, in real actions on a plea in abatement. *Ibid.*

So, if the plaintiff does not enter up judgment after verdict for him, because the damages are small, the defendant may. *Hard. 219.*

So,



So, if the defendant dies after the verdict, and before judgment signed, judgment may be signed within two terms after. 1 Sal. 401.

[If plaintiff (in an action for arrears) dies before judgment on a special verdict, judgment may be entered as of the term in which the *posse* is returnable. *Trelawney v. Winchester*, H. 30 G. 2. 1 B. M. 219.]

[On a case reserved for the consideration of the court, if defendant dies pending the argument, judgment shall be entered *nunc pro tunc*. *Ashley v. Reynolds*, M. 5 G. 2. Str. 159.]

[If defendant dies after judgment pronounced for him, the court will give leave to enter it up as of that term, tho' the application is six or seven terms after. *Norwich v. Berry*, H. 9 G. 3. 4 B. M. 2277.]

[If an executor receive assets between the time of the plaintiff's suing out the writ, and a judgment *quando accederet*, upon *plene administravit* pleaded, the court will permit the plaintiff, in his *scire facias*, to amend his judgment as to the time, by making it a judgment as of that term, when he could, at the soonest, have entered it up, unless the defendant can shew, that in point of fact some injustice will be done by it in the particular case. *Mara v. Quin*, B. R. M. 35 Geo. 3. 6 T. R. 1.]

[If defendant in error dies pending a *cur. advisare vult*, the court will give leave to enter judgment *nunc pro tunc*. *Cumber v. Wane*, P. 7 G. Str. 426.]

If judgment be signed or pronounced in any term, it may be entered upon a roll of the same term, at any time before the effoin day of the next term. *Mod. Ca.* 191.

So, if judgment be pronounced, and the roll not engrossed, it may be done many years after by leave of the court. *Mod. Ca.* 59.

Tho' it be a judgment in error on an indictment for treason, &c. *R. Mod. Ca.* 59.

[The court will not give leave to enter up a judgment of twenty years standing, *nunc pro tunc*. *Flower v. Earl Bolingbroke*, M. 12 G. Str. 639.]

Yet the court may stay it by rule till the cause is examined. *Mod. Ca.* 59.

And the court do not give leave to enter it of a precedent term, but it shall be continued till the present term. *Mod. Ca.* 184. 191.

[If no fraud appears in plaintiff, but the judgment has not been docketed in due time by negligence, the court will not interpose to set aside judgment on motion. *Barnes*, 261.]

[By rule of C. B. E. 12 G. 2. it is ordered that after the first day of the then next term, all *posseas* and inquisitions, on which final judgments are signed, shall be left with the prothonotaries, in order that the judgments may be immediately entered. *Barnes*, 259.]

[By rule of B. R. & C. P. H. 35 Geo. 3. it is ordered, that after the first day of the next term no judgment shall be signed for non-payment of issue money; but that it shall remain to be taxed as part of the costs in the cause. 6 T. R. 218. 2 H. Bl. *Fuller v. Osborne*, B. R. M. 36 Geo. 3. 6 T. R. 477. *Vide supra*, (E. 42.)]

[The court will not allow a plaintiff to sign judgment because the defendant refuses to pay for half the paper-books delivered to the judges,

Judges, the case being within the above rule. *Fulham v. Bagshaw*,  
C. P. T. 38 Geo. 3. 1 Bos. & Pul. Rep. 292.]

(N) Protestation.

**A** Protestation is made to the intent that the defendant or plaintiff may not be concluded by his plea or replication, if the issue be found for him. *Co. Lit.* 124. b. *Pl. Com.* 276. b.

As, in an action by a villein against his lord, who pleads in bar, he must at the beginning of his plea make protestation that he is his villein, otherwise the plaintiff shall be enfranchised, tho' the issue be found for the lord. *Lit. sect.* 192, 193.

And a man may plead it in abatement, or take it by protestation and plead over. *Lit. s.* 193.

So, a man may take a protestation in his replication: as, in *assumpsit*, if the defendant pleads an agreement to take a bill in satisfaction, the plaintiff may say, *protestando* that there was no agreement and no bill given, that it was not sealed. *R.* 5 Mod. 136.

So, a man may take by protestation matter, which he cannot plead: as, in a *præcipe in capite*, the tenant cannot plead that the land is holden of *B.* and not of the king, but shall make protestation of it.

[In an action for taking goods of the value of 5*l.* the defendant may make protestation that they were not of more than the value of 3*s.* 4*d.* *Lut.* 1320.

On an information the defendant shall take by protestation, that it is a *minus sufficiens*. *Pl. Com.* 1. a.

The protestation must come after *precludi*, *non*, &c. and not before. *Pl. Com.* 276. b.

But a protestation, repugnant or inconsistent with the plea, is not good: as, in replevin, for a taking in *A.* a protestation that he did not take, and a plea that there is no such *vill* as *A.* with an avowry by *return habendo*, is bad. *Bro. Protestation*, 1.

So, if the defendant pleads a descent, which *tells* entry, and the plaintiff *protestando* that there was no descent, pleads continual claim; for he does not acknowledge the descent by the protestation, and confesses and avoids it by plea. *Bro. Protestation*, 5.

In an action by an executor, the defendant ought not to take by protestation, that the plaintiff was not executor, and plead that *A.* was administrator, who gave to him; for it is the effect of the plea, that the plaintiff was not executor. *R.* *Pl. Com.* 276. b.

In *mayhem*, if the defendant *protestando* that it was *de son assault*, pleads *nul mayhem*. *Kel.* 95. a.

Nor, an idle and superfluous protestation: as, in action by the executor of *A.* if the defendant makes protestation that *A.* did not make a will, and that *A.* did not make the plaintiff executor; for if he made no will, the other part is included. *Pl. Com.* 276. b.

Yet an idle or repugnant protestation does not vitiate the plea, tho' it be shewn for cause of demurrer; for the intent of a protestation is, that the party may not be concluded in another action. *R.* in *B. R. inter Sir G. Warburton and —*. *R.* by C. B. *M.* 9 Ann.

The protestation does not avail, if the issue be against him; as, if



an issue is found against a lord, the villein shall be enfranchised, tho' he takes protestation, that he is his villein. *Co. Lit.* 126. p.

Yet, if the vouchee takes by protestation the value of the land, and enters into warranty; tho' it is found against him, the protestation prevents a conclusion as to the value of the land. *Co. Lit.* 126. a.

### (O) Shewing of Deeds.

#### (O 1.) When it shall be.

**I**N all actions, a man, who claims by deed and pleads it, ought to say *hic in curia prolat.* if he is a party to the deed, for by the shewing of deeds in court, the court are to judge whether they are good. *R. 10 Co. 92. a. Co. Lit. 35. b. R. 2 Cro. 272. Kel. 201.*

And therefore, if a man claims a villein, or any other thing which he cannot have without deed, he ought to shew the deed in court. *Lit. f. 183.*

So, if a man alleges an estate of freehold to be on condition, he must shew a deed thereof. *Lit. f. 365.*

(O 2.) *How pleaded.* If a man pleads a deed, he ought regularly to allege a *profert* of the deed itself.

Or, of the record.

And the printed act is not sufficient, if he makes a *profert* of an act of parliament in plea. *R. Sal. 566.*

But by the *st. 3 & 4 Ed. 6. 4 & 13 El. 6.* the exemplification or *constat* of inrolment of letters patent, pleaded or shewed, shall be of like effect as the first letters patent, if the same had been pleaded or shewn.

And therefore it is sufficient to say, *prout per exempl. irrotulament.* *1 Sand. 189. Sal. 566.*

So, by the *st. 10 Ann. 18.* a copy of the inrolment of any indenture of bargain and sale inrolled.

But, if he pleads an inrolment, he need not say before whom the deed was acknowledged. *R. Pl. Com. 105. a.*

And if the inrolment be not effectual, the other party may traverse the inrolment, and it shall be tried by the record. *Ibid.*

[In debt on assignment of bail-bond, *profert* of the bond is enough, without setting down the witnesses' names. *Robinson v. Taylor, T. 13 G. Fort. 360.*]

(O 3.) *What deed.* So, if a man pleads letters patent to him, or to another, to whom he is privy, or under whom he justifies, he ought to shew them to the court. *10 Co. 92. Mo. 849. Dy. 29. b.*

So, in debt upon bond, he must shew the bond.

So, where an action is founded on a deed, he must shew the deed: as, covenant, &c.

And he must shew the original; for a counterpart is not sufficient. *R. Noy, 53.*

So, in an action upon the case for the profits of an office, he must shew the letters patent of the office. *Per two J. Latch, 88.*

So, in debt by an executor, he must shew to the court the letters testa-

testamentary. *R. Hob. 53. Cont. if not demanded. 1 Rol. 78. Vide post. (O. 16.)*

[If the defendant prays *oyer* of the letters testamentary, it is sufficient if the executor produces an exemplification of the probate. *Shepherd v. Shorthose, H. 7 G. Str. 412.*]

So, if he pleads payment with an acquittance, he must shew the acquittance. *R. Sal. 519.*

But he need not shew to the court a writing not sealed: as, if he pleads a warrant of a justice of the peace, he need not say *hic in curia prolat.* *R. 3 Lev. 205.*

So, if he pleads a sheriff's warrant. *D. 3 Lev. 205. 2 Cro. 372.*

Or, an award; for it is no deed. *Sti. 459. Vide Arbitrament (I).*

Or, a policy of insurance. *1 Sid. 386.*

[Plaintiff is not obliged to shew a promissory note or bill of exchange, on motion. *Odiarne v. Duke of Grafton, M. 1727, Bunb. 243.*]

So, tho' it be under seal, if it be not a deed: as, a composition with creditors on the *st. 8* (or *8 & 9 W. 3. 18. R. Mod. Ca. 58. (Vide Ld. Raym. 967.)*

(O 4.) *Where one is privy.*] So, a man who claims any estate or interest by a deed must shew the deed, tho' he is no party to it. *10 Co. 92. a. Co. Lit. 226. a.*

As, if there be a release of a right to tenant for life or in tail, he in reversion or remainder, who pleads it, must shew the deed. *Lit. f. 453.*

Or, if it be to him in reversion or remainder, if the tenant for life pleads it, he must have it in his hands. *Lit. f. 452.*

So, if a confirmation be to tenant for life, remainder to *A.*, he shall not have waste or other benefit by such remainder, without shewing the deed. *Lit. f. 573.*

So, if the defendant, being a tinner, pleads a privilege granted by charter of *Ed. 1.* to tanners not to be sued out of the stannaries, he ought to shew the patent, for he is privy to it. *R. Mo. 849.*

(O 5.) *Or, claims only part of the estate.*] Tho' he has only part of the estate, which was granted by the original deed: as, if an estate be granted by letters patent, the lessee of part must in pleading shew the letters patent. *R. 10 Co. 92. a. Dub. Dy. 29. b. Semb. cont. 2 Cro. 70.*

So, if the grantee of a rent grant a part of the rent to another, the second grantee ought to shew the first deed. *3 H. 6. 20, 21. 10 Co. 93. a.*

(O 6.) *Or, justifies under a party or privy.*] If a man justifies under one who is party or privy to a deed, in pleading he must shew the deed. *10 Co. 92. a. Co. Lit. 226. a.*

As, if he justifies as servant to the lessee of a patentee. *R. 10 Co. 92. a. 2 Cro. 317.*

Or, to a lessee, who by a covenant in his lease has power to take trees for fireboot. *R. 2 Cro. 292.*

Or, as servant to a lessee of tithes. *R. 2 Cro. 360.*

(O 7.)



(O 7.) *Tho' nothing is conveyed by the deed, if a deed was necessary.* And if a deed is necessary, he who pleads it must shew it, tho' nothing is conveyed or transferred by the deed, but it relates to collateral matter: as, if a man pleads attornment by a corporation to a grant to him in reversion, he must shew the deed of attornment, tho' he claims nothing from those who attorned, which is only a consent. 6 Co. 38. b.

(O 8.) When it is not necessary.

(O 8.) *If he be a stranger.* But if a man be a stranger to the deed, and claims nothing out of it, nor justifies as a servant to one who is party or privy, he need not shew the deed, tho' he pleads it. 10 Co. 93, 94.

As, if he comes in not by the party to the deed, but by act of law, and therefore cannot provide for the shewing of the deed: as, if guardian in chivalry in right of the heir enters for a condition broken, he need not shew a deed of the condition. Co. Lit. 225. b.

So, tenant by statute merchant, staple, or *elegit*. Co. Lit. 225. b. 5 Co. 75. a.

So, tenant in dower. Co. Lit. 225. b.

If a minister sues for an augmentation on the *st.* 29 Car. 2. reserved by a dean on a demise by indenture of lands belonging to his deanery, he need not shew the indenture, for it is sufficient to say *penes se remanent*. R. 3 Lev. 83.

A bailiff, who justifies under a justice of peace, need not shew the commission. 20 H. 7. 7. a.

Nor, a man who pleads a patent to a stranger. R. Hard. 187.

Nor, *cestuy que use*, who pleads a grant of an advowson by a deed to B. to his use; for the deed belongs to B. R. 2 Cro. 217.

So, an assignee of a debt upon bond by commissioners of bankrupt; for he comes to it by act of law, and therefore need not shew the bond. R. Cro. Car. 209.

So, if there be a covenant to stand seised to the use of B., he who claims under B. need not shew the deed of covenant in pleading; for B. is in by law, viz. by the *st.* 28 H. 8. 10. of uses. Semb. Cro. Car. 442.

[A *profert* is not necessary of a conveyance deriving its effect from the statute of uses. Dy. 277. Cro. Jac. 217. Carth. 316. 3 T. R. 156. Bolton v. Carlisle, C. P. M. 34 Geo. 3. 2 H. Bl. 262.]

[In a conveyance by feoffment, the statute of frauds requires that livery should be accompanied by an instrument in writing; yet the party is not bound to make a *profert* of the deed. Read v. Brookman, B. R. E. 29 Geo. 3. 3 T. R. 156.]

[In a plea of justification under process of an inferior court erected by letters patent; it is not necessary to make a *profert* of the letters patent. Titley v. Foxall, C. P. T. 31 & 32 Geo. 2. Willes, 688.]

So, an executor of a feoffee need not produce the deed, by which the plaintiff enfeoffed B, to the use of the testator, in debt on a bond for performance of a covenant of the same deed. R. Lut. 483.

[If plaintiff claims not the land but only a rent-charge, *profert* is not necessary; for the charters belong to the owner of the land, and the owner of the rent-charge is not entitled to them. Whitfield v. Faussat. H. 1749, 1 Ves. 387.]

(O 9.)

(O 9.) *Except where the deed belongs to him.*] Yet, if the deed belongs to him, he must shew it, tho' he came to the estate by act of law: as, the lord by *escheat* shall not plead a condition to defeat a freehold without shewing it. *Co. Lit. 226. a.*

So, tenant by the curtesy shall not plead a condition made by his wife, tho' he is in by act of law; for it is presumed that he has the deeds which belonged to his wife. *Co. Lit. 226. a.*

So, if the uncle of a tenant in tail enfeoffs another with warranty, who afterwards releases the warranty to the feoffor, and the uncle dies, if the tenant in tail pleads the release, he must shew it; for it belongs to him after the death of his uncle. *Co. Lit. 393. a.*

(O 10.) *If the estate be executed.*] So, a man who pleads a deed to which he is neither party nor privy, need not shew it, if the estate be executed: as, if he pleads a feoffment to *A.* upon a condition and entry for the condition broken, and afterwards a descent to the defendant, he need not shew the deed of condition; for it is executed. *Co. Lit. 226. a.*

So, if he pleads a mortgage and payment at the day, he need not shew the deed; for the condition being performed, the deed perhaps was delivered up. *Ibid.*

So, if a mortgagee demises for years, and the mortgagor re-enters in debt for rent against the lessee afterwards, he shall plead the mortgage and re-entry, without shewing the deed. *Co. Lit. 226. a.*

So, if a confirmation be to a lessee for life, remainder to *A.* in waste, &c. by *A.*, after the estate executed he need not shew the deed. *Co. Lit. 317. b.*

So, if defendant pleads an assignment of a lease, the plaintiff replies that the lessee could not assign without the lessor's licence by deed, and the defendant rejoins that he had licence by deed, he need not shew it; for it is executed. *R. 6 Co. 38. b. R. 2 Cro. 102.*

(O 11.) *Except where he is party or privy.*] But a party or a privy to a deed must shew it, tho' the estate be executed: as, the lessor himself cannot plead a condition and entry for the condition broken, without shewing the deed, tho' the condition be executed. *Co. Lit. 227. b. 228. b.*

(O 12.) *If the shewing be hindered by the other party.*] So, if the plaintiff detains the deed, the defendant may plead without shewing it: as, tenant in an assize may plead a feoffment on condition and entry, and that the plaintiff entred and took the chest where the deed was, &c. and detains it without shewing the deed. *Co. Lit. 226. a.*

So, in waste, the defendant may plead a release, and that the plaintiff got possession of it, and detains it, without shewing the release. *5 Co. 75. a.*

So, the plaintiff may declare that by indenture, which the defendant *penes se retinet*, *A.* demised the rectory to the defendant who thereby covenanted to find a priest, and to pay him 20 l. *per ann.*, and that the plaintiff was found, and now brings debt for the 20 l. without a *profert in cur.*; for neither the indenture nor counterpart belong to him. *R. 3 Lev. 83.*

(O 13.)



(O 13.) *Or, be impossible.*] So, if a deed be shewn in court and denied, for which reason it remains in court, it may be pleaded in another court without shewing it. 5 Co. 74. b.

[So, a deed may be pleaded *as lost by time and accident*, without profert. 3 T. R. 151. 4 T. R. 323.]

[Where in setting forth a conveyance it was stated that a release was cancelled by the seal of the releasor being taken off and destroyed, and that part of the deed was destroyed or lost, with a profert of the residue; it was holden to be good pleading. *Bokton v. Carlisle*, C. P. M. 34 Geo. 3. 2 H. Bl. 259.]

So, if letters patent, which are in their nature matters of record, are of record in the same court, they may be pleaded without shewing. 5 Co. 74. b. Sal. 497.

Otherwise, if in its nature not matter of record; for a deed inrolled in the same court cannot be pleaded without shewing. 5 Co. 74. b.

So, there ought to be a *profert* of letters patent inrolled in another court, or of an exemplification thereof. Sal. 497.

(O 14.) *If the deed was not necessary or conveyed nothing.*] So, if there be a deed, when it was not necessary, whereby no estate or interest is conveyed, a man, who pleads it, need not shew it to the court: as, if a lease be on condition that he will not assign without licence, and the lessee pleads a licence by deed, he need not shew the deed; for there is nothing conveyed by it, and a licence without deed would have been sufficient. R. 6 Co. 38.

So, if the condition be that he will not assign without deed, and he pleads an assignment by deed, he need not shew the deed; for a deed was not necessary *ex provisione legis*, but only *ex provisione hominis*. 6 Co. 38. b.

So, in debt for rent upon a lease by indenture, the plaintiff need not shew it; for the lease is the foundation of the action, and it need not be by indenture. *Per two J. Cro. El. 711.* 6 Co. 38. b. in marg.

In *quare impedit*, if the plaintiff makes title by a grant of the next avoidance to A. who made executors, who granted to him, he need not shew the letters testamentary; for the grant to the plaintiff was good, tho' the will was not proved. R. Dy. 135. a.

(O 15.) *Or, be alleged in the inducement to the action or bar.*] So, if the deed pleaded be only in the inducement to the action or bar, it need not be shewn to the court: as, in a suit in the *Exchequer* by the king's farmer, he need not shew the deed wheteby he is farmer; for it is collateral to the action. 6 Co. 38. b.

So, in an action on the *ss. 2 Ed. 6. 13.* if the plaintiff declares that the king granted tithes by letters patent to A. for life, who leased to the plaintiff for years, he need not shew to the court the letters patents, which are only conveyance to the action. R. 2 Cro. 70.

So, in an action for disturbance of a way, if the plaintiff declares that a corporation, and all *que estate*, &c. in such a messuage, have a way, he need not shew the deed whereby the estate was conveyed to the corporation; for it is only inducement. R. 2 Cro. 673.

So,

So, in replevin, if the avowant claims by a *que estate* a hundred to which a leet is incident, he need not shew the deed whereby the hundred is claimed, for this is only inducement to the leet. 2 *Leo.* 74.

So, in trespass, if the defendant justifies by command of the heir of *A.* who died seised, and the land descended to his heir, and the plaintiff says that *A.* by indenture covenanted to stand seised to the use of *B.* &c. and by his licence, &c. and traverses the dying seised, he need not shew the indenture, for it is only inducement to the traverse. *R. Cro. Car.* 442. *Jon.* 377.

So, in trespass, if the defendant justifies by *A.*'s dying seised, and a descent to him, and the plaintiff shews that before *A.* was seised, *B.* being seised made a lease to *D.* who died, and plaintiff's wife took out administration and traverses *A.*'s dying seised, there is no need of a *profert* of the letters of administration to his wife; for it was only inducement to the traverse. *R. Hob.* 38.

(O 16.) *If the deed be not mentioned, to entitle him.*] So, if a man pleads a deed by way of discharge, and not in order to make a title, he need not shew it to the court: as, in bar to an avowry made by a corporation for rent and services, if the plaintiff pleads a lease of the manor made to *A.* who demised to him, he need not shew the deed, for it is pleaded by way of discharge, and he does not claim title by it. *R. Mo.* 870.

So, in an action against an administrator, if the defendant pleads original purchased before administration granted to him, he need not shew the letters of administration, for he doth not entitle himself by them. *R. Lut.* 10.

In an action by an executor, if the defendant pleads administration granted to another, he need not shew the letters of administration. *R. Pl. Com.* 277. *a.*

If there be a grant to the lord of a manor that the tenants of the manor shall be discharged of toll, and a tenant pleads such discharge, he need not shew the grant. 20 *H.* 7. 6. *b.* *Cont. per Brudnel,* 20 *H.* 7. 7. *a.*

So, in a writ, founded on a deed, the deed need not be shewn.

So, also, in a *scire facias* by an administrator or executor upon a recognizance to his testator, he need not shew the letters testamentary. *R. Cro. El.* 592.

(O 17.) When the not shewing is aided.

If a man did not shew a deed to the court, when he ought, the omission was esteemed matter of substance, and not helped upon a general demurrer. *Dub.* 1 *Leo.* 310. *R.* 2 *Cro.* 292. *R.* 10 *Co.* 94. *D.* 1 *Roll.* 20. *D.* *Hob.* 233. *R.* 2 *Cro.* 32. *R. cont. Sal.* 497. *D. cont.* 1 *Leo.* 300. *Cro. El.* 153. *Acc. Mo.* 885.

But now it is aided on a general demurrer. *R. Lut.* 1355.; and by the *st.* 4 & 5 *Ann.* 16. it is enacted that no exception shall be taken for not alleging the bringing into court any bond, indenture, or other deed, unless shewn for cause of demurrer.

So, an omission of *profert* *hinc in cur. literas testamentar.* in an action by an executor, was substance, and not aided on a general demurrer. *R. Hob.* 83. *R.* 2 *Cro.* 409. 412. 3 *Bul.* 223. *R.* *Cro. El.* 551.



But now it shall be aided. *R. 2 Sand. 502. R. 1 Sid. 249. R. Lut. 301.*; and it is so enacted by the *st. 4 & 5 Ann. 16.*

So, the omission of letters of administration was held to be substance. *Hob. 233.*

But now it shall be aided on general demurrer. *R. 1 Vent. 222. 1 Sid. 98.*; and it is so enacted by the *st. 4 & 5 Ann. 16.*

And by the *st. 16 & 17 Car. 2. 8.* after verdict no judgment shall be staid or reversed for want of alleging the bringing into court of any bond, bill, indenture, or other deed, mentioned in the declaration or other pleading, or letters testamentary, or letters of administration.

So, if the declaration alleged matter of record, and did not conclude *prout patet per recordum*, it was substance.

But now it shall be aided on a general demurrer. *R. 1 Mod. 9. Vide st. 4 & 5 Ann. 16. Vide ante, (E 29.)*

### (P) Oyer.

#### (P 1.) Of Deeds.

**I**F a man *proferat in cur.* a deed, it remains in court, in judgment of law, the whole term, in which it is shewn; for the whole term is but one day. *R. 5 Co. 74. Wymark. Co. Lit. 231. b. Lut. 1644. Sal. 497.*

And, if the deed be denied, it remains in court till the plea is determined, and the *custos brevium* has the custody of it. *5 Co. 74. b. Co. Lit. 231. b. Mod. Ct. 233.*

But if it be not denied after the end of the term in which it was shewn, the law adjudges it to be in the custody of the party himself; for there is no officer in court to whom the charge of it belongs. *5 Co. 74. b. Co. Lit. 231. b. Sal. 497.*

So, letters testamentary or of administration do not remain in court *omnino*; for they may be necessary elsewhere. *Sal. 497.*

If a deed is brought into court by one party, the other may demand oyer of it at any time whilst it remains in court, and take advantage of any proviso or clause in such deed. *R. 5 Co. 74. b.*

So, if a deed be brought into court by one tenant or defendant, the others may plead in bar any matter in such deed, without having it in hand. *5 Co. 74. b.*

And therefore, tho' a deed be not denied, oyer of it may be demanded in the same term in *C. B.* as well as in *B. R.* *Lut. 1644.*

And, by the course of *B. R.*, oyer may be at any time before plea, tho' it cannot be in *C. B.* after term, or after an imparlance. *Terms de Ley.* But it is said that it shall not be after imparlance to another term. *2 Lev. 142. Vide Bro. Oyer, 16, 17. 33. 39.*

[Oyer must be demanded before rule to plead is out. *Barnes, 241. 329. 268. 326.*]

[And by the plaintiff oyer cannot be demanded in another term than that in which the plea is filed. *Per Buller J. 1 T. R. 149.*]

So, by the course of *B. R.* no imparlance or continuance is entred before replication, rejoinder, &c. tho' day be allowed for two or three terms, to reply, &c. and then the replication, rejoinder, &c. being entred generally, may take advantage of the deed mentioned in the bar,

bar, &c. for the whole shall be understood to be in the same term. *R. 5 Co. 75. a. Wymark. Semb. Lane, 39.*

If the defendant demands *oyer* of an obligation, he shall not have *oyer* of the condition, unless he demands that also. *Mod. Ca. 237.*

But if he demands *oyer* of an indenture, which refers to matter indorsed, it is not a complete *oyer*, if he has not *oyer* of the indorsement also. *R. Mod. Ca. 237.*

[*Oyer* shall contain the names of the witnesses, and all memorandums on the bond. *Barnes, 263. Willes, 288. S. C.*]

[If there are two counts for the same debt on one policy of insurance, defendant cannot have *oyer* of two policies. *B. R. H. 243.*]

If *oyer* be demanded of a deed shewn in a plea, it becomes part of the plea. *1 Sand. 317.*

So, if there be *oyer* of a deed shewn in a declaration, it will be part of the declaration.

So, if the party has not the deed, which he shews in his declaration, &c. and *oyer* of it is demanded, the court on an affidavit will oblige the other party to produce his counterpart, or will grant an imparlance. *2 Cro. 429. 1 Sid. 50.*

[And where an original lease was lost, the court, on application, has ordered that a copy of the counterpart should be deemed good *oyer*. By *Buller J. Read v. Brookman, B. R. E. 29 Geo. 3. 3 T. R. 160.*]

So, if an action be founded on a writing, as a policy of assurance, where a *profert* is not necessary, the court may grant an imparlance, till a sight given of the writing, if the defendant cannot have it otherwise. *Semb. 1 Sid. 386.*

[*Oyer* of a deed, in covenant, cannot be dispensed with, tho' shewn to be lost, and defendant have the other part in his hands. *Soresby v. Sparrow, P. 16 G. 2. Str. 1186. Wilf. 16.*] *Vide ante, (O 13.)*

But where a note is only evidence of the action, the court will not direct a sight of it. *R. 1 Sal. 215.*

But a man cannot demand *oyer* of a deed, which is not in court, and therefore in debt upon a bond with a *profert in cur.*, if the defendant demands *oyer* of the bond and condition, which appears to be for the performance of the covenants in an indenture, he cannot demand *oyer* of the indenture; for it was not brought into court. *R. 1 Sand. 9. 122. Sal. 498.*

So, in debt on a recognisance, the defendant cannot demand *oyer* of it, if it was not acknowledged in the same court; for a recognisance in *Chancery* or other court is not brought into court as a bond is. *R. Poph. 202.*

[So, a party cannot demand *oyer* of an act of parliament, because it is not in the power of the court. *Jeffery v. White, B. R. M. 21 Geo. 3. Dougl. 476.*]

[Nor, of letters patent, being a matter of record, unless there is an affidavit made that they are not inrolled. *Rex v. Amery, H. 26 Geo. 3. 1 T. R. 149.*]

So, in a *scire facias*, on a recovery of an annuity by deed, the defendant cannot demand *oyer*; for the action is founded on the recovery, not on the deed. *Bro. Oyer, 1. 32.*

So, if the defendant justifies by a precept of a justice of peace, the plaintiff cannot demand *oyer* of the precept. *Bro. Oyer, 13.*

So, if the defendant demands *oyer* of a will, &c. whereof the plain-



tiff makes a *profert*, &c. when he need not, it shall not be allowed. *Sal. 497.*

So, if the defendant demands *oyer* of a deed, when it is not demandable, and the plaintiff gives *oyer*, he shall not be concluded thereby, but may afterwards make his *oyer* complete. *R. Sal. 498.*

If the defendant demand *oyer*, when it ought not to be granted, it is bad. *Sal. 498.*

But the plaintiff cannot in his demurrer say *quod placit. predict. est minus sufficiens*. *R. 2 Lev. 142.*

And if a man demands *oyer* of a deed, not in court, it is bad on a special demurrer. *R. 1 Sand. 9.*

But it shall be aided on a general demurrer. *R. 1 Sand. 9.*

So, if the defendant demands *oyer* of an indenture, not mentioned in the declaration, and the plaintiff gives it, the defendant may plead thereon. *Mod. Ca. 237.*

If a man craves *oyer* of a deed shewn in a declaration, which is granted, the other cannot say that the deed read is not the same on which he declared; for the reading is the act of the party himself, by which he is concluded. *R. Lut. 1644.*

Otherwise, if *oyer* is demanded of a writ, &c. he may say that it is not the same; for the reading is the act of the court. *Per three J. Tracy cont. Lut. 1644.*

So, if the defendant demands *oyer* of a deed, which is granted, and in his plea recites the deed different from the true deed, the plaintiff by his replication may pray that the deed may be inrolled, and so procure it to be truly inrolled.

[Defendant after *oyer* may plead the general issue, without taking notice of the *oyer*, and plaintiff cannot, when he makes up the issue, insert the *oyer* at the head of the pleas; if he would avail himself of it, he must pray it to be inrolled at the head of his replication at his own expence. *Str. 1241. Willes, 288. n. (c.)*]

[In *C. B.*, if *oyer* prayed and not pleaded, plaintiff may insert it in the plea; it is only where it is not prayed that he is obliged to have it enrolled on his replication. *Barnes, 327.*]

So, if the *oyer* be imperfect, but not varying from the deed, and the defendant demurs, he shall not take advantage of it; for he might insist upon a complete *oyer*. *R. Sal. 602.*

[If defendant, after having craved *oyer* of a deed, do not set forth the whole deed, the plaintiff may sign judgment as for want of a plea; or the court will quash the plea. *Wallace v. Cumberland, B. R. T. 31 Geo. 3. 4 T. R. 370.*]

[If a bond is in the hands of a third person, the court will compel him to give *oyer* of it, and produce it at the trial; tho' he is a barrister, and alleges it was left in his hands to await the event of a suit depending; for defendant may avail himself of that by plea. *White v. Earl Montgomery, M. 17 G. 2. Str. 1198.*]

[If defendant pleads with a *profert*, and *oyer* is demanded, plaintiff may sign judgment if it is not given in two days. *Barnes, 245.*]

#### (P 2.) Of Writ and Record.

So, a man may demand *oyer* of a writ or other record alleged in pleading: and therefore the defendant may demand *oyer* of the original.

[The

[The defendant is not entitled to *oyer* of the original, and if he *prays oyer*, the plaintiff may sign judgment without taking any notice of it. *Dougl.* 227.]

[And now *oyer* will not in general be granted of a record. 1 *T. R.* 150.]

So, may the *garnishee*. *Bro. Oyer*, 11.

But shall not have *oyer* of *mesne* process: as, of re-summmons on default, &c. *Bro. Oyer*, 3. 18.

So, in error, the defendant shall not have *oyer* of the original, but of the record he may have. *Bro. Oyer*, 19.

Nor, in attaint. *Bro. Oyer*, 19.

So, in a *scire facias* against an executor on a recovery, the defendant may demand *oyer* of the record. *Bro. Oyer*, 12. 26. 38.

So, in debt on a judgment. *Semb. Bro. Oyer*, 14. 26.

[Plaintiff may have a rule to reject plea of a recovery in the same court, unless *oyer*. *Hunter v. Wiseman*, H. 2 G. 2. *Gavinell v. Thompson*, T. 3 G. 2. *Str.* 823.]

But in debt on a recovery in an inferior court of record, the defendant shall not have *oyer* of the record; for it remains in the inferior court. *Bro. Oyer*, 8.

Nor, of a record in another court. *Bro. Oyer*, 26.

Or, after removal to another court by a *recordare*, error, &c. *Bro. Oyer*, 4. 31.

So, he shall not have *oyer* of a record, when it is only conveyance to the action; as, in escape. *Bro. Oyer*, 29.

So, he shall not have *oyer* of a record, when he is a party to it. *Bro. Oyer*, 19. 31. 36.

[If defendant pleads tender before original, and plaintiff replies original purchased before time of tender pleaded, the court will not make rule for *oyer* of original, which is a record. *Barnes*, 340.]

So, in *scire facias* on an office found for the king, the defendant shall not have *oyer* of the office; for it is recited in the writ. *Bro. Oyer*, 22.

The defendant shall not plead in abatement of the writ before *oyer* of it.

Nor, variance between the writ and count. *R. Sal.* 658.

[If defendant pleads variance between writ and count, without *oyer*, he shall answer over. *Vanderplank v. Banks*, H. 32 G. 2. 2 *Wils.* 85.]

[After *oyer*, defendant may plead *nul tiel record*, without inserting the *oyer*; and plaintiff, if he pleases, may insert it in his replication. *Simmonds v. Parmenter*, T. 18 G. 2. *Wils.* 97.]

So, the defendant shall not plead *condition performed*, before *oyer* of the bond. *Bro. Oyer*, 16. 25.

But the defendant shall not have *oyer* after imparlance. *Bro. Oyer*, 14. *Per Holt, Mod. Ca.* 28.

Nor, after plea in abatement. *R. Mod. Ca.* 28. *Sal.* 498.

Demand of *oyer* was antiently made in court; but now it is made by one attorney of the other. *Mod. Ca.* 28.

And when *oyer* ought to be granted, the defendant need not plead before *oyer*. *Mod. Ca.* 23.

But the defendant cannot take a copy of a writ from the record, to make *oyer* of it, without the plaintiff's consent; for it ought to be demanded of and granted by the other party. *Mod. Ca.* 28.



So, in covenant on an indenture, the defendant cannot, without demanding *oyer*, set out the indenture and plead *covenants performed*. *R. Mod. Ca. 154.*

If *oyer* is granted, when it need not, it is no error. *Mod. Ca. 28. Sal. 498.*

[And the party craving *oyer* shall be entitled to take the whole instrument as part of his adversary's plea. *Dougl. 467.*]

Otherwise, if it be denied, when it ought to be granted. *Mod. Ca. 28. Sal. 498.*

[The defendant has as many pleading days to plead after *oyer* is granted as he had when it was demanded. *Webber v. Austin, B. R. M. 40 Geo. 3. 8 T. R. 356.*]

### (Q) Demurrer.

(Q 1.) What it is.

**D**emurrer is, when for the insufficiency of the count, plea, &c. in point of law, the other party demurs, and refers it to the judgment of the court. *Lit. 71. b. 5 Mod. 132.*

[If the plaintiff in his replication do not answer some matter contained in the plea, or answer it improperly, the defendant must demur to it. *Bullythorpe v. Turner, C. P. E. 17 Geo. 2. Willes, 475. Barnes, 353. S. C. Coppin v. Carter, 1 T. R. 462. Thellusson v. Smith, 5 T. R. 152.*]

(Q 2.) How it shall be delivered, &c.

And in *C. B.* a demurrer to a plea, &c. need not be received, unless it is under a serjeant's hand. *3 Leo. 222. Comp. Att. 41.*

But this does not extend to a demurrer on a challenge to an array, *3 Leo. 222.*

[If the joinder in demurrer is signed by counsel, at the time of accepting the paper-book, it is sufficient, tho' it was not signed when delivered. *Barnes, 156.*]

A demurrer to an indictment shall not be received after verdict. *R. 1 Sid. 208.*

If a defect in pleading will not be aided by verdict, it is safer to join issue on the fact than to demur; for the fault in law will be considered afterwards. *4 Co. 14. a.*

If there be a demurrer to part, and issue to part, the demurrer shall regularly be determined first. *Co. Lit. 72. a.*

Yet it is in the discretion of the court to try the issue before the demurrer is determined. *Co. Lit. 72. a. Semb. Dgl. 2.*

[But now, where issues are taken to some of the pleas, &c. and demurrers to others, the plaintiff has a right to argue the demurrers either before or after the trial. *2 T. R. 394.*]

If there be judgment for the plaintiff on a demurrer, he may, if he pleases, enter a *non pros* on the issue, and have a writ of inquiry on the demurrer, but not without a *non pros* to the issue. *R. 1 Sal. 219.*

[On judgment for plaintiff, on demurrer to one count, he may execute writ of inquiry, without a *non pros* to the issues, which he may supply when he enters final judgment, *Fleming v. Langton, M. 9 G. Str. 532.*]

[If

[If there is judgment on demurrer as to one count, plaintiff may enter *nolle prosequi* as to the rest, and need not be amerced. *Davis v. Hoyle*, M. 10 G. Str. 574.]

If one party demurs, the other must join in demurrer. *Semb. Co. Lit.* 72. a.

Or, amend or discontinue his action on payment of costs. *Per rule*, 1654. *Mills*, 29.

And if demurrer be joined, it cannot be waived afterwards without consent. *R. Cro. Car.* 513.

Yet, the king if he pleases, may waive a demurrer: as, in an information by *qui tam*. *Cro. Car.* 347.

When demurrer is joined, the court shall adjudge upon the whole record, and not only on the point referred to the court by the demurrer. *R. Hob.* 56.

And if the defendant makes default at the day given after demurrer joined, there shall be final judgment against him. *Mod. Ca.* 5.

But, on a demurrer to a plea in abatement, the defendant cannot insist upon a defect in the declaration. *Lut.* 1592, 1667.

Yet, this does not extend to a plea in abatement, which may also be pleaded in bar. *Semb. Lut.* 1604.

[It must be entered on the roll the term it is joined of. *Barnes*, 328.]

[After joinder, plaintiff tenders paper-book to defendant, if he refuses to accept and pay, judgment; if he accepts, plaintiff moves for *consilium*. *Barnes*, 163. 165.]

[Defendant may demur after issue tendred, and it may (on leave) be set down after paper-day. *Barnes*, 296.]

[After issue joined demurrer cannot be received; therefore, tho' one record is averred by plaintiff, and another is denied by defendants, and so no proper issue joined, yet after issue demurrer shall be set aside; and advantage must be taken of the impropriety in arrest of judgment. *Barnes*, 84.]

[Defendant may demur, if the replication does not offer a fair issue, and affords reasonable cause of demurrer, tho' he has had time to plead, on consenting to plead issuable plea, to rejoin *gratis*, and take short notice of trial. *Dewey v. Sopp*, P. 16 G. 2. Str. 1185.]

[Court will give leave to withdraw demurrer, after it is set down to be argued and trial lost, on costs. *Barnes*, 155.]

[Tho' the court will sometimes give leave to withdraw a demurrer and plead, after demurrer argued, yet not after trial of other issues. *Robinson v. Rayley*, P. 30 G. 2. 1 B. M. 316.]

### (Q3.) The Form of a Demurrer.

[If defendant demurs after issue joined upon *de injuria sua propria absque tali causa*, it is a discontinuance, and ill. *Aflett v. Vincent*, P. 13 G. Ld. Raym. 1482.]

A demurrer ought to be to the whole plea, otherwise it is a discontinuance for the whole. *Per Chamb.* 2 Rol. 390. *Vide Plea and Replication, ante*, (E 1.—F 4.)



And therefore if the defendant pleads three pleas, and the plaintiff in his demurrer says *quod placitum predictum est minus sufficiens*, it is a discontinuance. *R. Tel. 65.*

So, in trespass for taking and carrying away goods, if the defendant *quoad* the taking demurs, and says nothing to the carrying away, it is a discontinuance. *R. Tel. 5.*

So, in trespass for taking and carrying away goods, if the defendant justifies, and the plaintiff *quoad placitum* to the taking the goods, and the matter therein demurs, and the defendant joins in this form *ex quo* the plaintiff acknowledges the taking *petit judicium*, without mention of the carrying away, it will be a discontinuance. *R. 1 Brownl. 192. Tel. 5.*

So, if a demurrer is to a replication to a plea in abatement, and prays that the writ may abate, and the plaintiff joins in demurrer praying his damages, as where the demurrer is to a plea in bar, it will be a discontinuance. *R. Sho. 155.*

[After plea in abatement and replication, if defendant demurs and plaintiff joins, he must pray *respondeas ouster*, and not judgment and damages; but if he does, he may amend on payment of costs. *Anon. P. 24 G. 2. 1 Wilf. 302.*]

So, if the defendant pleads to part, and says nothing to the residue, and the plaintiff demurs, it is a discontinuance, for the demurrer shall not be intended to be for the not pleading to part; for the plaintiff ought to have prayed judgment on a *nil dicit*. *R. 1 Rol. 488. l. 5.*

But, if the defendant demurs to a *scire facias* or declaration, and concludes his demurrer in abatement, the plaintiff may join in bar and shall have judgment; for the matter being sufficient, and confessed by the demurrer, the defendant shall not avoid judgment by his conclusion. *R. 3 Lev. 223.*

If a count or declaration does not contain a good cause of action, there may be a demurrer to it.

If the declaration is founded on a bond or other specialty, the defendant may demand *oyer* of the specialty, and if it shews no cause of action, he may demur; for the deed on *oyer* is part of the count, *Vide ante, (P. 1.)*

[If declaration on recognizance of bail does not set out condition, defendant cannot demur; it may be absolute; if conditional he should plead *nul tiel record*. *Barnes, 339.*]

[But if the defendant demands *oyer* of a bond, which appears to be made by many jointly, and thereupon he demurs, it is bad; for perhaps the others did not seal or execute the bond. *R. Jen. 303.*]

So, if there are several counts in the same declaration, some good and some bad, and the defendant demurs generally to the whole declaration, the plaintiff shall have judgment for so much as is good, *1 Sand. 286. Vide ante, (C 32.)*

[If on action for *crim. con.* defendant pleads not guilty, and not guilty within six years, and issue to the first, demurrer to the second, verdict for plaintiff on issue, and plea held good on the demurrer; there shall be judgment on the demurrer for defendant, and plaintiff have no damages. *Cake v. Sayer, H. 32 G. 2. 2 Wilf. 85.*]

So, in an action on the *ft. 13 Ed. 1*, against an hundred for a robbery

bery of money and goods, if it is bad for the goods, on a demurrer to the whole the plaintiff shall have judgment for the money; for they are in their nature several. *R. 2 Sand. 380.*

So, in covenant, where one breach is bad, the other good. *2 Sand. 380. Vide post. (2 V 3.)*

So, in trover, &c. where one article is insensible or uncertain. *R. 1 Sal. 218.*

The usual form of a demurrer is, that the party alleges *quod narratio, &c. est minus sufficiens*, and prays judgment of the count, or *quod placitum est minus sufficiens, &c.* *Pl. Com. 400. b.*

But it is sufficient if it has the substance of a demurrer, tho' it is not formal: as, if *petit judicium de narratione*, and prays *quod coisset*. *R. 5 Mod. 132.*

Tho' it does not conclude with an averment *et hoc, &c.* *R. 1 Lee, 24. Vide ante, (E 33.)*

So, a demurrer not formally joined is sufficient to bring the matter before the court. *R. 3 Lev. 222.*

So, now the words, *materiaque in eodem contenta* are added to the old form of a demurrer. *Pl. Com. 400. b.*

So, a demurrer may be to an *aid prier* and *receit*. *Co. Lit. 72. a.*

To a voucher. *Co. Lit. 72. a.*

To a wager of law. *Co. Lit. 72. a.*

#### (Q 4.) General Demurrer.

A demurrer is general or special. *Co. Lit. 72. a.*

A man who demurs generally shall take advantage of all matters. *Pl. Com. 66. a.*

Of all matter which are requisite to shew a right or good title in the plaintiff. *Hob. 301.*

And therefore if the declaration don't shew a sufficient right or title in the plaintiff, it will be bad on a general demurrer; for a right which does not plainly appear is as none. *R. Hob. 301.*

[On demurrer to an indictment found in an inferior court, objections may be taken as well to the *jurisdiction* of such court, as to the *subject matter* of the indictment. *1 Term Rep. 316.*]

If a demurrer begins in bar, and concludes in abatement, there shall be final judgment. *R. 1 Lev. 312. Vide Abatement, (I 15.)*

[Plaintiff cannot take advantage of duplicity in defendant's rejoinder, without having shewn it for cause of demurrer. *Browning v. Dann, M. 9 G. 2. B. R. H. 167.*]

[If there is a demurrer to a plea in which the point has not been settled, but which the court determines to be good, they will permit plaintiff to move to withdraw demurrer, and to reply. *Collins v. Collins, T. 32 & 33 G. 2. 2 B. M. 820.*]

[After demurrer argued and determined for defendant, plaintiff may have leave to withdraw his demurrer, and reply, on paying costs. *Anon. T. 3 G. 3. 2 Wils. 173.*]

(Q 5.) *Confesses all the facts well pleaded.*] A general demurrer confesses all matters of fact well pleaded. *Pl. Com. 13. b. 85. a. Co. Lit. 72. a.*

And therefore, if a man pleads a demand of rent, and that he was there



there before sun-set, and continued there till the sun-set, and no one was there on the other part, to which there is a demurrer, the whole fact alleged is confessed, and nothing remains, but whether it be a good demand. *Pl. Com.* 172.

So, in assise, if the defendant does not traverse seisin and disseisin, but pleads a recovery in bar, the plaintiff confesses and avoids the recovery by his replication, to which the defendant demurs; this is a confession of the seisin and disseisin. *R. 2 Rol.* 22.

So, in *assumpsit* upon consideration that he had granted 1000 trees to be cut down in three years, and that he had cut down 800, and then the defendant promised to permit him to cut the residue after three years, if he would not cut them down at present; the defendant pleads that he had cut down 1000 before the promise, a demurrer to the plea confesses that he had. *R. Nel.* 195.

So, in covenant, if the defendant pleads *covenants performed*, and the plaintiff assigns a breach, and then the defendant demurs, he confesses the breach and contradicts his own plea. *R. Cro. El.* 329.

In debt upon bond to pay, if *A.* died without issue then living, the defendant says that *A.* died, having issue living *apud B.* and the plaintiff demurs for want of a good *venue*, he admits that *A.* had issue living. *R. Dy.* 15. *a.*

[If defendant demurs to an information *quo warranto*, for exercising an office of publick trust, he cannot except that it is not such an office, for he has confessed it. *Rex v. Neal*, *P.* 8 *G.* 2. *B. R. H.* 106.]

In debt on bond to pay, &c. within 20 days after the return of a ship, or at the end of 18 months; the defendant pleads that the ship returned within 18 months, and that he paid within 20 days after; the plaintiff replies, and traverses the payment, to which the defendant demurs, the demurrer admits the breach, and therefore the plaintiff shall recover. *R. 2 Mod. Ca.* 349.

[If defendant demurs generally to the whole declaration, and one count is good, and may be joined, there must be judgment for plaintiff. *Bedford v. Alcock*, *T.* 22 & 23 *G.* 2. 1 *Wils.* 248.]

(Q 6.) *But a demurrer is not a confession, if the plea, &c. be bad.*] But if a count, plea, or replication, be vicious, a demurrer thereto is no confession of the matter alleged. *R. 2 Rol.* 22. 1 *Leo.* 80.

And therefore, if a plea in *quare impedit* shews a title in the king, and the plaintiff demurs, if the plea be bad, the demurrer is not a confession of the king's title. *R. 2 Rol.* 22. *R. Hob.* 164.

If a replevin supposes a taking in a place in *A.* and the avowry be for rent in *B.* and the plaintiff says that *B.* is within *A.* a demurrer thereon is not a confession of matter, which is repugnant and impossible and the ground of the demurrer. *R. 1 Sid.* 10.

So, a thing not material or traversable, is not confessed or admitted by the demurrer, when it is not traversed. *R. Sal.* 561.

So, there cannot be a demurrer after issue joined. *Semb. Sho.* 213.

(Q 7.) *What matters are aided by a general demurrer.*] By the *27 El.* 5. after demurrer in any action in any court of record, the judges shall give judgment as the very right of the cause and matter in

in law appear, without regard to any imperfection, defect, or want of form in any writ, return, plaint, declaration, or other pleading, or in any process, except what the party demurring specially and particularly sets down.

And the court, after demurrer, may amend all such imperfections, defect, and want of form.

Provided it extend not to appeals, indictments, or presentments, or actions on popular or penal statutes.

And therefore now a demurrer confesses all matters informally pleaded, if they are not specially shewn. *Hob. 233. Cont. 3 Mod. 235.*

And every thing shall be said to be form, without which the right of action appears to the court. *Hob. 233.*

And therefore all defects of the clerk, and misprisions, which the court may amend, without varying the matter, are aided by general demurrer. *Sav. 87.*

But matter of fact not alleged, and which the judge cannot know by the record, cannot be amended, nor shall the omission be aided by a general demurrer. *Sav. 88.*

And this statute ought to be strained to remedy defects in form. *Hob. 133.*

And now, by the *st. 4 & 5 Ann. 16.* after demurrer in any court of record, the judges shall give judgment, &c. without regard to any imperfection, &c. in any writ, &c. or other pleading, process, or course of proceeding, except those the party demurring particularly sets down as causes of the same, altho' such imperfection, &c. might before be taken as matter of substance, and not aided by the *st. 27 El. 5.* so as sufficient matter appear in the pleadings, on which the court may give judgment according to the very right of the cause.

[If debt in the *debet et detinet* is brought by an administrator against the heir of the obligor, where he bound himself and his heirs, it is good on a general demurrer, since *st. 4 Ann. c. 16. Burland v. Tyler, P. 11 G. 2 Ld. Raym. 1391.*]

[If to debt on bond to indemnify plaintiff for beer he should deliver to A., defendant pleads none delivered since making the bond, and plaintiff reply so much delivered; it is good on general demurrer, tho' it does not say before filing the bill. *Thrale v. Vaughan, H. 16 G. 2. Wilf. 5.*]

But matter of form, which is shewn specially for cause of demurrer, cannot be amended. *R. Tel. 38.*

So, on a demurrer, matter of form, not specially shewn, shall be aided on the part of him who joins, and also of him who demurs, in all parts of the pleadings. *Per Rule, 1654. Mills, 29.*

[The omitting to state the consideration of a bargain and sale cannot be taken advantage of on a general demurrer. *Bolton v. Carlisle, C. P. M. 34 Geo. 3. 2 H. Bl. 259.*]

#### (Q 8.) Special Demurrer.

(Q 8.) *Founded on special matter.*] But a man may allege special matter, and conclude with a demurrer: as, in trespass by A. for taking a horse, if the defendant pleads that one A. dispossessed him of the



the horse, and gave it to the plaintiff, the plaintiff may say that *A.* in the bar, and *A.* in the count, are the same person, and then demur; for without special matter alleged the demurrer would not have been good. *Co. Lit.* 72. *a.*

If a man demurs specially, he waives all other matters, and relies upon one particular point. *Pl. Com.* 66. *a.*

(Q 9.) Which shews a special cause.] So, since the *st.* 27 *El.* 5. if a man demurs for form, he must shew specially the causes of demurrer.

And in *B. R.* he may shew them at any time in the same term, or one day after the term, if the demurrer be not entred upon the roll. 2 *Roll.* 330.

And it is not sufficient that the demurrer be *quia caret forma*, but it must shew specially in what point the form is defective. *Hob.* 232. *D. Lut.* 4.

And therefore a demurrer for duplicity, *quia duplex et caret forma*, is not sufficient, but it must shew in what the duplicity consists. *R. in B. R. inter Lamplugh and Shortridge*, *P.* 13 *W.* 3. 1 *Sal.* 219.

And by rule in *C. B. M.* 1654, the causes assigned on demurrers ought not to be involved in general expressions of *double, negative, pregnant, uncertain, want of form*, &c. but specially shewn, that the other side may join in demurrer, amend paying costs, or discontinue. *Mills*, 29.

[If plaintiff sets out a record remaining in *C. B.*, and that the same was removed to *B. R.*, it is informal and bad on special demurrer. *Wilder v. Buckland*, *M.* 11 *G. Str.* 611.]

[If to debt on a bond to indemnify, defendant pleads *quod indemnium conservavit*, plaintiff may demur to it for not shewing how; but it must be shewn for cause, for the *how* is only form. *White v. Cleaver*, *H.* 12 *G. Str.* 681. 2 *Ld. Raym.* 1416.]

[An immaterial traverse is good cause for a special, but not for a general demurrer. *Courtney v. Satchwell*, *P.* 12 *G. Str.* 694.]

[If the plea, &c. conclude with a verification where it ought to conclude to the country, and *vice versa*, that will be bad on special demurrer. *Doug.* 94—97.]

[So, the not alleging a protest in a declaration on a bill of exchange. *Salomons v. Stavely*, *Dougl.* 684. *in notis.*]

[Demurrer to replication for duplicity, in alleging distress to be in the night, and possession continued by payment of rent, is good. *Browning v. Dann*, *M.* 9 *G. 2. B. R. H.* 167.]

[Defendant cannot demur to declaration, because it says he was summoned, instead of attached, without praying *oyer*. *Bisby v. Elliston*, *H.* 9 *G. 2. B. R. H.* 189.]

[Defendant cannot demur for a small variance between the writ and the declaration, tho' it may be pleadable in abatement. *Godfrey v. Duberry*, *M.* 11 *G. 2. Andr.* 75.]

[Where a defect is pointed out by demurrer, the court will not consider it as surplusage. *Barlow v. Evans*, *T.* 18 *G. 2. Wilf.* 98.]

After demurrer joined, on motion the cause shall be put in the paper to be argued by counsel.

The motion ought to be on *oyer* of the record in court.

And if the roll, whereon the pleadings are entred, be of a former

term, it must be filed: if in the same term, it may be read in court without being filed with the other rolls. *Sal.* 565.

If a demurrer or special verdict be entered in court to be argued, the plaintiff's attorney shall deliver two copies of the record to the chief justice and senior judge, and the defendant's attorney to the two puisne judges. *Per rule, P. 27 Car. 2. Mills, 61.*

And no argument shall be heard at the bar before all the judges have copies. *P. 27 Car. 2. Mills, 61.*

If the attorney of either party does not deliver, the other may deliver copies to all the judges three days before the argument, and thereon the counsel of his side shall be heard, and he shall be paid for them upon demand, or allowed for them in costs. *Ibid.*

(Q 10.) Demurrer upon Evidence.

[So, a proceeding, by which the judges, whose province it is to answer to all questions of law, are called upon to declare what the law is upon the facts shewn in evidence, analogous to the demurrer upon facts alleged in pleading. *Per Eyre C. J. Gibson v. Hunter, T. 33 Geo. 3. 2 H. Bl. 205.*]

If the plaintiff or defendant shews in evidence any record or other writing, whereon a doubt in law arises, the other party may demur on the evidence. *Co. Lit. 72. a. R. 5 Co. 104. a.*

So, if he shews evidence by witnesses, whereon a doubt arises, the other party may demur to it. *R. 5 Co. 104. a. Baker.*

So, in an information the king may demur to evidence given for the defendant. *Pl. Com. 4.*

But if the doubt be, whether a matter of fact is well proved, the defendant cannot demur to the evidence; for the jury may find on their own knowledge: as, if for proof of an arrest the writ is not produced, the defendant cannot demur. *R. 1 Lev. 87.*

If there be a demurrer to evidence, the jury shall be immediately discharged, and need not inquire of the damages; for that may be supplied by a writ of inquiry. *R. Cro. Car. 143. [Doug. 222.]*

[And after the execution thereof, the party may move in arrest of the final judgment, on any objection to the pleadings. *Doug. 222.*]

Yet the same jury may inquire of the damages conditionally. *Semb. Cro. Car. 143. Pl. Com. 408. per Mont. Ch. B. 1682. Doug. 222. n. (212.)*

So, if at *nisi prius* the defendant pleads a plea after the last continuance, the plaintiff may demur to it. *Hard. 112.*—When and how he shall plead it, *vide Abatement, (I 24.)*

So, if there be a challenge to an array, the other party may demur. *Hard. 112.*

A demurrer to a challenge may be determined at *nisi prius*. *Hard. 112.*

But a demurrer to a plea after the last continuance shall be adjourned. *Ibid.*

If a man demurs upon evidence, he must admit the evidence to be true. *Co. Lit. 72. a. Cro. El. 751. 5 Co. 104. a. R. All. 18. Pl. Com. 411. a. [Doug. 119—134.]*

And therefore, if a man demurs for that the evidence is not sufficient, and besides says also that there is no such writ as was offered  
in



in evidence, and so refers the fact as well as the law to the court, an *alias venire facias* shall go; for the court cannot proceed to judgment. *R. Al. 18.*

If a man demurs upon the evidence, the other party must join in the demurrer. *Co. Lit. 72. a.* or otherwise must waive the evidence. *R. 5 Co. 104. a. Baker.*

If the evidence be matter of record, or in writing. *Cro. El. 751, 752.*

But in an information or other suit by the king, if the defendant demurs upon the evidence, the king's counsel need not join. *Co. Lit. 72. a. 5 Co. 104. a.*

So, if one will demur upon the evidence given by witnesses, the other need not join; for the credit of the witnesses may be referred to the jury. *Cro. El. 752.*

So, the court may over-rule, if the matter of law seems clear, tho' the party will demur. *R. 2 Rol. 119.*

[On a demurrer to evidence the party cannot take advantage of any objection to the pleadings. *Doug. 218.*]

[On a demurrer to circumstantial evidence, the party offering the evidence is not obliged to join in demurrer, unless the party demurring will distinctly admit upon the record every fact and every conclusion which the evidence offered conduces to prove. *Gibson v. Hunter in error; in Parl. Trin. 33 Geo. 3. 2 H. Bl. 187.*]

### (R) Issue.

**I**SSUE is, when both parties put the cause upon a point of fact to be tried by a jury.

An issue is either general or special. *Co. Lit. 126. a.*

#### (R 1.) General.

The general issue is, when the issue is joined on the plaintiff's or demandant's whole charge in general: as, if the tenant pleads in *formedon, ne dona pas.*

In assize, *nul tort, nul disseisin.*

In *quare impedit, ne disturba pas.*

[In *quare impedit* there is no general issue. By *Ashhurst J. Read v. Brookman, B. R. E. 29 Geo. 3. 3 T. R. 158.*]

In replevin, *non cepit.*

In debt, *nul debet. Vide post. (2 W 17.)*

In an action on a statute, or on the case, *non culp.*

To the general issue the plaintiff cannot reply, but must join issue. *Co. Lit. 126. a. Hob. 271.*

When a plea must conclude in issue to the country, *vide ante, (E 32.)*

When the general issue shall be pleaded, *vide ante, (E 13.)*

#### (R 2.) Special.

A special issue is, when issue is joined upon any particular point.

#### (R 3.) Must be upon an Affirmative and Negative.

An issue proceeds out of two several allegations of the parties, the one affirmative and the other negative. *Co. Lit. 126. a.* And

And therefore two affirmatives do not make a good issue. *Co. Lit.* 126. a.

As, if the defendant pleads that *A.* is living, and the plaintiff says that *A.* is dead, he must traverse that *A.* is living, otherwise there cannot be a good issue. *Sav.* 86.

So, if the defendant, being executor, pleads several judgments, and no assets *ultra*, and the plaintiff replies that one of the judgments is continued by fraud, and that he has assets *ultra* the others, it is not a good issue without a negative. *Semb.* 1 *Sand.* 338.

So, if the defendant pleads that the plaintiff is a bastard, and the plaintiff replies that he is *mulier*, he must add, *and not bastard*, in the negative. *Kit.* 214. b.

Nor, two negatives; and therefore, if a man takes a traverse which is a negative, there must be an affirmative after it, before the conclusion to the country. *Co. Lit.* 126. a.

So, regularly, the plaintiff in his replication ought not to conclude to the country upon a negative, without a traverse: as, in trespass, if the defendant pleads that his father was seised, and died seised, whereby it descended to him, the plaintiff shall not reply that the father did not die seised, *et hoc*, &c. but must maintain his count, and traverse, *absque hoc* that the father *obiit seistus*. *Sav.* 64.

Yet, there shall be a general issue upon a negative. *Sav.* 64.

So, the king may join issue on a negative. *Dub. Sav.* 64.

And when there is a full negative and affirmative, it must always conclude to the country. *Vide ante*, (E 32.)

But it is not necessary that the negative and affirmative be in precise words: as, in debt for rent on a lease for years, if the defendant pleads *nothing in the tenements*, and the plaintiff replies, that he was seised in fee, here is a good issue. *Co. Lit.* 126. a.

If the defendant claims a way *non solum ire, equitare, verum etiam carucis carriere*, and there be issue thereon, it is good; for here is a sufficient affirmative. *R. Mar. Pl.* 83.

Yet, if a breach of covenant be assigned, *quod non assignavit*, a lease for years, and the defendant pleads *non transposuit*, it is bad. *R.* 2 *Leo.* 116.

And for necessity issue may be joined on two affirmatives. *Semb.* *Co.* 126. a. *Bro. Issue*, 28.

So, if issue be tendered by an affirmative, and the other joins, it is good, tho' there was not a negative; as if an executor pleads, *no assets*, and the plaintiff replies that he purchased another writ, and then he had assets, and tenders an issue thereon, and the defendant joins, it is good. *R.* 2 *Cro.* 580. 589. 2 *Rol.* 186. 204. 209.

[It is enough, if the second affirmative is so contrary to the first, that the first cannot in any degree be true; so to duress of imprisonment pleaded to a bond, it is a good replication that defendant was at large, at his own disposal, executed of his own free will, and not for fear of imprisonment, concluding to the country. *Tomlin v. Purkis*, *H.* 16 *G.* 2. *Str.* 1177. *Wilf.* 6.]

(R 4.) Must be upon a single Point.

The issue ought to be on a single and certain point. *Co. Lit.* 126. a.

And



And therefore, if after a justification by process in false imprisonment there be a traverse *absque hoc quod est culpabilis aliter aut alio modo aut in alio loco*, and issue joined thereon, the judgment shall be arrested for the uncertainty of the issue. *R. 2 Lev. 164.*

But if the defendant, sued as executor, pleads payment of several sums due on several bonds, and the plaintiff replies *quod non solvit*, such a sum to *A.*, such to *B.*, &c. and concludes *et de hoc ponit se super patriam*, it is well; for they are several issues, and not one multifarious issue. *R. 1 Lev. 281.*

[If to debt on bond, defendant pleads, insolvent-act, that he was beyond seas, a fugitive for debt, that he was a person enabled to return, did return and surrender, and was duly discharged, and plaintiff replies *not duly discharged*, he puts only the discharge in issue, and defendant need only prove that, by producing the duplicate. *Gillam v. Stirrup, T. 8 G. 2. B. R. H. 145.*]

[Tho' issue must be taken on a single point, it is not necessary that a single point should consist of a single fact; thus, if defendant in trespass justifies under a right of common, and the replication traverses that the cattle were defendant's own, that they were levant and couchant, and that they were commonable, it is not multifarious; for both circumstances are requisite to the one point of defence. *Robinson v. Rayley, P. 30 G. 2. 1 B. M. 316.*]

(R 5.) Not upon a Negative Pregnant.

(R 5.) *What shall be called so.*] So, an issue on a negative pregnant, (*viz.*) on matter which imports other sufficient matter, is bad; as, in a writ of entry *in consimili casu*, if a man counts of an alienation in fee, and the defendant pleads that he did not alien in fee, it is bad; for it implies that he aliened, tho' not in fee. *Dy. 17. a.*

So, in *formedon*, where the demandant counts on a gift by deed, if the tenant says, *ne dona pas* by deed, it is bad; for this implies a gift by *parol.* *Co. Lit. 126. a.*

In waste against a lessee for years, if the defendant pleads that he did not lease for years, it is bad; for it is a negative pregnant. *Kit. 232. b.*

In an action against an innkeeper, plea, that the goods were not stolen thro' default of him or his servants, is bad: for it is a negative pregnant. *Kit. 233. a.*

So, in an action for not taking care of his fire, plea, that the house was not burnt for want of his good care, is a negative pregnant. *Kit. 233. a. b.*

So, if the day or place is parcel of the issue. *R. 2 Lev. 11.*

In debt on a bond for performance of a covenant, which was, that he would not grant without the plaintiff's consent, if the defendant pleads that he did not grant without the plaintiff's consent; it is bad. *R. 2 Cro. 560.*

In trespass, the defendant justifies his entry by the plaintiff's licence, traverse, *quod non intravit per licentiam suam*, is a negative pregnant. *R. 2 Cro. 87.*

(R 6.) *What not.*] But if the matter implied be not sufficient, it is not a negative pregnant; as, in debt upon a retainer in husbandry, if

if the defendant pleads that he did not retain him in husbandry, it is not pregnant; for a retainer generally is not sufficient to maintain his count. *Bro. Issue*, 25. *R.* 38 *H.* 6. 22.

So, if the issue be tendred to the point of the action, it is not bad, tho' it be a negative pregnant; as, in an action upon the *stat. R.* 2. plea, that he did not enter *contra formam statuti*, is good, tho' a negative pregnant. *Kit.* 232. *b.*

So, in an action upon any statute, that he did not do *contra formam statuti*, is good. *Kit.* 233. *a.*

So, in debt on a bond to stand to an award, so that it be delivered to the parties, &c. plea, that no award was made and delivered to the parties, is good, tho' a negative pregnant; for it is pursuant to the condition, which is entire. *Ibid.*

(R 7.) Yet it may be upon a Disjunctive.

But issue may be upon a disjunctive, where the words of the disjunctive proposition are synonymous: as, an issue that gold was found in a ship passing, or upon its passage, from *London* to *R.*, is good. *R. Hard.* 17. 19. for the parts of the disjunctive are synonymous.

That the customs were not concealed or withheld. *Hard.* 17. *Dy.* 43. *b.*

That he paid or caused to be paid. *Hard.* 19.

That an executor of his own wrong *administavit seu aliter ad usum suum proprium convertit*. *R. Hob.* 49.

(R 8.) Must be upon a material Point.

So, the issue ought to be on a material point, that may be well tried. *Co. Lit.* 126. *a.*

On the most material point. *D.* 1 *Sand.* 22.

And therefore, place or time ought not to be part of the issue, where they are not material. *R.* 2 *Sand.* 317. *Hard.* 40.

But, if the defendant alleges a request by *A.* such a day, and the plaintiff says, *non requisivit prout defendant allegavit*; this does not extend to the time, but only to the substance of the plea. *R. Hard.* 40.

[A contract for stock should be registered before 1st November 1721; —If defendant pleads that the contract was not registered before 1st November 1720, *secundum formam stat.* and plaintiff replies, it was registered *sec. form. stat.* it is good, and the day shall be rejected as surplusage. *Wolley v. Bristoe*, *T.* 9 *G.* *Str.* 554.]

[In debt on bond, if defendant pleads payment of principal and interest before the day, and before purchasing the original, plaintiff may reply *non solvit modo et forma*. *Martin v. Pritchard*, *H.* 11 *G.* *Str.* 622.]

[In debt on bond, if defendant pleads *plene administavit*, and plaintiff replies assets sufficient to satisfy the damages aforesaid, and issue is joined, and a verdict for plaintiff, it is well; for the word (damages) is surplusage. *Collet v. Masterman*, *M.* 22 *G.* 2. 1 *Wils.* 238.]

(R 9.) And the whole shall be put in Issue.

And the whole matter of complaint shall be put in issue; as, in *assumpsit* for service for such a time, the defendant shall put the whole time in issue. 1 *Sand.* 268, 269.



So, in an action on the case for stopping three lights, every part of the injury shall be put in issue; and therefore a justification of the stopping of two lights, with a traverse that he stopped three, is bad. *R. Tel. 225. 1 Sand. 268. 2 Sand. 206.*

(R 10.) Upon a triable Point.

So, it ought to be upon a point which may be well tried: as, if it be alleged that a woman was *enseint* by her husband at the time of his death, the issue must be, *if she was enseint*, not *if enseint* by her husband, for *filatio non potest probari*. *Co. Lit. 126. a.*

[No issue can be offered that is contrary to the record. *Crokat v. Jones, M. 13 G. Str. 734. Ld. Ray. 1441.*]

(R 11.) The Form of joining Issue, and when and how the Issue shall be entered, &c. for Trial.

If the defendant tenders an issue, he shall say, *et de hoc ponit se super patriam*. *Co. Lit. 126. a.*

If the plaintiff or demandant, *et de hoc petit quod inquiretur per patriam*. *Ibid.*

And if *hoc petit* be omitted, it is bad. *3 Lev. 65.*

But if the plaintiff joins issue in these words, *et pradiet.*, defendant *fi. lit.*, where it should be, *prad.* plaintiff; this will be jeofail. *1 Rol. 200. l. 2. 25.*

Or, *quod est cul.*, for *non est inde cul.* *1 Rol. 200. l. 10.*

So, if the defendant says, *solvit ad secundum diem M.* and the plaintiff replies, *non solvit pradieto secundo die Aug.* and so mistakes the month. *R. 2 Cro. 550. 2 Rol. 135.*

So, if the defendant says, *solvit 20 l.* and the plaintiff *non solvit prad. 30 l.* *R. 2 Cro. 586. R. Cro. Car. 593.*

So, in trespass, if the defendant pleads a licence to the husband to enter with his wife, and the plaintiff replies, *quod non dedit licentiam* to husband and wife; for the variation is material. *R. 2 Lev. 194.*

[If plaintiff replies, and concludes to the country, without any *similiter* on the part of defendant, it is not aided by verdict, nor can the verdict be amended. *Cooper v. Spencer, M. 11 G. Str. 641.*]

[On replication *nul tiel record*, complete issue is joined, and there is no need of rejoinder. *Barnes, 355.*]

[On *nul tiel record* pleaded, the record must be brought in at the day given. *Barnes, 343.*]

By the usual course, four days are given to join issue, demur, or plead over. *1 Sand. 318.*

And if the clerk of the papers draws the issue, and delivers the paper-book to the defendant's attorney, who within the four days waives the issue, and makes a frivolous rejoinder for delay, and, upon a summons before the secondary, will not take issue, the plaintiff may sign judgment by *nil dicit*. *R. 1 Sand. 318.*

In *C. B.* if the defendant pleads the general issue, (for which it is sufficient that his attorney signs the plaintiff's attorney's dogget,) the plaintiff's attorney draws and delivers a copy of the issue to the defendant's attorney, who must receive and pay for it. *Com. Att. 40.*

[If a prisoner appears by attorney, he shall pay for the issue-book, or

or judgment may be signed; but not if he appears in person. *Barrall v. Mason*, H. 27 G. 2. 2 Will. 11.]

[Defendant's attorney must pay for the issue, (even if left in the office,) at his peril. *Barnes*, 243.]

[But if plaintiff demands more than is due, judgment signed shall be set aside. *Barnes*, 263. 275. 2 Bl. 1098.]

[If judgment is signed for want of paying for the issue, the court will set it aside, on payment of costs of motion, and for the issue, if it is to the country; but not if it is on *nul tiel record* to a judgment, and there are no merits to be tried. *Everal v. Mason*, H. 27 G. 2. 2 Will. 11.]

[If it be tendered to a porter at defendant's attorney's chambers, and not paid, judgment may be signed. *Barnes*, 253.]

[An agreement that issue shall be delivered in the country is void; therefore, if notwithstanding such agreement it is tendered in town, and not paid for, judgment may be signed. *Barnes*, 251. *Semb. contra*, *Barnes*, 239.]

But in *B. R.* the defendant's attorney has the benefit of the issue. *C. Att.* 324.

So, after a special plea to issue in *C. B.* the plaintiff's attorney delivers a copy of the issue, &c.

[If plaintiff has delivered the issue-book to defendant, and afterwards mislays the papers, the court will order defendant to give him a copy of the issue. *Wiar v. Smith*, H. 7 G. Str. 414.]

[In rules for entering issues the day of notice is exclusive; and *non pros* signed a day too soon shall be set aside. *Barnes*, 318.]

In *B. R.* after plea to issue, it is left with the clerk of the papers, who gives a rule to the other side to join or demur, and draws the issue, and shall be paid for the issue-book. *Com. Att.* 325.

If the defendant gives a rule to the plaintiff to enter his issue, if the action lies in *London* or *Middlesex*, the plaintiff must bring the record into the office within four days after notice of the rule, otherwise he shall be nonsuited. *Pr. R.* 274.

[But the defendant is bound to search in the office, whether the plaintiff has brought in the issue-roll, before he signs judgment of *non pros*, even though he may have searched on the expiration of the rule to bring in the roll. *Minus v. Baxter*, B. R. M. 26 Geo. 3. 1 T. R. 16.]

And, if the plaintiff has given notice of trial, the rule for entering the issue may be given the same term in which issue is joined, in an action in *London* or *Middlesex*. *Pr. R.* 275.

In an action in another county, on such rule, (which shall not be the same term in which issue is joined,) the plaintiff must enter his issue before the continuance-day of that term. *Pr. R.* 274.

And if the general or special issue be not entered in due time, the plaintiff shall be nonsuited. *Lut.* 98.

The copy of the issue to be tried in *London* or *Middlesex*, on a record of a precedent term, shall be brought to the clerk of the treasury to be engrossed four days before the day of trial. *Per Rub.* M. 1654. (*Vide Mills*, 30.)

And no record of *nisi prius* shall be signed before issue entered on the roll. (*Vide Mills*, 31.)

[In *C. B.* no record of writ or *nisi prius* received at sittings after



term in *Middlesex*, unless entred with marshal within two days after term; and in *London* the day before the day of adjournment. *Barnes*, 494.]

And the issue shall be entred of the same term in which it is joined, *Per rule, P. 5 W. & M. (Vide Mills, 111.)*

The record of *nisi prius* shall be ingrossed on parchment of the same breadth with the rules of the court. *Per rule, Tr. 29 Car. 2. (Vide Mills, 70.)*

And the prothonotary shall not sign it, if it is not ingrossed and entred upon the roll in a fair hand, and every pleading begin a new line, and with great letters, and if there are divers counts they shall be numbered in the margin. *Per rule, Tr. 29 Car. 2. (Vide Mills, 70.)*

And the officer who signs, and the clerk of the treasury who ingrosses it, shall take the same care. *Tr. 29 Car. 2. (Vide Mills, 70.)*

The records of *nisi prius* of *C. B.* shall be signed by the prothonotary, and signed and sealed by the clerk of the treasury or his deputy, within three weeks after every *Hilary* and *Trinity* terms, and not after without special warrant. *Per rule, Tr. 29 Car. 2. (Vide Mills, 72.)*

If, after the record of *nisi prius* is signed, the judge is made a knight, it is not error. *R. Latch, 161.*

[The delivery to a gaoler of notice of trial against a prisoner shall be good, within the reason of 4 & 5 *W. & M.* which directs the delivery of a declaration to be good. *Whitehead v. Barber, H. 6 G. Per cur. on conference with the other courts. Str. 248.*]

[In all cases (except where the defendant has delayed the cause by injunction) where there have been no proceedings for four terms, exclusive of the term in which the last proceeding was had, a term's notice is necessary before the next proceeding. *Vide 2 Bl. 784. Doug. 71.*]

[Giving notice of trial at the end of half a year after issue joined, prevents necessity of giving a term's notice till a year after the last notice given and countermanded. *Green v. Gauntlett, M. 9 G. Str. 531.*]

[When a term's notice of trial is required on an old issue, it must be given before the *essoin-day*. *Bogg v. Rose, P. 15 G. 2. Str. 1164. Contra, Harvey v. Porter, M. 6 G. Str. 211.*]

[By *stat. 14 G. 2. c. 17.* defendant living forty miles off shall have ten days' notice of trial in writing, and six days' notice of countermand, on pain of costs.]

[And verdict shall be set aside for want of it. *Barnes, 305.*]

[The plaintiff is not bound by the practice of *B. R.* to give notice of trial till the term after that in which issue is joined. *Hall v. Buchanan, B. R. M. 29 Geo. 3. 2 T. R. 734.*]

[Where the defendant resides 40 miles from *London*, there must be 14 days' notice of trial, tho' he was arrested, and the venue laid, in town. *2 Bl. 1205.*]

[Take notice of trial at next *assizes*, without date, county or name, is good on the back of the issue, but not on a separate paper. *Henbury v. Rose, M. 19 G. 2. Str. 1237.*]

[Where short notice of trial is to be accepted in country causes, such

such notice shall be given at least four days before the commission day, one day exclusive, and the other inclusive. 3 T. R. 660.]

[Short notice of trial can be given but once, and notice can be continued but once; but if the full time is given, the word *continue* shall not vitiate it. Barnes, 292.]

[Plaintiff can continue his notice of trial only once in a term, and if verdict is obtained on second, defendant making no defence, it shall be set aside. *Green v. Giffard*, M. 13 G. 2. Str. 1119.]

[A continuance of a void notice of trial given within the regular time, may operate as a new notice. 2 Bl. 1298.]

[If the issue is of *Michaelmas*, notice by proviso may be given of *Hilary*. Barnes, 295.]

[Notice of trial cannot be given in the country, but countermands may. Barnes, 298. Qu.]

[But notice on an old issue may be given, either in town or country. Barnes, 306. Qu. Whether not on any?] ]

[Defendant must give the same notice as plaintiff. Barnes, 299.]

[Where the defendant carries down the record by proviso, it is sufficient, if he obtain the usual rule for trial by proviso, any time before trial, tho' after he has given the plaintiff notice of trial. 1 T. R. 695.]

[A defendant in a case where the king is party, cannot carry down the *nisi prius* record to trial by proviso, as no laches can be imputed to the king. *Rex v. Dyde*, E. 38 Geo. 3. 7 T. R. 661.]

[Notice cannot be countermanded and continued at the same time. Barnes, 301.]

[If notice of trial is countermanded, two days in a town cause, and four days before the assizes in a country cause, costs shall not be paid, but one day must be exclusive. *Whitlock v. Humphreys*, M. 3 G. 2. *Frogmorton v. Norcliffe*, M. 6 G. 2. Str. 849.]

[In a country cause, two days' countermand to the attorney in the country is sufficient. *Mendapace v. Humphreys*, P. 10 G. 2. Str. 1073. B. R. H. 369. Barnes, 298. altered by 14 G. 2. c. 17.]

[Commission-day of assize on *Monday*, countermand on *Saturday* good. Barnes, 305.]

(R 12.) When Misjoining an Issue shall be aided.

(R 12.) By the st. 32 H. 8. 30.] But by the st. 32 H. 8. 30. after verdict, misjoining of issue is aided. Vide Amendment (O).

And therefore, it shall be aided, if issue is joined upon bad pleading. *Ibid.*

Or, upon an immaterial point, or a negative pregnant. *Ibid.*

Or, if the issue comprehends more than is material. R. Hob. 119.

But it is not aided, if it be a void issue. Vide Amendment (O).

(R 13.) By verdict.] So, a bad issue may be aided by a verdict: as, in debt upon a bond against the executor of A. who pleads *non est factum suum*, if the jury finds that it is the deed of A. for the issue was upon an affirmative and negative, and by the finding of the jury it appears that the plaintiff had cause of action. R. Ray. 458.

Yet, in debt upon a bond to pay the clear profits of a mine, the defendant



defendant pleads performance, the plaintiff replies, that there were profits to the value of 20*l.* and the defendant has not paid; the defendant rejoins that there were no clear profits, and issue thereupon, and the jury find that there were clear profits, *modo et forma*, as the plaintiff has replied; this was not aided by the verdict. *R. 2 Lev. 135.*

[If to trespass for breaking his close, defendant pleads it was his proper lands, and plaintiff replies it was his estate of inheritance, and proper lands, and not of defendant; it is cured by verdict. *Cary v. Hinton, P. 7 G. 2. Str. 973.*]

(R 14.) When an Issue shall be tried.

If one of the defendants pleads in abatement a plea which abates the writ as to all, and the others plead to issue, the issue shall not be tried till the plea in abatement is determined. *Kit. 239. a.*

Tho' the plea to issue was first taken. *Ibid.*

If the defendant demurs to part of the declaration, and takes issue to other part, there shall be judgment on the demurrer before the issue is tried, regularly; tho' the court may do otherwise at discretion. *Co. Lit. 72. a. Latch, 4. 1 Leo. 82.*

If, a plea in abatement being over-ruled, the defendant pleads *not guilty*, the whole record must be entred, otherwise it will be irregular. *R. Carth. 499.*

So, if a new trial is granted, and the record is on a new roll in a subsequent term. *Ibid.*

But, in an information for counterfeiting receipts, and by them receiving money out of the *Exchequer*, if the defendant traverses the counterfeiting, and pleads to the residue, whereon there is a demurrer, the court will try the issue first. (*Com. 109.*)

(R 15.) When it may be waived.

If several issues are joined and brought to trial, yet the king by his prerogative (where the king is concerned) may waive any issue. *1 Bul. 197.*

So, after evidence given to any of the issues, on which the jury are ready at the bar to deliver their verdict, the attorney-general for the king may waive any issue whereon no evidence has been given. *R. 1 Bul. 197.*

So, after notice of trial, the king may waive the trial without payment of costs. *1 Sal. 193.*

Otherwise, the prosecutor. *1 Sal. 193.*

But, if evidence is given on the issue, the attorney-general cannot waive it, when the jury is at the bar to deliver their verdict. *1 Bul. 197.*

So, after verdict pronounced, the king cannot waive part of the issues, and take a verdict for the residue, *Ibid.*

(R 16.) When the Trial deferred.

So, for cause, the court may put off the trial on payment of costs, after notice of trial given: as, if a material witness is beyond sea.

[The court will not put off a trial at the instance of the defendant, on

on account of the absence of a material witness, if he has conducted himself unfairly, or been the cause of any improper delay. *Saunders v. Pittman*, C. P. E. 37 Geo. 3. 1 Bos. & Pull. Rep. 33.]

[The court will not put off a trial on account of the absence of a material witness, if by his evidence the defence of slavery is intended to be established. *Robinson v. Smyth*, C. P. T. 39 Geo. 3. 1 Bos. & Pull. 454.]

But in such case, if the costs are not paid, the plaintiff may proceed to trial, and not have an attachment. 1 Sal. 83.

So, a trial shall not be put off where the plaintiff is administrator, because a suit for administration in the ecclesiastical court is not determined. Sal. 646.

[But trial, on collateral issues, tho' in capital cases, shall not be put off, unless the defendant make oath of the truth of his plea. 1 Bl. 4512.]

[If one moves to put off trial on the day of trial, notice must be given of the motion, and also copies of the affidavits to be produced. *Edwards v. Vesey*, T. 8 G. 2. B. R. H. 128.]

[The court will not put off a trial till a third person is compelled in equity to produce a deed, unless there appears collusion with plaintiff, and affidavit is made that defendant cannot go to trial safely without it. *Anon.* T. 10 & 11 G. 2. B. R. H. 390.]

[The court will not make a rule on a plaintiff who brings an action on a bond, to allow an officer of the stamp-duties to inspect it, on suspicion of its having been forged. *Chetwind v. Marnell*, C. P. E. 38 Geo. 3. 1 Bos. & Pull. Rep. 271.]

[If plaintiff does not go on to trial according to notice, the court will not stay proceedings till he has paid costs, tho' he is necessitous and absconds, in any case but ejectment. *Waring v. Potter*, T. 10 & 11 G. 2. Andr. 17.]

[If, previous to a trial, libels have been dispersed by one of the parties to influence the jury and witnesses, it may be put off, but the court will not afterwards put it off till the libellers (printers and booksellers) have been tried on an information. *Rex v. Gray*, H. 31 G. 2. 1 B. M. 510.]

[To put off trial for absence of witness, when there is any suspicion, it must be made appear that the witness is material, that the party applying has been guilty of no neglect, and that there is reasonable expectation of being able to procure their attendance at the future time prayed. *Rex v. Chevalier D'Eon*, T. 4 G. 3. 3 B. M. 1513.]

[And where a witness will be absent for a long time, as 18 months, a special case is requisite to put off a trial for want of his evidence. 1 Bl. 436.]

[But a trial may be put off till a commission shall go to examine a material witness, who is out of England, and refuses to attend the trial. 1 Bl. 512.]

[And, if a party refuse to consent to the examination of a witness to an essential fact by commission, when his presence cannot be compelled, or to admit the fact, the court will assist the other party by putting off the trial. *Doug.* 419.]

[Motion to put off trial must be two days before trial. *Barnes*, 437, 438.]



[If the materialness of witness did not appear sooner, trial may be put off after the cause called. *Barnes*, 452.]

[The application to put off the trial on the absence of a material witness may be made as well on the affidavit of a third person as on that of the party himself. *Barnes*, 448. *Semb. cont. Id.* 437.]

[Affidavit for new trial must be positive as to witnesses being material; it must add that party cannot safely proceed without; but to that, belief is sufficient. *Ibid.*]

[On affidavits that a material witness is not expected till such a time, trial may be put off till term after that time. *Barnes*, 440.]

[If witness leaves town after notice of trial, it shall not be put off. *Barnes*, 442.]

[In action for words, general affidavit of absence of witnesses is sufficient. *Earnes*, 442.]

[Affidavits sworn before a vice-consul abroad may be read. *Barnes*, 466.]

[The court will not receive the affidavit of an attorney's clerk to put off a trial, unless it be stated that the clerk was particularly acquainted with the circumstances of the cause, and had the management of it. *Sullivan v. Magill*, C. P. E. 31 Geo. 3. 1 H. Bl. 637.]

[A criminal information having been granted against the defendant, he, before the trial at *nisi prius*, distributed hand-bills in the assize term, vindicating his own conduct and reflecting on the prosecutors; this matter being disclosed to the judge at *nisi prius* by an affidavit, was held a sufficient ground to put off the trial. *Rex v. Jolliffe*, T. 31 Geo. 3. 4 T. R. 285.]

(R 17.) When there shall be a new Trial.

[Trials by jury, in civil causes, could not subsist now, without a power, somewhere, to grant new trials. *D. per Ld. Mansfield*, *Bright v. Eynon*, T. 30 & 31 G. 2. 1 B. M. 390. *Vide* 1 Bl. 464.]

[Motions for new trials have been very much encouraged of late years; for nothing tends more to the due administration of justice, or even to the satisfaction of the parties themselves, than applications of this kind. The court and the counsel are enabled to consider the question more fully than they could do in the hurry of business at *nisi prius*. But there is a wide difference between the reasons which ought to induce the court to grant such rules, and those which are sufficient to grant new trials. In B. R. a rule to shew cause why there should not be a new trial is granted for little more than asking, if any plausible doubt can be stated; but if this were to be followed up by making the rule absolute on the same grounds, it would be great injustice to the parties, and would tend to multiply litigation to an enormous degree. By Buller J. *Vernon v. Hankey*, B. R. M. 28 Geo. 3. 2 T. R. 120.]

[On a motion for a new trial by a defendant in an action against him for goods delivered to the use of a third person on his undertaking to see the plaintiff paid, the court will take into consideration not only the expression used, but the particular situation of the defendant at the time of his undertaking, and the amount of the sum for which he will thereby be made liable. *Keate v. Temple*, C. P. M. 38 Geo. 3. 1, Bos. & Pull. Rep. 158.]

[Where

[Where no point has been saved at the trial, the court will not set aside a verdict on a question of law, if the justice and conscience of the case be with it. *Cox v. Ketchin*, C. P. M. 39 Geo. 3. 1 Bos. & Pull. 338.]

[If the testimony of witnesses on which a verdict has proceeded, be founded on and derive its credit from particular circumstances, and those circumstances be afterwards clearly satisfied by affidavit, the court will grant a new trial. *Lisler v. Mundill*, C. P. E. 39 Geo. 3. 1 Bos. & Pull. Rep. 427.]

[New trials were granted before 1655. This appears from *Slade's* case, (1648;) *Style*, 138.; and from *Wood v. Gunston*, *Style*, 466. It cannot be traced far back, because old reports give no account of determinations on motions. *Ibid.* 4 T. R. 657.]

If regular notice of trial was not given, the verdict shall be discharged upon motion, and a new trial granted. *Pr. Reg.* 248.

[If a cause be made a *remanet*, no new notice of trial need be given. *Jacks v. Moyer*, B. R. E. 39 Geo. 3. 8 T. R. 245.]

[*Aliter* where the trial of the cause is put off to the next sittings or assizes by rule of court. *Ibid.*]

[And this where the plaintiff gives a peremptory undertaking. *Ibid.*]

As, if notice was not given to the defendant himself, his attorney or solicitor, eight days exclusive, if the trial be in *London* or *Middlesex*, or within thirty or forty miles' distance. *Pr. Reg.* 388, 389.

[The *venue* was in *London*, and verdict for plaintiff without defence; the verdict was set aside, because only eight days' notice of trial was given, the defendant residing in *India*. *Douglas v. Ray*, B. R. H. 32 Geo. 3. 4 T. R. 552. *Brind v. Torris*, C. P. E. 18 Geo. 3. 2 H. Bl. 1205.]

If there was not fourteen days' notice, where the party is at the distance of forty miles or more. *Pr. Reg.* 389. *Mod. Ca.* 18.

[The forty miles from *London* to entitle to fourteen days' notice of trial, shall be computed and not measured miles. *Bates v. Pettipher*, M. 7 G. 2. Str. 954. *Osgood v. Lyon*, M. 18 G. 2. Str. 1216.]

If there was not a term's notice, where the issue was joined a year before. *Pr. Reg.* 387. 1 Sid. 34. viz. if four terms have past without proceeding, since the term in which the issue was joined. *Mod. Ca.* 18. *Sal.* 645. 650.

And, to make a term's notice, it ought to be given regularly in the prior term *sedente curia*. *Mod. Ca.* 18. 58.

So, a proceeding in the vacation after the fourth term, by taking out a *venire facias*, &c. tested the last day of the term, is not sufficient, tho' it be in law an act within the term. *R. Mod. Ca.* 57. *Sal.* 457. 650.

But a term's notice is not necessary, for the usual notice is sufficient, where the delay for a year after issue joined was, by an injunction out of the court of *Chancery* served at the suit of the defendant. *R.* 1 Sid. 92.

[Where short notice of trial is to be accepted in country causes, such notice shall be given at least four days before the commission-day, one day exclusive, and the other inclusive. *Reg. Gen. B. R. E.* 30 Geo. 3. 3 T. R. 660.]

Or, by the defendant's claiming privilege of parliament. 1 Sid. 92.

So,



So, it is not necessary, where the defendant gives notice of trial by *proviso*. *Dub. 1 Sid. 34.*

Nor, where there was notice of trial, (tho' countermanded,) or any proceeding by the plaintiff, within the year. *R. Mod. Ca. 18. 58.*

Nor, where the proceedings have not ceased for a year, exclusive of the term in which issue was joined. *Mod. Ca. 18. 58.*

So, fourteen days' notice is not necessary, where there are not fourteen days between the term and assizes. *Mod. Ca. 18.*

[Motion for new trial must be within the first four days of term. *Barnes, 446.*]

[This is the rule both in civil and criminal cases. *Rex v. Holt, M. 34 Geo. 3. 5 T. R. 436.*]

[But if it appear to the court at any time before judgment, that injustice has been done by the verdict, they will interpose and grant a new trial. *Ibid. Dougl. 171. 797.*]

So, a new trial shall be granted, if the judge certifies the verdict to be contrary to the evidence. *2 Mod. 199. Barnes, 439.*

[The certificate of the judge reporting the matter of fact, as appearing before him at the trial, is conclusive. *Rex v. Poole, P. 7 G. 2. B. R. H. 23.*]

[If cause tried before judge of another court, there must be affidavit of what passed on trial. *Barnes, 447.*]

[If on information *quo warranto*, where there are many issues, the jury find a general verdict for the king, and the judge reports that two of the issues were found against evidence, a new trial shall be granted; there should be a separate verdict upon each issue. *Rex v. Cockerell, T. 11 & 12 G. 2. Andr. 260.*]

[If there is evidence on both sides, it cannot be called a verdict against evidence; and there shall not be new trial, tho' the jury found against the party with whom the judge thinks the weight of evidence lies, or for whom he sums up. *Ashley v. Ashley, Smith v. Huggins, M. 14 G. 2. Str. 1142. Anon. T. 16 G. 2. 1 Wilf. 22.*]

[New trial may be granted tho' evidence on both sides, if all the witnesses to a release are not examined. *Norris v. Freeman, M. 10 G. 3. 3 Wilf. 38.*]

[New trial may be granted in a criminal case, on report of the judge and affidavits of the jury, that the verdict against the defendant was taken contrary to their meaning, and to the judge's directions in point of law. *Rex v. Simmons, T. 25 & 26 G. 2. 1 Wilf. 329.*]

[Where several defendants are tried at the same time for a misdemeanour, and some are acquitted and some convicted, the court may grant a new trial as to those convicted, if they think the conviction improper. *Rex v. Mawbey, E. 36 Geo. 3. 6 T. R. 619.*]

[So, in an indictment for a misdemeanour, where the jury find the defendant guilty contrary to evidence. *Rex v. Routledge, M. 21 Geo. 3. Dougl. 531.*]

[So, if master brings trespass *vi et armis* for taking his apprentices, and it appears that the apprentices being imprisoned by their master in a lock-up-house of *A.*, and fearing to be sold to *Guinea*, complain to quarter-sessions, who discharge them; and *W.* a sea-lieutenant agrees with them to serve, gives *A.* money to keep them that night, and next morning sends press-gang with a note to *A.* to deliver them, which he does, taking a receipt; and on trial all the defendants (the

justices and *W.*) are found *not guilty*; although *W.* ought to have been found guilty on the evidence; yet, as he appeared to act with good intention, the court will not grant new trial. *Reavely v. Mainwaring*, *H. 2 G. 3. 3 B. M. 1306.*

Or, if the judge allowed what was not, or denied what was, good evidence. *Mod. Ca. 242. 307. [3 T. R. 749. 754.]*

[If defendant in an action for a seizure *sine aliqua probabili causa*, is not permitted to give evidence that there was a probable cause. *Bill v. Robinson*, *M. 1719, Bunb. 49.*]

[And in such case it may be granted, tho' a special verdict has been signed by the counsel on both sides. *Namink v. Farwell*, *M. 1719, Bunb. 51.*]

[If on an issue directed to try a *modus* for five closes, it appears that the *modus* extends to two closes more, (for the same sum,) and the judge thereupon directs the jury to find for plaintiff, against the *modus*; a new trial shall be granted. *Taylor v. Walker*, *P. 1729, Bunb. 267.*]

[If the judge directs the jury on a point of law, and they find a verdict contrary to his direction; or, if he directs them to find specially, and they find a general verdict; there shall be a new trial granted. *Rex v. Poole*, *P. 7 G. 2. B. R. H. 23.*]

[Unless it appears to the court that the judge was mistaken. *Ibid.*]

[Or, that it is impossible that defendant should have judgment, by reason of his bad plea. *Ibid.*]

[Replevin for taking cattle; avowry, *damage feasant*; plea, right of common; replication, a custom to inclose, and the lands uninlosed free from his common, and the lands inclosed free from the common of others; if it is proved at the trial that the inclosed lands are free from common, (though it is said by some witnesses, that if one acre is left uninclosed, he has a right to common on the other's uninclosed lands,) if the judge says the custom being entire is not proved, and jury finds in consequence for plaintiff, there shall be new trial for the misdirection. *Hew v. Strobe*, *M. 6 G. 3. 2 Wils. 269.*]

If the party was disappointed of evidence by sickness, or other accident, without his default. *Mod. Ca. 22.*

[If the best evidence is not produced by him for whom the verdict is, as only a copy of bishop's institution-book to prove presentation by the patron in *quare impedit*; for the presentation or the institution-book itself might have been produced. But, *N. B.* in *quare impedit* security must be given for costs and profits of living, if second verdict for the same party. *Tillard v. Shebbeare*, *M. 8 G. 3. 2 Wils. 366.*]

Or, the witnesses or counsel were absent by surprise. *Sal. 645.*

If a juror declare a design to give a verdict for one of the parties before the trial. *Sal. 645.*

[If a juror challenged, be sworn on the *tales* by another name. *Parker v. Thornton*, *M. 12 G. Str. 640. 2 Ld. Ray. 1410.*]

[Because the jury tossed up whether 300*l.* or 500*l.* damages. *Melish v. Arnold*, *M. 1719, Bunb. 51.*]

[Because the jury drew lots, whether to find for plaintiff or defendant, tho' it happen according to evidence, and the judge's opinion. *Hale v. Cour*, *M. 12 G. Str. 642.*]

[But such conduct being a very high misdemeanour in a juror, the affidavit,



affidavit, on which the application for a new trial in such a case is grounded, must be made by some third person, as one who has seen the transaction through a window or the like. 1 T. R. 11.]

[And, in no case shall the subsequent declaration of the jury vitiate a verdict given according to the merits of the case. 2 Bl. 803.]

[If a verdict is obtained by a trick contrary to conscience, tho' strictly regular, the court will set it aside, and make the party pay costs, and order new trial; as, if plaintiff refuses to produce a note he had received in payment, and which was not paid by his own negligence, because defendant had not given him notice to produce it. *Anderson v. George*, P. 30 G. 2. 1 B. M. 352.]

[If a verdict is founded on a note, which is manifestly obtained by fraud, whereas the jury only considered the question of forgery; the court will set it aside, and grant new trial. *Bright v. Eynon*, T. 30 & 31 G. 2. 1 B. M. 390.]

[If the merits have not been tried, because plaintiff could not give material matter in evidence on the issue joined, and therefore a verdict against him, the court will set it aside, tho' it was right on the evidence given, and order new trial on payment of costs. *Dyrolles v. Howard*, P. 3 G. 3. 3 B. M. 1385.]

[If there is reason to suspect a verdict to have been obtained by perjury, the court will grant it. *Fabrillus v. Cook*, M. 6 G. 3. 3 B. M. 1771.]

[If on a verdict subject to the opinion of the court on a case stated, sufficient facts are not set forth, or if on a special verdict it is defectively found, the court will grant new trial. *Bond v. Seawell*, M. 6 G. 3. 3 B. M. 1773.]

[Defendant pleads four pleas, plaintiff joins issue on three, taking no notice of fourth, and verdict for him, he shall reply issuably or demur; if he replies, new trial; if he demurs, proceedings stayed till argument. *Barnes*, 465.]

[If sheriff on inquiry has admitted improper evidence, whereby damages lessened; court will order new trial. *Barnes*, 448.]

[On the trial of a traverse of an inquisition of lunacy, if the defendant is not well, and cannot attend the trial, a new trial shall be granted. *Rex v. Roberts*, P. 17 G. 2. Str. 1208.]

[If the merits have not been tried, court will grant new trial for variance between issue delivered and record, tho' not material. *Barnes*, 464.]

[If the demand is certain, court will set aside damages if too small, not where uncertain. *Barnes*, 455.]

[There may be a new trial after a former new trial. *Goodwin v. Gibbons*, T. 7 G. 3. 4 B. M. 2108.]

[It may be granted for excessive damages, but not a third trial. *Chambers v. Robinson*, H. 12 G. Str. 691. Note; this case was denied to be law by Pratt C. J. *Beardmore v. Carrington*, P. 4 G. 3. 2 Wils. 244. Vide 1 T. R. 277.]

[Verdict shall not be set aside for smallness of damages, tho' it may for excessive damages. *Hayward v. Newton*, M. 6 G. 2. Str. 940. *Barker v. Dixie*, T. 9 G. 2. Str. 1051. B. R. H. 279. *Barnes*, 445.]

It is a general rule, that the court will not set aside a verdict in an action for a personal injury, on account of the smallness of the damages;

images, unless the smallness of them arose from a mistake in point of law. *Doug.* 509.]

[But altho' a verdict is against evidence, yet if the action was frivolous and vexatious, and the real damage small, the court will not grant a new trial; which should be to attain real justice, not to gratify litigious passions, on every point of *summum jus*. *Macrow v. Hull*, *M.* 30 *G.* 2. 1 *B. M.* 11. *Farewell v. Chaffey*, *M.* 30 *G.* 2. 1 *B. M.* 3. *Burton v. Thompson*, *M.* 32 *G.* 2. 2 *B. M.* 664.]

[In *personal torts*, the court will never grant a new trial for excessive damages, unless they are such as manifestly shew the jury to have been actuated by *passion*, partiality or prejudice. *Cowp.* 230.]

[A new trial will be granted on account of excessive damages in an action for assault and battery. *Jones v. Sparrow*, *B. R. E.* 33 *Geo.* 3. 5 *T. R.* 257.]

[In an action of defamation a new trial was granted on account of the damages being excessive; but the court directed that the former verdict should stand as a security in the meantime for the damages which might be given on a second trial. *Wood v. Gunston*, *B. R. M.* 1655, *Style*, 466.]

[So, also in an action on the case for diverting the plaintiff's water-course, where the jury under circumstances of aggravation gave 3000*l.* damages. *Pleydell v. Dorchester*, *B. R. H.* 38 *Geo.* 3. 7 *T. R.* 529.]

[But inquisition was set aside, and new inquiry granted, for smallness of damages. *Tatton v. Andrews*, *T.* 14 & 15 *G.* 2. *Barnes*, 448.]

[New trial may be granted after nonsuit: as, if a judge has directed it, because he thought there was not sufficient evidence that an inn-keeper had been such a trader as made him liable to the bankrupt laws. *Buscall v. Hog*, *M.* 11 *G.* 3. 3 *Wils.* 146.]

[If the plaintiff is nonsuited, and the nonsuit recorded, there cannot be a new trial; for the plaintiff is out of court. *Serle v. Ld. Barrington*, *M.* 11 *G.* 2 *Ld. Ray.* 1370.]

[If plaintiff in ejectment on trial will not produce a deed which is in court, tho' notice has been given to do it, and is thereupon nonsuited; the court will not grant new trial. *Roe v. Harvey*, *M.* 10 *G.* 3. 4 *B. M.* 2484.]

But, there shall not be a new trial on account of the absence of a witness, whom the party might have had without his neglect. *Mod. Ca.* 22. *Sal.* 647. *F. g.* 40. *Price v. Brown*, *H.* 12 *G.* *Str.* 691. *Cooke v. Berry*, *T.* 18 *G.* 2. 1 *Wils.* 98. *Barnes*, 439.

[Nor, to let the party into a defence of which he was apprised at the first trial. 2 *T. R.* 113.]

Nor, after two verdicts for the same party, without proof of practice. *Mod. Ca.* 22.

Nor, upon an indictment or information, where the defendant is acquitted, tho' contrary to the direction of the judge, without proof of practice. *Sbo.* 336. *Sal.* 646. 1 *Lev.* 9. 1 *Sid.* 153.

[New trial shall not be granted, if defendant is acquitted on indictment for not repairing highway. *Rex v. Silvertown*, *P.* 24 *G.* 2. 1 *Wils.* 298.]

[No new trial on a feigned issue found for defendant, where the verdict against him would have the same consequence as a verdict in a cri-



a criminal prosecution. *Rex v. Praed, Rex v. Edwards, St. Ives' causes, M. 9 G. 3. 4 B. M. 2257.*]

Nor, where the action is rigorous; as, for not taking care of his fire, &c. *Sal. 644. 648. 653. R. 5 Mod. 88.*

Nor, after an indictment for a capital offence.

Or, for perjury, tho' the witnesses were absent by practice. *1 Sid. 149. 153.*

[New trial is never granted on penal statute, if verdict for defendant, if no misbehaviour appears in him. *Mattison v. Allanson, M. 19 G. 2. Str. 1238. Forneveau v. —, P. 10 G. 3. 3 Wils. 59.*]

[A new trial may be granted after verdict for defendant, if the jury have been misdirected in point of law. *Calcraft v. Gibbs, B. R. M. 33 Geo. 3. 5 T. R. 19.*]

[No new trial in a *qui tam* after verdict for defendant, tho' against the judge's directions. *Seymour v. Day, P. 4 G. 2. Str. 899. Jervois v. Hall, P. 16 G. 2. 1 Wils. 17. Barnes, 466.*]

[Yet it may be granted on an information of seizure for fraudulent exportation, where verdict is for defendant, where nothing is forfeited but the goods. *Robinson v. Lequesne, T. 1728, Bunb. 253.*]

Or, in *quo warranto*, where the defendant is acquitted. *Dub. 2 Mod. Ca. 207.*

[It may, if the judge certifies it was against evidence; but the twelve judges equally divided; and no new trial could be granted. *Rex v. Bennet, T. 4 G. Str. 101.*]

[A new trial may be granted in an information in nature of a *quo warranto*. *Rex v. Francis, E. 28 Geo. 3. 2 T. R. 484.*]

[The court will grant a new trial in a penal action on account of a mistake or misdirection of the judge. *Wilson v. Rastall, B. R. T. 32 Geo. 3. 4 T. R. 753.*]

[In *quo warranto*, to which defendant pleads an election under the nomination of B. and A. bailiffs, it is no cause for a new trial, that the judge directed a judgment of *ouster* in *quo warranto* against B. and A. for acting as bailiffs; especially if judgment of *ouster* must have been against defendant, tho' this issue had not been against him. *Rex v. Hebdon, P. 12 G. 2. Andr. 388.*]

[Nor, in a writ of right, unless the verdict be flagrantly wrong. *2 Bl. 941.*]

It shall not be in an inferior court. *Sal. 650. [Str. 113. Sayer, 203. Dougl. 380.]*

Nor, shall be for want of notice, if the defendant made a defence. *Sal. 646.*

Nor, shall be, where the verdict is with the right. *Sal. 644. 646, 647.*

[When the merits have been tried fairly and fully, the court will not grant a new trial: as, if defendant has mistaken one abuttal of a way which he claims in his plea, and yet has a verdict. *Sampson v. Appleyard, M. 12 G. 3. 3 Wils. 272.*]

[In debt on bond, conditioned to pay to a third person A., if on trial there is evidence that A. declared there was nothing due to him, there shall not be a new trial on affidavit of A. that he looked on defendant as indebted to plaintiff the obligee; for A. is the real plaintiff, and his declaration good evidence. *Hanson v. Parker, H. 23 G. 2. 1 Wils. 257.*]

Nor,

Nor, after an interlocutory judgment. *Mod. Ca.* 264.

[New trial cannot be granted on the crown side, after signing interlocutory judgment. *Rex v. Armstrong*, *M.* 12 G. 2. *Str.* 1102.]

[There shall not be a new trial after four years' acquiescence, tho' judgment is not signed. *Rex v. Bill*, *M.* 8 G. 2. *Str.* 995.]

Nor, usually in an action for words. *Sal.* 644.

Or, ejectment. *Sal.* 648. [*Contra Goodtitle v. Clayton*, *P.* 8 G. 3. 4 *B. M.* 2224.]

[If plaintiff in ejectment moves against the casual ejector on the *ft.* 4 G. 2. c. 28. that there is half a year's rent due, and no distress, and at the trial deserts that, and sets up another title, yet, if defendant makes defence, there shall be no new trial. *Kempton v. Croft*, *P.* 8 G. 2. *B. R. H.* 108.]

Nor, after a motion in arrest of judgment. *Sal.* 647.

Or, a trial at bar. *R. Sal.* 650. 643. 2 *Jon.* 225. *Carth.* 507.

[After trial at bar, if the evidence is doubtful, a new trial shall not be granted. *Smith v. Parkhurst*, *H.* 12 G. 2. *Andr.* 315. *Str.* 1105.]

But on a trial at bar on a traverse to the return of *mandamus*, a new trial at bar may be granted if the verdict was against evidence. *Musgrove v. Nevins*, *P.* 10 G. 2. *Ld. Raym.* 1358. *Str.* 584. *Smith v. Parkhurst*, *H.* 12 G. 2. *Str.* 1105.

[New trial shall not be granted after trial at bar in ejectment, unless justice is not otherwise to be attained. *Smith v. Parkhurst*, *H.* 12 G. 2. *Str.* 1105. *Andr.* 315.]

[Where there is a bill of exceptions, a new trial shall not be moved for on the same point of law as is contained in the bill. 2 *Bl.* 929.]

[It shall not be granted for variance between the paper-book in which plaintiff is called *James*, and the record in which he is rightly called *John*; or, because the word *not* is omitted in not regarding his promises. *Mathar v. Brinker*, *P.* 4 G. 3. 2 *Wilf.* 243.]

[Where on trying a traverse on a return no damages are given; it cannot be supplied by writ of inquiry, but there must be a *venire facias de novo*. *Kynaston v. Shrewsbury*, *T.* 9 G. 2. *Str.* 1051. *B. R. H.* 147.]

[Where judgment, tho' regular, has been obtained by surprise, the court will set it aside; but not, where regular, and no surprise. *Lockwood v. Beaumont*, *M.* 9 G. 2. *B. R. H.* 157.]

[In case, for maliciously suing and arresting plaintiff in an inferior court, which had not jurisdiction, and verdict for plaintiff; there shall not be new trial, tho' the declaration is faulty, in not alleging that defendant knew the court had not jurisdiction. *Goslin v. Wilcock*, *P.* 6 G. 3. 2 *Wilf.* 302.]

[If defendant pleads in abatement, to which plaintiff demurs, and judgment of *respondeas auster*, then he pleads *nil debet*, and the plea-roll contains nothing but the declaration and *nil debet*, the plea in abatement not having been deserted, or judgment entered on it, this irregularity is cured by defendant's having accepted and paid for the issue, and the court will not grant new trial. *Combe v. Pitt*, *P.* 5 G. 3. 3 *B. M.* 1682.]

[On two issues, general verdict, right as to one, contrary to evidence on the other, cannot be severed, nor new trial granted. *Barnes*, 436.]

[New trial refused, when evidence on both sides, tho' Ch. Just. who



who tried still of opinion that the weight of evidence was on the other side. *Swain v. Hill*, H. 10 G. 3. 3 *Wils.* 45. N. B. Here were two issues, both which must have gone back, and one was clearly right.]

[New trial shall not be granted, because of variance between paper-book and the record, the record being right. *Barnes*, 475.]

[The court will not grant new trial for excessive damages, where they depend on circumstances solely under the cognizance of a jury, and fit for their decision; as, for criminal conversation with plaintiff's wife. *Wilford v. Berkeley*, T. 31 G. 2. 1 B. M. 609. 4 T. R. 651.]

[N. B. This rule is not here extended to *torts* in general, tho' so quoted by lord Camden, in *Beardmore v. Carrington*, 2 *Wils.* 244.]

[The court will not even grant a rule to shew cause for new trial for excessive damages, if the judge who tried it says, tho' he thinks the damages too large, yet he is not dissatisfied with the verdict: as, 200 l. for custom-house officers searching for prohibited goods, and finding none, but doing no damage. *Redshaw v. Brooke*, P. 9 G. 3. 2 *Wils.* 405.]

[Tho' judge certifies damages excessive, yet if court think otherwise, they will not grant new trial. Thus, on action for very malicious prosecution, on which plaintiff had been imprisoned and tried for felony, *Page J.* certified 50 l. damages excessive, but the court thought not. *Barnes*, 436.]

[Where the jury have found a verdict for the plaintiff upon a presumption contrary to evidence, the court will not grant a new trial, if the plaintiff be entitled to recover in conscience and equity. *Wilkinson v. Payne*, B. R. M. 32 Geo. 3. 4 T. R. 468.]

[Trying a feigned issue without the consent of the court, is a contempt of the court; and after such trial they will stay the proceedings. *Hofkins v. Berkeley*, B. R. M. 32 Geo. 3. 4 T. R. 402. *Vide Trial*, (E 1.)]

(R 18.) When there shall be a Repleader.

If an issue is misjoined, or joined on an immaterial point, &c. when it is not aided by the *st.* 32 H. 8. a repleader shall be awarded. *Cro. El.* 883. R. 1 *Lev.* 32. 2 *Mod.* 137. 140.

[As, if plaintiff declares on a lease to A., which he says is come by assignment to defendant, and he pleads that A. did not assign to him, and issue is joined, there shall be a repleader; for it is an immaterial issue. *Enys v. Mobun*, M. 3 G. 2. *Str.* 847.]

[Or, if a bond is conditioned for payment of money, on or before 5th of December, and defendant pleads payment on 5th of December, and plaintiff replies, and verdict for plaintiff, there shall be a repleader; for it is an immaterial issue. *Tyron v. Carter*, M. 8 G. 2. *Str.* 994.]

[But altho' an issue is immaterial, yet a repleader shall not be granted, if the cause can be ended more expeditiously; as, if the plea be ill, or good in form tho' not in fact, and amounts to confession. *Rex v. Philips*, M. 7 G. *Str.* 394.]

So, if the issue joined is nugatory and void, whereon the court cannot

cannot give judgment, there shall be a repleader. *R. Mod. Ca. 2. Hard. 331.*

[When the finding on an issue does not determine the right, the court ought to award repleader, unless it appears from the record that no manner of pleading the matter could avail. *Rex v. Philips, P. 30 G. 2. 1 B. M. 292.*]

[If there is a mistake in a plea, (as, if a mayor sets forth his being sworn in according to the charter, when in fact he was sworn in on a *mandamus*, according to 11 G. 1. c. 4.) and several issues taken by the replication to one entire defence, all which are found against defendant, as he could not give in evidence the true and proper manner of his being sworn in, on this plea; the court may order the whole verdict to be set aside, with costs, and liberty to amend the plea. *Ibid.*]

[So, if the issue is concluded to the country, where it should be to the record, &c. or *à contra*. *R. 1 Leo. 90.*]

There shall be a repleader of a bar, replication, or rejoinder, which is bad; for at the first defect the repleader begins. *Ray. 458. [Vide Cowp. 510.]*

By the common law, if an immaterial issue was joined, the court might award a repleader before trial. *Mod. Ca. 2 Sal. 579.*

But will not now, where the issue joined will be aided by the statutes of *jeofail*. *R. Mod. Ca. 3. Sal. 579.*

[Nor, in any case but where complete justice may be answered. *Cowp. 510.*]

So, there shall not be a repleader where the trespass is confessed, tho' the issue was immaterial. *1 Sal. 173.*

And there may be a repleader after a verdict. *Cro. El. 883. Hard. 331.*

[But it is doubted whether a repleader ought to be granted when the issue is found against the party tendering it. *Doug. 396.*]

But generally there shall be no repleader upon a demurrer. *1 Leo. 79.* without the consent of the parties. *Per two J. Rol. 271. Mo. 461. Agr. Mo. 867. Latch, 147. Adm. 2 Lev. 142. Cont. allowed, 3 Lev. 440. Per Powell, Mod. Ca. 102. R. Sav. 89. 2 Bul. 37.*

Yet, if there be a bad bar, and a bad replication, a repleader may be awarded upon a demurrer. *Bro. Replead. 39. But Periam said, the roll of that case could not be found. R. Pl. Com. 138. a. But Periam said, that there it was by consent. 1 Leo. 79. Acc. per three J. Periam cont. 1 Leo. 79. But in the same case it is doubted. Sav. 89. Semb. Cro. El. 318. 1 And. 167.*

So, there shall be no repleader, where, by the defect in joining issue, there is a discontinuance. *R. Mod. Ca. 3.*

Or, the defendant made default at the trial, whereby he is out of court. *R. 1 Sal. 216. 2 Sal. 579.*

[After inquest is taken by default, defendant cannot be received to make suggestion on the roll; for after default there can be no repleader. *Brampton v. Crabb, H. 3 G. Str. 46.*]

[In debt on bond, if defendant pleads payment before the day under a *scilicet*, there shall not be a repleader. *Cowne v. Barry, M. 7 G. 2. Str. 954.*]

[There shall be no repleader where defendant pleads payment and



acceptance in satisfaction of debt on bond, and plaintiff takes issue on the acceptance. *Hackshaw v. Rawlings*, H. 3 G. Str. 23.]

If issue be joined in *Chancery*, and the record sent into *B. R.* to be tried, for a defect in the *venire facias*, a repleader shall be awarded in *B. R.* and not in *Chancery*; for the record being in *B. R.* can never be remanded. *R. 1 Rol.* 287.

So, anciently a repleader was awarded upon a writ of error; but this is now obsolete. *Per Hale*, 2 *Sand.* 319. 2 *Lev.* 12.

If a repleader be awarded or denied, when it should not be, it will be error. *R. Mod. Ca. 2. Sal.* 579.

If a repleader is awarded, the judgment is *quod replacitent*, and the fresh pleading begins where the first defect was. *R. Mod. Ca. 2. Sal.* 579.

There shall be no costs on a repleader. *Ibid.*

### (S) Verdict.

#### (S 1.) General.

**A** Verdict is general or special. *Co. Lit.* 226. b.

A general verdict is, when the jury find the point in issue generally: as, in assise on *nul tort*, *nul disseisin*, that the tenant *disseisvit*, or *non disseisvit*. *Co. Lit.* 226. b.

If the plaintiff is nonsuited, and the jury find damages; as, in replevin; it is no verdict, but only an inquest of office. *R. Cro. El.* 412.

#### (S 2.) Special.

A special verdict is, when the jury find the special matter, and thereupon pray the discretion of the court. *Co. Lit.* 226. b.

[On a point reserved for opinion of court, the verdict must always be for plaintiff. *Barnes*, 455.]

[The rule should be, if the opinion of the court is for plaintiff, that the *postea* be delivered to him; if for defendant, that verdict be entered for him *ex assensu juratorum*. *Barnes*, 451.]

A special verdict may be found in all cases, as well upon indictments and appeals as upon commons. *Co. Lit.* 227. a. *R. 9 Co.* 13, 14. *Dowman*.

In all actions, real, personal, or mixt. *R. 9 Co.* 13, 14.

On all issues joined between the king and the subject, as well as between party and party. *Ibid.*

And upon any issue joined on a special matter, or point collateral, as well as on the general issue. *R. cont. Dy.* 284. a. *R. acc. per all the J. in B. R. and the opinion in Dyer denied.* 9 *Co.* 14. *Dowman.* *Cont.* 3 *Leo.* 48. *R. acc. Mo.* 858.

So, by consent a special verdict may be determined by the court without being filed upon record. *Mo.* 774.

But if the jury find a special matter not pertinent to the point in issue, the court may disallow the verdict, and the case must be understood to be such in the books, where the court disallows a verdict. 9 *Co.* 14. a.

As, in trespass for a thing transitory in *A.* if the defendant is found not guilty in *A.* for the jury ought to say *not guilty generally*, or find the special matter. 2 *Rol.* 694. l. 25.

[In

[In a case for the opinion of the court, the facts proved at the trial ought to be stated, and not the evidence of the facts only; thus, in trespass on a copyhold, it is not enough to state that admission of plaintiff was proved, but must state that plaintiff had title or possession. *Palmer v. Johnson*, P. 3 G. 3. 2 *Wils.* 163.]

## (S 3.) Privy.

A verdict shall be given in court. *Co. Lit.* 227. b.

Or, may be given privately before the judge in all cases, except in criminal ones, which affect life or member. *Ibid.*

But in criminal cases, which affect life or member, a privy verdict shall not be given. *Co. Lit.* 227. b. *R. Ray.* 193.

But in other criminal cases it may. *R. ibid.*

And where a privy verdict is given, if the judge or any of the jury die before it is affirmed, it is not good. *R. Mo.* 33.

The jury may vary from the privy verdict, before it is affirmed in court. *Co. Lit.* 227. b. *R. Mo.* 33. *R. Dy.* 209. a.

So they may vary from the first tender of their verdict in court, before it is recorded. *Co. Lit.* 227. b.

But after the verdict is recorded, they cannot go from it. *Ibid.*

So, after a verdict in writing delivered to the sheriff on an extent, it cannot be altered, except in form. 2 *Rol.* 712. l. 45.

## (S 4.) What Things a Verdict may find.

(S 4.) *Matter of record.*] The jury may find by their verdict all things given in evidence, material to the issue, if it be not contrary to the record or the admission of the parties.

As, they may find matter of record, given in evidence: as, letters patent, statutes, judgments, &c. *Hob.* 227.

A fine or common recovery. 2 *Rol.* 691. l. 23.

A record of an attainder produced *sub pede sigilli.* 2 *Rol.* 691. l. 20.

So, any record regularly proved. *Cont.* 2 *Rol.* 691. l. 20. *Hob.* 227.

So, matters upon record in a spiritual court; as, a divorce, &c. 2 *Rol.* 691. l. 25.

(S 5.) *An estoppel.*] So, the jury may find matter of estoppel, and tho' it is not pleaded and relied upon, when it is found the court shall judge according to law. *Co. Lit.* 227. a.

And therefore, if a man makes a lease by indenture to A. of his own land, whereby A. is estopped to say, that it was not demised, the jury may find such matter, tho' it be not pleaded. *Co. Lit.* 227. a. *Dub. Cro. El.* 140. *Ow.* 96. *R. 4 Co.* 53. *R. Cro. Car.* 110. *Vide* 1 *Leo.* 206.

And the jury must find the *estoppel* under pain of an attainder. 4 *Co.* 53. b.

So, the jury may find tenure of the king by *estoppel.* 2 *Rol.* 690. l. 5. 7 *H.* 4. 41. a.

So, they may find a bond to be made before the date, tho' the party is estopped from saying so. *R. 2 Co.* 4. b. 2 *Rol.* 690. l. 7. 706. l. 17.



But where the plaintiff makes title by *estoppel*, or pleads and relies upon the *estoppel*, the jury cannot find contrary to the *estoppel*. 1 Sal. 276. *Vide Estoppel*, (B—E 10.)

(S. 6.) *A matter which bars or avoids an estate.*] So, the jury may find a collateral warranty; for it bars a right. Co. Lit. 227. a. R. 10. Co. 97. b. 2 Rol. 690. l. 10.

So, they may find a condition which defeats an estate. 2 Rol. 690. l. 30. 35. Lit. f. 366.

Or, a release of an estate. Cont. per Shard. 26 Aff. 2. b. Acc. 2 Rol. 691. l. 7.

Or, a confirmation, though they are without deed.

(S. 7.) *The jury may find a special matter, when they cannot give a general verdict upon it.*] So, they may find a matter specially for the plaintiff, on which they could not give a general verdict for him, without danger of an attain: as, if a man justifies by a lease 30 Mar. habendum from Lady-day before for a year, and the issue is upon the lease, and a lease is proved of 25 Mar. habendum from thenceforth for a year, the jury may find for the defendant, and not safely for the avowant; yet they may find specially, on which the court shall give judgment for the avowant. R. Hob. 73. 2 Rol. 690. l. 45.

(S. 8.) *Or, give a general verdict, when the special matter does not warrant it.*] So, the jury may find a general verdict for the plaintiff, where the special matter found would be against him: as, in trover, on proof of a demand and refusal, they may find for the plaintiff; but if it be found specially, it will be adjudged no conversion. *Vide Action upon the Case upon Trover* (E).

On proof of a voluntary feoffment to a son, the jury may find it fraudulent as to creditors, &c. but if it be found specially, it will not be judged so. R. 10 Co. 56. b.

Yet, if the special matter gives a violent presumption of a fact, it shall be adjudged accordingly: as, if the jury find that the parties declared by a subsequent indenture that a recovery was suffered to such uses, the court will adjuge the recovery to those uses. R. 9 Co. 8. b. Mo. 192.

So, if they find a conveyance of one, who fled beyond sea, to trustees for payment of his debts, and that the residue should be at his disposal, with power of revocation, and that he continued in possession afterwards, it shall be adjudged fraudulent as against the king, tho' it be not expressly found. R. Mo. 194.

(S. 9.) *May find a matter in another place or county. When the place is only for a venue.*] When the matter of the issue is alleged in any particular place for conformity to have a *venue*, the jury may find the thing done in any other place or county. R. 6 Co. 47. a. 2 Rol. 689. l. 40. *Vide post*. (S. 15.)

As, if an executor pleads *plene administravit*, and the plaintiff replies *assets at A.* the jury ought to find for the plaintiff, if assets at any place within or out of the realm are proved. R. 6 Co. 47. 2 Cro. 55.

So,

So, if the heir pleads *nothing by descent at A.* the jury ought to find for the plaintiff, if there are assets in any other county or place.

*Qu. Dy. 271. b. R. 6 Co. 47. a. 2 Rol. 689. l. 16. R. 2 Cro. 503.*

So, if there be a feoffment with warranty by tenant in tail, in *formedon* by the issue in *Norfolk*, the jury may find assets in any county. *6 Co. 47. a.*

If tender of homage be alleged at *D.* it may be found in any other place. *2 Rol. 689. l. 50. Vide post. (S 15.)*

So, if the issue be of a thing done out of the realm, it may be found by a jury of the county where the action is brought; as, if the issue be, whether a ship demurred at *M.* in *Spain.* *R. 6 Co. 47. b.*

[A replication to a plea of *ne unques accouple*, in a writ of dower, alleging a marriage in *Scotland*, need not state that the marriage was had in any place in England, by way of *venue.* *Ilderton v. Ilderton, C. P. T. 33 Geo. 3. 2 H. Bl. 145.*]

And in such case the jury is bound to find matter in another county, under pain of an attainder. *Cont. Bro. Attainder, 104. R. 6 Co. 47. a. acc.*

(S 10.) *When a local thing is material, upon the general issue.*] So, on every general issue, the jury may find all local things, material to the matter in question, tho' in another county. *R. 6. Co. 47. a.*

As, in action on the *ft.* 32 *H. 8.* for buying of titles in *N.* where the bargain was for a title of land in another county; upon the general issue the jury shall find the value of the land in another county. *R. 2 Rol. 688. l. 35.*

In assise, they shall find death, &c. in another county. *2 Rol. 689. l. 5. 10.*

In ejectment, upon *not guilty*, if the plaintiff makes title by a lease of land in *A.*, except the manor of *B.*, the jury of one county may find that the manor extends into two counties, and that the lessor had nothing in *A.* except the manor. *R. Hob. 170.*

(S 11.) *When a bar in a foreign county is pleaded.*] So, when a bar in a real or personal action is pleaded in a foreign county: as, a release, &c. the jury shall assess damages for land in another county, and so by a mean shall inquire of a local thing in another county, of which they could not originally. *R. 6 Co. 47. a.*

As, in trespass *quare clausum fregit*, if a release, arbitrament, &c. in another county be pleaded and tried there, the same jury shall assess damages for the trespass. *2 Rol. 687. l. 50.*

So, if a release, &c. in a foreign county is pleaded in assise, *aid*, *cofnage*, &c. *2 Rol. 688. l. 10.*

So, in waste. *2 Rol. 688. l. 15.*

So, in trespass for breaking his close, if the defendant pleads that the plaintiff is a *villein regardant* to his manor in another county. *R. 2 Rol. 688. l. 25.*

(S 12.) *At another time.*] So, they may find a thing to be done at another time, when the day is not material: as, in trespass for a battery, &c. such a day, the defendant may be found guilty at another day. *2 Rol. 687. l. 25.*



So, in conspiracy. 2 *Rol.* 687. l. 20.

So, in battery, tho' the defendant justifies by *son assault* the same day, by which the day is made parcel of the issue. *R. cont.* 2 *Rol.* 680. l. 45. 687. l. 30. *R. cont. Brownl.* 233. *R. acc. Cro. Car.* 514.

(S 13.) When it shall not a Thing in another Place.

(S 13.) *In criminal cases.*] But in criminal cases the jury cannot find an offence in another county than where it is alleged. 6 *Co.* 47. b. As, in felony. *Ibid.*

(S 14.) *When the place is parcel of the issue.*] So, when the place is parcel of the issue, the jury cannot find the point in issue in another place. *R.* 6 *Co.* 47. a. *D. Hob.* 170.

(S 15.) *When the place is material.*] So, in a local trespass, the jury cannot find the defendant guilty in another county: as, in trespass for the cutting of trees, grass spoiled, &c. 2 *Rol.* 688. l. 50.

Nor, in another place in the same county. *Semb.* 2 *Rol.* 689. l. 35.

And if the jury find a general verdict for the plaintiff, in trespass *quare clausum fregit*, &c. where the proof is of a trespass in another place or county, an attain lies.

So, a jury in *Bucks* cannot find a foundation of a priory in *Oxon.* *R.* 2 *Rol.* 688. l. 52.

In an action in an inferior court, the jury cannot find a thing issuable done out of the jurisdiction. 1 *Cro.* 101. 2 *Cro.* 503. *R. inter Drake and Bear*, T. 15 *Car.* 2. *B. R.*

But a jury in an inferior court may inquire of a matter for increase of damages, tho' done out of the jurisdiction. 1 *Cro.* 571. *Agr. inter Drake and Bear*, T. 15 *Car.* 2.

(S 16.) *So, the jury cannot find a thing contrary to the record.*] So, the jury cannot find a thing contrary to the record. 2 *Rol.* 691. l. 30. *R.* 11 *H.* 6. 42. a. *R.* 9 *Co.* 69. b.

And if a verdict finds matter contrary to the record, it is void as to that, 9 *Co.* 69. b.

(S 17.) *Contrary to the matter agreed by the parties.*] So, the jury ought not to inquire of a thing, which is agreed by the parties to the issue. 2 *Rol.* 691. l. 35.

As, in dower, if the tenant pleads, *always ready to render dower*, and the issue is whether the husband died seised, the jury shall not inquire whether he was seised of an estate of which the wife was dowerable; for this is confessed by the plea. 2 *Rol.* 691. l. 40. 3 *Leo.* 80.

In waste, for waste in *A.* if the defendant pleads no such *vill* as *A.* the jury cannot inquire whether there was any waste committed, or whether the plaintiff had land in *A.* for it is confessed by the plea. 2 *Rol.* 691. l. 43.

In assise, if the tenant pleads that the demandant took the profits *pendente lite*, the jury cannot find that the tenant was not seised; for it is admitted by the plea. 2 *Rol.* 691. l. 50.

So, if a tenant justifies for common, and issue on the common found for the demandant; the jury cannot find that the tenant did not put in his cattle, 2 *Rol.* 692. l. 5.

In debt for rent of four acres, the defendant pleads that he demised six acres, *absque hoc* that he demised four only; the jury cannot find a demise of less than four; for it is agreed that four were demised. 2 *Roll.* 692. l. 20.

If by the pleading it appears that there is a manor, and the question arises upon the tenure, the jury shall not find matter which destroys the manor. *R. Lut.* 1216.

If the defendant avows for a *heriot*, and shews tenure by fealty and 2s. rent, &c. the plaintiff admits the tenure, and traverses the prescription; if the jury finds a tenure by 12d. it is not material, and the avowant shall have judgment. *R. 2 Mod.* 5.

If he says that *locus in quo*, &c. is parcel of the manor of *B.*, which is his freehold, and avows for *damage feasant* there, if the plaintiff traverses that the said manor is the freehold of the defendant, it cannot be found that there is no such manor. *R. Dy.* 183. a.

In a *præcipe* against *A.* who pleads, and *B.* as in reversion prays to be received, and the issue is, that *B.* had not the reversion in fee, and the jury find that neither *A.* nor *B.* had anything, *B.* shall be received; for it is contrary to the admission of the party, for it is admitted that *A.* is tenant, and the verdict imports that he is not.

(S 18.) *Out of the issue.*] So, the jury cannot find matter out of the issue: as, in debt, on *no such award* pleaded, the jury cannot find matters which make the award void, if they are not contained in the award itself. *R. 2 Roll.* 692. l. 25. *Vide Hob.* 54.

In waste the plaintiff declares upon a feoffment to the use of the defendant for life, remainder to the plaintiff, and the issue is upon the feoffment, and found that there was a feoffment to such uses; the jury shall not find that the use to the defendant was without impeachment of waste. *R. per three J.* 3 *Leo.* 80. *Cra. El.* 40.

If a verdict finds matter out of the issue, it is void for so much, tho' it concludes thereon generally, for or against the plaintiff or defendant. *Hob.* 53. *Vide post.* (S 28.)

And tho' the matter out of the issue destroys the plaintiff's title. 1 *Leo.* 66.

If the plaintiff by replication pleads assets in a certain manner, and the verdict finds assets generally, it will be good. *R. 2 Cro.* 140.

But if a verdict does not directly conclude to the point in issue, yet it is good, if the court can collect the point in issue out of the verdict. *Hob.* 54.

As, if the issue be that the tenant has the *fee*, verdict, that he has nothing, is good, for it denotes that he has not the fee. *Hob.* 54.

(S 19.) And a Verdict shall be void.

(S 19.) *If it finds only part of the issue.*] So, a verdict is insufficient for the whole, if it finds only part of the issue and says nothing to the residue: as, in an information for intrusion into a house and 100 acres of land, if the verdict finds against the defendant for the land, but says nothing as to the house, it is void for the whole. *Co. Lit.* 227. a. *R. 2 Leo.* 196.

[If in debt for 500 l. on a charter-party to pay 50 guineas per month, defendant pleads he paid 50 guineas per month for all the time,



time, and issue taken that he did not, and the jury find that 357 l. remains unpaid, and says nothing of the rest of the 500 l. the verdict is void. *Hooper v. Shepherd*, P. 11 G. 2. Str. 1089. Andr. 156.]

In trespass for breaking his close, and beating his servant; if it says nothing to the battery. R. 3 Leo. 83.

In trespass against husband and wife for beating his horse and other trespasses, a verdict, that the wife beat the horse, and for the residue *not guilty*, but says nothing as to the husband whether he beat the horse or not, is bad. R. Tel. 106.

In debt for 7 l. if it finds *nil debet* for 6 l. and nothing for the residue. R. Cro. El. 133.

In trespass for a gown and manteau, if nothing found for the manteau. R. 3 Lev. 55.

In waste in pulling down, selling and destroying of houses, &c. if nothing found as to the sale. 1 Lev. 309.

So, in an action against three, who plead severally, if three several issues are joined, and there is a verdict on two issues only, but nothing is said as to the third issue, it is void for the whole. R. 2 Rol. 722. l. 5.

[If in a civil case the verdict is taken generally, and any one count is bad, it vitiates the whole. *Trevor v. Wall*, B. R. E. 26 Geo. 3. 1 T. R. 151. *Hancock v. Haywood*, B. R. M. 30 Geo. 3. 3 T. R. 433.]

[But in criminal cases, if a verdict is taken generally, and there is any one count to support it, the verdict shall stand good. By *Ld. Mansfield*, C. J. *Peake v. Oldham*, B. R. E. 15 Geo. 3. *Corwp.* 276. *Grant v. Afle*, B. R. T. 21 Geo. 3. *Dougl.* 730.]

[But the verdict may be amended by the judge's notes if the amendment is applied for before judgment, and if not applied for in time, the only remedy is a *venire facias de novo*, which may be granted by a court of error. *Dougl. Ibid.*]

[Where the parts of a judgment are separate, it may be affirmed as to part, and reversed as to the rest. 3 T. R. 435.]

[On a writ of error where one count appears to be bad, and the verdict is entred generally on all the counts, the court must reverse the judgment *in toto*, since they cannot see on which of the counts damages were given; but that is not applicable to the case where the damages are assessed severally on the separate counts. By *Buller J.* *Ibid.*]

[If the verdict is against law, the court, on motion, will order it to be set aside and a verdict entred. *Man v. Cadell*, B. R. M. 15 Geo. 3. *Corwp.* 232.]

In an action by husband and wife for a battery of both, if on *not guilty*, the defendant is found guilty for the battery of the wife, but nothing is said as to the battery of the husband. R. *Hard.* 166.

Yet in trespass for battery and wounding, and not guilty to the wounding and justification to the residue, if it finds that he beat and wounded of his own wrong, but says nothing to the issue on the *not guilty*, it is good. R. Cro. El. 854.

So, in prohibition, if it finds the custom, &c. for the defendant, but says nothing as to the proceedings after the prohibition delivered. R. 2 Mod. Ca. 3.

But it may find part of the issue for the plaintiff and part for the defendant. *Vide post.* (S 26.)

Tho'

Tho' the issue is entire: as, in a writ of error to reverse a fine by him in remainder after an estate tail, if the defendant pleads a common recovery in bar and there is issue thereon, and the recovery is found of part of the land, it is for the plaintiff for part, but the defendant may proceed in error to reverse the fine for the residue. *R. 2 Rol. 711. l. 30.*

In debt on a penal bill for 300 *l.* on *nil debet*, it may find for 100 *l. debet*, for 200 *l. nil debet.* *R. Sal. 664.*

[If in a special verdict assets are found entire, and if the penalty of three bonds are charges on the assets, then for defendant, if not charges, then for plaintiff, and the court thinks the penalty of two bonds are charges, and of the third not; judgment may be entred thereon, *quia videtur cur.* &c. accordingly. *Str. 1028. B. R. H. 219.*]

So, if it finds words, which imply the whole issue, it is sufficient, tho' part of the issue is not expressly found: as, in trespass for assault and battery, if it finds the defendant guilty of the trespass and assault, and says nothing to the battery; for *trespass* implies it. *R. 2 Lev. 111. Cro. El. 85. Vide supra.*

So, in an information for forging and publishing a deed, if it finds the defendant guilty of the trespass and forgery *predict.*, but says nothing to the publishing; for the word *trespass* implies it. *R. 2 Lev. 111.*

[If a man is indicted for forging a bond, for publishing *such* bond, and for publishing a *certain* bond, knowing it to be forged, and the jury find a special verdict that he forged a bond, and published the same, and say no more, the court will supply what the jury ought to have done, and find him guilty of the two first offences, and not guilty of the third. *Rex v. Hays, T. 3 G. 2. Str. 843. Ld. Raym. 1518.*]

So, the jury cannot find a part only of a deed or will, but must find the whole, otherwise the verdict is void for the whole. *Vau. 84.*

[But if several pleas go each to the whole, if one of them be found for the defendant, he shall have a general verdict, and the jury need take no notice of the other. *Barber v. Dixon, H. 17 G. 2. Wils. 44.*]

(S 20.) *If it be imperfect.*] When the imperfection shall be aided by intendment, *vide post.* (S 31.)

When by special conclusion, *vide post.* (S 35.)

So, a verdict is void which finds the matter so imperfectly that there does not appear a good title for the plaintiff; as, in assise for rent, if the jury find a demand and refusal, *et sic disseisvit*, but do not find a demand upon the land, it is void; for other demand is not a disseisin. *R. 2 Rol. 693. l. 45. 696. l. 40.*

If the jury find a devise till the heir pays so much, but do not find whether the heir has paid or not. *R. 2 Rol. 698. l. 40.*

If it finds that *A.* had two sons, *B.* and *C.* (and who was heir is the question,) if it does not find which is the eldest son, it is void; for it shall not be intended that *B.* being named first is the elder. *R. 2 Rol. 699. l. 15. Cro. cont. Cro. Car. 302.*

If it finds that the lessor of the plaintiff entred and leased to the plaintiff, who was ousted by the defendant, but does not find any title in the plaintiff. *Semb. 2 Rol. 699. l. 40.*

If



If it finds a lease from a college, and entry by the bailiff for a condition broken, but does not find an authority to enter by deed. *R. 2 Rol. 699. l. 50.*

If it finds a special title in *A.* and that *B.* entred and leased to the plaintiff, and if *A.* has title, for the plaintiff, &c. but does not find that *B.* disseised *A.* so that his entry and lease is void; for it shall not be intended that *B.* entred by *disseisin.* *2 Rol. 700. l. 5.*

If it finds that 100 acres of wood in the declaration are parcel of a farm, which farm was demised to the plaintiff by indenture *prout*, and the indenture shews a demise of the whole farm, *except coppice*, but does not find there was any coppice on the farm, or that the wood in the declaration was coppice, it is not sufficient to bring the matter intended by the exception in question, but it is a sufficient verdict for the plaintiff. *R. 2 Rol. 700. l. 15.*

If it finds a devise on a condition precedent, but don't find the condition performed. *R. 2 Rol. 700. l. 50.*

If it finds a feoffment by a father, who is tenant for life, with remainder to *B.* his son, with warranty to the plaintiff, and that *B.* is his only son by such a wife, but does not find that he is his son and heir, and then the warranty will not descend upon him; and it shall not be intended, for he might have another son by another wife. *R. 2 Rol. 701. l. 10. Cro. Car. 391.*

In *assumpsit* to pay on request, if it finds that he undertook, but does not say *modo et forma*, nor finds any request. *R. 2 Rol. 711. l. 45.*

If it finds a devise, and does not say that the devisor is dead. *R. 2 Leo. 120.*

If a verdict find that *Julian* wife of *B.* is dead, when the issue is whether *Jemmet* wife of *B.* is dead, and does not say that *Julian* and *Jemmet* are the same name. *R. Mo. 411.*

If, in an information for usury, it finds *quod corrupt. agreat. fuit*, but does not find the loan. *R. 2 Cro. 210.*

So, if the verdict does not expressly find matter necessary to maintain the action, it is imperfect. *R. 2 Jon. 61.*

As, if it finds an entry but no expulsion. *Poph. 12.*

So, if it finds matter specially, and finds an entry by the defendant on the plaintiff, and then makes a general conclusion, without finding title in the defendant, or possession, there shall be judgment for the plaintiff, without regard to the special matter. *R. Cro. El. 438.*

So, if a verdict does not find damages and costs, it is imperfect; as, in annuity. *R. 11 Co. 56. a. 2 Rol. 722. l. 30.*

Or, finds entire damages when it ought not; for insufficient damages are as none. *11 Co. 56. a.*

So, in detinue, if it does not find the value as it ought. *10 Co. 119. b.*

Or, in *valore maritagi* does not find the value of the marriage. *R. 10 Co. 119. a. 2 Rol. 722. l. 10.*

But the omission of finding damages and costs will be aided by a release of them. *R. 11 Co. 56. a.*

So, an omission of that, which the court *ex officio* shall inquire of, will be aided by a writ of inquiry. *10 Co. 119. a.*

If

If there are several issues, and a verdict good as to one, and imperfect as to others, a *venire facias* goes to all. *R. 2 Rol. 722. l. 45.*

So, in an action against several, if the verdict is good as to some, imperfect as to others, there shall be a *venire facias de novo* as to all, and a defendant found not guilty, may afterwards be found guilty. *R. 2 Rol. 722. l. 35. 2 Cro. 627.*

[If the verdict is defective, and omits finding any thing within the province of the jury to find, no judgment can be given, and there must be a *venire de novo*. *Rex v. St. Asaph, 3 T. R. 428. in notis.*]

So, if there be a demurrer to part, and issue for part, and the verdict does not find damages for the matter in the demurrer, it is wholly void. *Dub. 2 Rol. 723. l. 5.*

But it may be aided by a release of damages on the demurrer, or a *non pros.* *R. 1 Sal. 346.*

So, if a verdict be imperfect, it shall not be rectified by the same jury, but a *venire de novo* must issue. *R. 2 Cro. 210.*

[If it appears on the face of the *jurata* that the cause was tried after the day of *nisi prius* mentioned therein, there must be a *venire facias de novo* awarded, for the *hab. corpora* and *jurata* cannot in this case be amended. *Crowder v. Rooke, T. 2 G. 3. 2 Wilf. 144.*]

[Wherever attaint would lie, writ of inquiry cannot be awarded to assess damages, but *venire de novo* must go; so, if issue is joined in abatement, and verdict for plaintiff. *Eichorn v. Lemaitre, H. 8 G. 3. 2 Wilf. 367.*]

[In debt for the penalty of 500 *l.* on articles not to cut trees, &c. on penalty, &c. if there is verdict for plaintiff, that defendant owes the debt and one shilling damages, a *venire facias de novo* shall go, for jury should have assessed the real damages on the breaches assigned, and plaintiff cannot take verdict for the whole debt by 8 & 9 *W. 3. c. 10. Drage v. Brand, P. 8 G. 3. 2 Wilf. 377.*]

[On *riens per descent*, verdict, "that there are lands sufficient," good, tho' the value not set out. *Barnes, 444.*]

(S 21.) *If it be uncertain.*] So, an uncertain verdict is void; as, in debt against an executor, who pleads *plene administravit*, if the jury find he has goods in his hands unadministred, and does not say to what value. *Co. Lit. 227. a.*

For it must find the fact clear to a common intent. *Vau. 75.*

In *valore maritaggi*, if it finds the marriage of the heir, and does not say by whom. *R. 9 Co. 74. a.*

If it finds the *st. 27 Eliz.* for making void fraudulent conveyances, and does not find the conveyance fraudulent; for it does not bring it within the statute. *R. 10 Co. 57. a.*

In dower, on *nunques seise que dower*, if it finds that the husband was seised of so much as *B.* has, and does not say how much. *R. 2 Rol. 694. l. 30.*

In ejectment, if it finds the defendant guilty of eight pieces of land, without other certainty. *R. 2 Rol. 694. l. 50. Vide Sav. 35.*

In an action on a penal statute, which gives a penalty for every offence, if it finds the defendant guilty contrary to the statute, but does not say how often he is guilty. *R. 2 Rol. 696. l. 5.*

In account against *A.* as receiver of 10 *l.* by the hands of *B.*, other



10*l.* by the hands of *D.*, if it finds that he received only one 10*l.* but does not say by whose hands. *R. 2 Rol. 689. l. 5.*

If it finds that there was a demand for rent due at *Lady-day*, and does not say for a year or half a year then ended. *R. per three J. Windb. cont. Sav. 122.*

If it finds *A.* his only daughter, it is not sufficient, without saying that she was his heir. *R. 3 Lev. 125.*

[In ejectment if it finds the defendant not guilty for four closes, containing 400 acres, and finds specially for the residue, and it does not appear how much the residue was. *R. 2 Cro. 113.*

[If there are four different demises in ejectment, and a verdict for plaintiff that he recover his term aforesaid, without saying which, it is void. *Lady Cops v. Title, H. 12 G. Str. 682.*]

So, if debt be for 40*l.* on several contracts, and a verdict as to 30*l.* *quod debet*, as to 10*l.* *quod nil debet*, but it does not say on which contract it finds for the plaintiff, on which not. *R. 2 Rol. 270.*

So, if it finds damages uncertainly; as, in *assumpsit* if it finds damages, 40*l.* if the law wills that they should give 40*l.*, but if the law wills not, then 3*l.* *R. 2 Rol. 695. l. 50.*

So, if it be uncertain for what thing or time the damages are given. *R. 2 Sand. 171.*

Yet, they may give less or greater damages on a contingency, and refer it to the court.

So, on a covenant to pay 11*l.* for every acre of land less than was alleged on a purchase, and breach assigned that there were so many acres less as amounted to 700*l.*, the jury find that there were so many, &c. and give 400*l.* damages, it will be good, tho' they find all the acres wanting, &c. for they are chancellors, and may mitigate damages. *R. 2 Rol. 703. l. 10.*

[S 22.] *If it be only argumentative.*] So, a verdict which finds the matter in issue only by argument and inference, is void; as, if the issue be, that a copyhold granted for three lives is heriotable, and the jury find that there never was any such grant in that manor; for it is not found directly that it is not heriotable, but only by argument. *R. 2 Rol. 693. l. 10.*

So, on an issue that by the custom a grant may be to three for the lives of two, a verdict, that a grant for three lives is good, will be void; for it does not find the issue but upon the inference, that the grant of a less estate is good where the custom warrants a greater estate. *R. 2 Rol. 693. l. 15.*

If the issue be, whether a copyhold may by custom be granted in tail, a verdict, that it may be granted in fee, is void. *Per Hought, 2 Rol. 693. l. 20.*

In debt, on a special *non est factum*, for that the bond was read as an acquittance, verdict that he is lettered, and knew it to be a bond, and gave it voluntarily, is not good; for it ought to find directly that it is his deed. *2 Rol. 693. l. 25.*

So, if the defendant pleads *solvit*, and issue is thereon, verdict that the defendant owes the money is not good, for it finds only by argument *quod non solvit*. *R. 2 Rol. 693. l. 32.*

So, in trespass for taking and cutting his leather, the defendant justifies

justifies as a searcher, &c. and that he in searching it cut it *more scrutator.*; the plaintiff replies, of his own wrong *absque hoc* that he cut it *more scrutator.*; verdict that he cut it of his own wrong is not good; for it does not find the issue but by argument. *R. 2 Rol. 694. l. 10.*

If the issue is, whether the tenure be of *B.*, verdict that he holds of *C.* is not sufficient. *R. 1 Lev. 210.*

In *assumpsit*, if the verdict finds that the plaintiff has damage by non-performance of the promise, it is not good. *R. 1 Rol. 77.*

In *trover*, on *not guilty*, if it finds that the defendant converted the goods to his own use, it is not good, tho' tantamount to *not guilty*. *R. Cro. El. 866.*

So, in all cases, a general verdict which finds the point in issue by way of argument, is void, tho' the argument or inference is necessary. *Vau. 75.*

(S 23.) *If it be repugnant.*] So, if it be repugnant: as, if in ejectment for 20 acres the jury find a demise for 10 acres only, and if the court are of opinion that this is a demise of 20 acres, then, &c. it is repugnant, and void for the whole. *R. 2 Rol. 695. l. 30.*

If it finds that *A.* was seised till 1 Feb., and that a writ of entry was sued against *B.* and *C. tunc tenent.*, returnable 23 Jan., to the intent to suffer a recovery, here no tenant to the *præcipe* is found; for if *A.* was seised till 1 Feb. it will be repugnant that *B.* and *C.* could be *tunc tenent.*; and therefore it is void for the whole. *Per Hob., but the other J. cont. Hob. 262.*

In appeal, if the verdict finds the defendant not guilty of homicide and felony, and then finds him guilty *se defendendo*. *1 And. 41.*

On an indictment for a riot, if it finds the defendant guilty of the fact, and not guilty of a riot. *3 Mod. 72.*

[If there is a verdict for defendant, when by his own shewing he is guilty: as, if he justifies under a distress for rent, and shews that the appraisers were sworn by the head-borough, when there was a constable present. *Broome v. Rice, T. 4 G. 2. Str. 873.*]

But if the thing, which makes the repugnancy, may be rejected as surplusage, it is good. *Vide post. (S 28.)*

So, in an action on the case for disturbing his common by digging turf and a fish-pond, the defendant pleads that he left sufficient common; verdict, that by digging turf he has not left sufficient common; that by the fish-pond he has left sufficient; and so finds that the plaintiff has sufficient common, and has not, yet it is good, for it is in different respects. *Dub. Cro. Car. 495.*

(S 24.) *If it be variant from the declaration.*] So, if there be a material variation between the verdict and the declaration: as, in debt upon a contract, if the verdict finds a different contract. *2 Rol. 702. l. 20. usq. 45.*

In detinue of a bond, &c. if it finds a different bond. *2 Rol. 703. l. 30.*

In *assumpsit*, if it finds a different promise. *2 Rol. 703. l. 35. 719. l. 5. 10. 50.*

In an action on the case for slander, if it finds words materially different, tho' of the same sense, or equally slanderous: as, if the declaration be, *he is a bankrupt*, verdict, *he will be*. *2 Rol. 717. l. 45.*

Or,



Or, if the declaration be, *he is a thief, verdict, he stole a horse* 2 Rol. 717. l. 50.

Declaration in the second person, *thou stolest, &c. verdict in the third, he stole.* R. 2 Rol. 718. l. 10.

So, in ejectment, if it finds a different lease. 2 Rol. 704. l. 35. 719. l. 32. ad 50. Hob. 73. Latch, 93. Hard. 330. 2 Lev. 14. And *vide ibidem*, what leases are variant.

So, in waste for cutting down trees, verdict, that he dug up. 2 Rol. 720. l. 10.

[The *et similiter* left out in issue delivered, tho' inserted in record, is fatal. Barnes, 475.]

[He the said indorsed, in issue, he the said A. indorsed, in record, fatal. Barnes, 476.]

But a small or immaterial variation does not avoid the verdict. *Vide post.* (S 30.)

[And if the record of *nisi prius* agrees with the declaration delivered, a variation from the issue delivered is not material. *Shepley v. Marlb, P. 13 G. 2. Str. 1131.*]

[If the record of *nisi prius* agrees with the roll, tho' not with paper-book of the issue, verdict shall not be set aside; and if the record of *nisi prius* is wrong, the court will amend it by the roll, after a verdict on defence made. *Leeman v. Allen, P. 3 G. 3. 2 Wilf. 160.*]

(S 25.) Or, *gives damage for a thing not incurred.*] So, a verdict shall be void, if it gives damages for that for which no cause of action was then incurred: as, in an action upon the case for seducing his apprentice, *per quod* he lost his service for the residue of the term, which is not yet expired, for he may afterwards return and serve. R. 2 Sand. 169. 1 Lev. 299.

So, in an action on the case for building a mill 3 Aug., *per quod* a close was overflown, *et totum proficuum a 2 Jul. amisit*, if the jury give entire damages. R. Sal. 663.

But in covenant, if the plaintiff assigns a breach, for that the house *fuit et adhuc tenebros. existit*, the damages shall not be intended for any thing after the action brought. R. 3 Lev. 246. 346.

(S 26.) But a Verdict is sufficient.

(S 26.) *If it finds the substance of the issue.*] But it is sufficient, if the substance of the issue is found. Co. Lit. 227. a.

As, in an issue, if A. be joint-tenant with B., if the jury find that A. has nothing, it is against him; for he cannot be a joint-tenant if he has nothing. 2 Rol. 705. l. 40. 50.

In trespass in *Middlesex*, the defendant justifies by a writ in *London*; the plaintiff replies that he took in *Middlesex* of his own wrong without such cause; if it finds that he took by writ in *Middlesex*, it is sufficient; for the effect of the issue was upon the place. 2 Rol. 706. l. 2.

In *audita querela* upon payment after execution, and issue thereon, if it finds a payment before, it is sufficient; for payment was the substance, and the time not material. R. 2 Rol. 706. l. 15.

On an issue, if taken by *ca. sa.*, if it finds a taking by an *alias capias*, it is sufficient. R. Hob. 54. 2 Rol. 707. l. 10. and many cases, *ibid.* 708, 709. 711. Mo. 858.

In

In ejectment, a lease of a manor is pleaded, whereof the tenements in which are parcel, and issue *an demisit maner*. : if it finds that he demised a farm called the manor, whereof the tenements, in which are parcel, and that there are copyholds but no freeholds there, tho' this is not a manor in law, yet it is sufficient ; for the substance is, a demise or not. *R. 6 Co. 67. 2 Rol. 712. l. 5.*

[In ejectment for a moiety, as one of two co-heirs, a verdict for a third part, plaintiff appearing to be one of three co-heirs, is good ; for plaintiff must recover according to his title. *Denn v. Purvis, P. 30 G. 2. 1 B. M. 326.*]

Issue whether *A.* was in the realm 1 *Aug. 3 Car.* and remained five years without entry or claim to avoid a fine, if it finds he was 4 *Car.* and not 3 *Car.*, it is sufficient ; for the time is not material, if he was five years without claim. *R. 2 Rol. 713. l. 10.*

Issue in trespass, whether the land was the freehold of *A.*, if it finds that as to two parts it was the plaintiff's freehold, and the other part *A.*'s, it is sufficient ; for it finds as much as proves the action not maintainable. *R. Cro. El. 157.*

In prohibition, it was suggested that a *modus* of 4s. time whereof, &c. was paid, and issue upon the *modus*, and it was found by the verdict that there was a *modus* of 4s. 6d. ; *R.* that the defendant shall not have a consultation, for a *modus* is found, tho' it is not the same as was suggested. *Cro. El. 819.*

So, it is sufficient, if it does not find the words of the issue, but words tantamount : as, if the issue be, whether the plaintiff *habuit et gavisus fuit officium predictum*, verdict, *quod occupavit*, is sufficient. *R. Mo. 401.*

[Indictment, that defendant *fabricavit et contrafecit* a bank-note for 520 l., verdict, that he *erast et alteravit* a note by turning the word two into five, held good, and judgment against defendant. *Rex v. Dawson, M. 3 G. Str. 19.*]

So, it is sufficient, if it finds so much of the issue as maintains or avoids the bar, tho' it does not find all the words of the issue : as, if the obligor pleads *solvit ad diem*, the plaintiff replies that the defendant, nor *A.* and *B.* joint obligors, *nec eorum aliquis solvit*, and issue thereon, if it finds that the obligor *non solvit*, it is sufficient. *R. Cra. Car. 6, 7.*

[If a special verdict on a *mandamus* finds that plaintiff was chosen a jurat, then chosen mayor, received the sacrament within a year before chosen mayor, but not before chosen jurat, it is good, tho' it does not find that there was no prosecution. *Martin v. Jenkin, M. 14 G. 2. Str. 1145.*]

So, it is sufficient if it finds the defendant guilty for part only of the demand on charge in the declaration : as, in trespass, if it finds him guilty for part only of the trespass alleged. *Vide 2 Rol. 683. l. 20. 703. l. 25. 704. l. 5. 10. Vide ante, (S 19.)*

[To trespass *vi et armis* for assault and battery, charging special damages, defendant pleads as to the *vi et armis* not guilty, and issue is joined ; and as to the special damages pleads "*son assault demesne* ;" plaintiff replies, "*de injuria sua propria absque tali causa*," and issue is joined ; verdict, "guilty of the trespass within written," is good. *Hawks v. Crofton, M. 32 G. 2. 2 B. M. 698.*]

In ejectment, if it finds him guilty only for part of the lands or tenements



nements demised. *R. 2 Rol. 703. l. 40. Cro. El. 13. 3 Lev. 334.*

So, in an action upon the case for putting in cattle and consuming his common, if he is found guilty only for depasturing the common, and not guilty for putting in the cattle. *R. 9 Co. 112. 2 Rol. 704. l. 15.*

So, in an information upon a penal statute, if it finds only one defendant guilty, or only in part. *R. 2 Rol. 707. l. 30. 50. 708. l. 5. Cro. El. 835.*

So, in an action for words, *you stole my horse*, and another count for charging with felony, if it finds that he did not charge with felony, but finds the words, it is sufficient as to them. *R. 2 Rol. 710. l. 5.*

So, in account, the defendant pleads to part bailiff to the plaintiff and a stranger, if it finds him bailiff to the plaintiff for so much, without more, it is sufficient. *R. Mo. 548.*

Otherwise, if the declaration is upon an entire contract, promise, &c.; for then, if it finds against the defendant for part, it is a material variation. *R. 2 Rol. 702. l. 20. ad 45. 707. l. 55.*

[If there is enough found, on several issues joined, for court to give judgment on, there shall be no new venire, tho' on one issue no proof nor verdict. *Barnes, 461.*]

(S 27.) *Or, omits a thing not material.*] So, omitting to find a thing not material does not avoid the verdict: as, if it finds that *A.* was seised and devised to *B.*, paying debts and legacies, and refers to the court what estate passed, it is not material, tho' it does not find whether *B.* has paid the debts and legacies; for it is a condition rather than a limitation. *R. 2 Rol. 699. l. 5.*

So, in debt for 750 *l.* upon a bond *pro septuagint. et quinquagint. libris*, if the jury finds that the defendant made the bond, it is sufficient, without finding that it was intended for 750 *l.* *R. Hob. 116.*

So, in trespass, or *rescous*, if the defendant alleges that *A. tenit* by rent and heriot-service, and justifies for a heriot, it is sufficient, if it finds a tenure by heriot-service, tho' not for the same rent. *Semb. Cro. El. 799.*

Otherwise in replevin, for the avowant ought to prove the tenure alleged. *R. Cro. El. 799.*

(S 28.) *Surplusage does not avoid it.*] And surplusage shall not hurt: as, if the jury find a direct verdict for the plaintiff or defendant, and then add uncertain or contradictory matter. *Vide several cases. 2 Rol. 695. l. 5. 15. 35. 1 Leo. 92. R. Mo. 431. R. Cro. El. 480. R. Cro. Car. 76. 130. 174. R. 2 Sand. 308. Sav. 112. Vide post. (S 40.)*

As, upon a *non est factum*, if it finds that it was his deed, but delivered after the date. *2 Rol. 706. l. 17.*

If the issue be, whether *A.* and *B.* enfeoffed, if it finds that *A.* and *B.* did not enfeoff, but that *A.* alone enfeoffed, the last clause is void. *2 Rol. 706. l. 25.*

Verdict, that an executor *administavit vel ad usum proprium disposuit*, is good, tho' in the disjunctive, and one way had been sufficient. *R. Hob. 49.*

If it finds the prescription alleged, it is good, tho' it finds more. *R. Hob. 117. R. 2 Lev. 253. Mod. Ca. 4.* If

If it finds a demise for life upon the land, but no other livery. *R. Cro. El. 482.*

Or, *quod A. 10 Jun. demisit habendum a die dat.,* and livery 23 Jul. this being repugnant shall be rejected. *R. 2 Cro. 153.*

So, in ejectment for 12 acres of land, if the defendant is found guilty for 20, the plaintiff shall have judgment for 12. *R. 2 Rol. 707. l. 5.*

In an action against husband and wife for words by the wife, if it is found that the husband and wife spoke, it shall be surplusage as to the husband, and a good verdict against the wife. *R. 1 Rol. 216. R. 2 Rol. 433.*

So, if the jury find that the defendant committed waste and sold, and then find the particulars of the waste but no sale, the first being only the title of the verdict shall be rejected as surplusage. *R. 2 Sand. 255.*

So, if it finds so much for damages, *to be paid in dying if it can be,* the last words shall be rejected. *R. Cro. Car. 219.*

So, if it finds the matter in issue and other matter out of the issue, which makes *contra.* *Vide ante, (S 18.)*

So, if tenant by receipt pleads that *A.* was seised for life, reversion to him, the demandant replies that *A.* was seised in fee, and issue thereon; a verdict that *A.* had nothing in the land, nor the other in reversion, is for the tenant by receipt; for it is found that *A.* had not the fee, and other is surplusage. *1 Rol. 705. l. 40. 50. 3 Leo. 80.*

So, on an indictment for battery, if the jury find the defendant guilty *prout Sir T. F. versus cum queritur,* where the indictment was found at the assises and *Sir T. F.* only joined issue for the king as the king's coronator et attorn. in *B. R.* it will be good; and *prout Sir T. F. versus cum queritur* rejected as surplusage. *R. 2 Sand. 308.*

(S 29.) *Except where it tends to the prejudice of the party.]* But when the surplusage tends to the prejudice of the parties, it is bad; as, in trespass for assault, battery, and wounding, the defendant justifies the assault and battery, and issue is thereon; the jury find the defendant guilty for the assault, battery, and wounding, and give entire damages, it is bad; for damages are given for the wounding, which was not in issue. *R. per three J. Wind. cont. 1 Sid. 96.*

(S 30.) *Nor, a small variation.]* Nor, a small addition or variation; as, if the declaration be of land in *Spreton* and *Begley*, and the verdict of land in *Spriton* and *North Begley.* *R. 1 Sid. 27. Vide ante, (S 24.)*

[Evidence of a house situate in the parish of *M.* will support an averment of a house "at *S.*" *S.* being extra-parochial, and both places usually going by the name of *S.* *Burbige v. Jakes, C. P. E. 38 G. 3. 1 Bos. & Pull. Rep. 225.]*

In *assumpsit*, if the jury assess damages *occasione debiti predicti* where it should be *occasione non performance assumption, predicti.* *R. Rol. 696. l. 10. Hob. 89.*

In an action upon the case for an escape against the gaoler of the prison of the castle of *M.*, a verdict finding that the defendant is gaoler



of the prison there, and permitted the escape; but that there is no castle there, is good. *R. 2 Rol. 712. l. 2.*

In an action for slander, if the declaration and verdict vary by the addition, omission, or change of any words, which are not material for the maintaining of the action or increase of damages. *R. 2 Rol. 717. l. 15 ad 50. 718. l. 20 ad 50. R. Hob. 180. R. Tel. 152.*

Otherwise if the words are totally different, tho' of the same sense. *Vide ante, (S 24.)*

In an action on the *ss. 2 Ed. 6.* for not setting out of tythes, and declaration upon a lease, if *A.* so long live, and continue parson, if it finds a lease if *A. so long live*, without more, it is sufficient; for it determines if he resigns, or does not continue parson, and therefore the substance is found; for the words omitted are what the law implies. *R. 2 Rol. 718. l. 5.*

In ejectment, if it finds a lease not materially variant. *Vide 4 Leo. 14. 2 Rol. 704. l. 30. 40.*

In trespass, if it finds him guilty in a moiety of the land described in the declaration, in the other moiety not guilty. *R. 2 Cro 183.*

So, if it varies in a point collateral to the matter in issue; as, if *A.* avows and pleads a lease for 21 years, and a grant of the reversion to him, and the grant of the reversion is traversed; if the jury find a lease variant from that pleaded, it is not material. *R. 2 Rol. 705. l. 25.*

If the issue be on a feoffment to the use of *A.* for life, and afterwards to *C.* in tail, if it finds a feoffment to the use of *A.* for life, and then to other uses, which are determined, and then to the use of *C.* in tail, it is good; for the uses determined are not material. *R. 2 Rol. 712. l. 20.*

In *assumpsit* by assignees of commissioners of bankrupt for 40 *l.* if the verdict finds the debt 35 *l.* only. *R. Al. 28.*

So, if a verdict varies from the sum demanded, it does not prejudice; as, in debt, if it finds less due than was demanded; for the residue may be paid. *R. 2 Rol. 702. l. 50.*

So, in *assumpsit*, on the custom of merchants, that either alone shall pay money promised by two to be paid at certain days, when they are found in arrear on account, if the verdict varies as to the days of payment, the days being past. *2 Rol. 703. l. 5.*

So, if a verdict finds a variation, when, notwithstanding, the matter found is sufficient to maintain the issue, the verdict is good.

[In action on promissory note, if there are two counts, one on the note in 1732, (as it was,) and the other for money lent in 1733, and as to this last count the issue varies from the declaration as to the time, it is not material. *Wright v. Crust, P. 9 G. 2. B. R. H. 252.*]

[If the issue delivered is entred of *Trinity*, and the record of *nisi prius* is of *Easter*, it is not material. *Crofts v. Wilkin, T. 9 G. 2. B. R. H. 303.*]

[If plaintiff's accepting issue is omitted in issue delivered, but inserted in record, and defendant on trial makes defence, (tho' only by excepting to plaintiff's evidence in point of law,) verdict shall not be set aside. *Barnes, 455.*]

[*John*

[*John John S.* in declaration, *John S.* in issue, immaterial. *Barnes*, 476.]

[*So*, that plaintiff was indebted to plaintiff. *Barnes*, 477.]

[*So*, award of *venire*, twelve good, &c. *venire* itself twelve free. *Barnes*, 487.]

(S 31.) *And it is sufficient, if it may be supplied by intendment.* And incident and necessary circumstances shall be supplied by intendment; as, on a general verdict, all circumstances which warrant the finding of the jury shall be intended. 2 *Rol.* 694. l. 5.

*So*, if a man may lease, reserving the most accustomed rent for 20 years before, if the jury find a lease, rendering the customary rent, it is sufficient; for it shall be intended the most accustomed for 20 years; for *customary* extends to all precedent time. *R.* 3 *Co.* 9. *Heydon*.

A bargain and sale found, without mentioning the consideration, shall be intended upon good consideration. *Cro. El.* 819. *R.* 2 *Rol.* 699. l. 10.

A retainer of a deputy, &c. found, shall be intended by deed. *R.* 9 *Co.* 51. b.

A presentment after a resignation; a consent to the resignation shall be intended. *R.* 2 *Cro.* 64. *Yel.* 61.

If it be found that he was seised in fee, and made a will, upon which the question arises, it shall be intended that it was land in *so-cage*, and that he devised it by his will, tho' it be not directly found. *R.* 2 *Rol.* 696. l. 20. 25. *R.* 2 *Rol.* 223.

*So*, that he died seised. *R.* 2 *Rol.* 694. l. 35. *Vide several cases to the same effect.* 2 *Rol.* 698. l. 20. 35. *R. cont.* 2 *Rol.* 699. l. 20.

If letters patent are found, they shall be intended under the great seal. *R.* 2 *Rol.* 699. l. 35.

If it finds that *A. recogn. se debere* before the mayor of the staple, it shall be intended that it was by writing obligatory, and according to the form of the statute. *R.* 4 *Co.* 65. b. 2 *Rol.* 700. l. 35. *Hob.* 55.

If it finds a court-baron held at the usual place, it shall be intended within the manor. *R.* 9 *Co.* 51. *Hob.* 56.

If the jury find that the defendant was not taken by a *cā. fa.* but by an *alias capias*, it shall be intended that the *alias* was on the same judgment, and between the same parties, otherwise it would not have been doubted whether the *alias* was sufficient. *R.* 2 *Rol.* 696. l. 50. *Hob.* 55. *Vide Cro. Car.* 458.

*So*, it shall be intended, that he was kept in execution; for it is consequential on the taking. *R.* 2 *Rol.* 697. l. 10. *Hob.* 56.

Trespass in four acres of land in *A.* and *B.*, verdict of the third part of two acres, and it does not say in what *vill*, it shall be intended that every acre was in both *vills*. *R. Yel.* 228. *Cont. Sav.* 35. *Acc. Cro. El.* 465.

If it be found that a man *virtute warrantis* made a lease, it shall be intended that he pursued his warrant, tho' all the circumstances are not found. *R. Cro. El.* 167.

If a verdict finds a lease by tenant in tail, it shall be intended that he continues alive. *R. cont. Cro. El.* 407. *Vide ante*, (S 66, 67, 68.)



If it finds a grant by patent, and *ulterius* grant, &c. it shall be intended by the same patent. *R. 2 Brownl. 232. 4.*

If it finds a deprivation by a bishop, it shall be intended well made. *R. Jon. 393.*

(S 32.) *And shall have a reasonable intendment.*] So, words shall have a reasonable intendment; as, in assise, if the jury find that the defendant is tenant, and disseised the plaintiff, it is sufficient, without saying that he is tenant of the freehold, or that the plaintiff was seised and disseised; for it shall be intended that he is tenant of the freehold, and not by *statute-merchant* or otherwise. *R. 2 Rol. 693. l. 40.*

If the jury find the contents of a deed, &c. and afterwards the deed *in hac verba*, the court will judge on the deed itself, and not on the collection of the jury. *Vau. 77.*

(S 33.) *And a reasonable construction.*] So, if a verdict finds that *A.* granted to his companion, the court construes it, that he released; for this is the proper conveyance from one joint-tenant to another. *2 Sand. 97.*

(S 34.) *When an intendment does not aid.*] But intendment does not aid a matter which stands indifferent and is material; as, that rent was demanded upon the land. *Vide ante, (S 20.)*

If it finds a bargain and sale, it shall not be intended that it was inrolled. *Hob. 262.*

So, if it finds a fine, it shall not be intended with proclamations. *Ibid.*

If it finds a gaoler insufficient at the time of the escape, in an action against the superior, it shall not be intended that he was so at the time of the action. *R. Eq. Ca. 527.*

So, it shall not be intended that no damages were given for a thing, which is sensible, tho' insufficiently alleged. *R. 1 Sal. 129. 364.*

(S 35.) *When Verdict aided by a special Conclusion.*

(S 35.) *For the court doubts nothing but that which is referred to the court.*] So, an imperfect verdict may be aided by a special conclusion; for the court will not doubt of any thing but what is referred to the court by the verdict. *R. 5 Co. 97. a. R. Mo. 268. 2 Rol. 698. l. 30. 40. 702. l. 10. D. Lit. 94. 134.*

As, if the jury refers, whether a resignation, &c. be good; whether there was a resignation shall not be doubted. *R. 1 el. 61. 2 Cro. 64.*

If entry be lawful, it shall not be doubted whether *A.* who commanded the entry was alive. *R. 3 Leo. 152.*

Nor, shall it be doubted whether the defendant's title is good, tho' none found, if the plaintiff's entry is not lawful. *R. Cro. El. 438.*

If the jury find the defendant guilty, if the will was executed, it shall not be doubted whether the devisor was seised. *R. Eq. Ca. 256.*

So, if a special verdict does not find a title for the plaintiff, but concludes, if the patent be good, for the defendant, if not, for the plaintiff; if the court judges the patent void, the plaintiff shall have judgment;

judgment; for the court will intend that the jury were satisfied that the plaintiff had a good title, if it was not avoided by the patent. *R. Cro. Car. 22.*

So, if the jury conclude, *if the devise is in fee, for the defendant*, it shall not be doubted whether there was other land in fee to supply the devise to the plaintiff. *R. Cro. Car. 130.*

*If such goods were distrainable, for the plaintiff*, it shall not be doubted whether there was a good cause for the distress. *Semb. cont. 1 Sal. 249.*

(S 36.) *And therefore a special conclusion waives the special matter.*] So, if a verdict finds a special matter in assise, and says besides, that the plaintiff was seised and disseised, such special conclusion waives the special matter. *2 Rol. 696. l. 20.*

If the plaintiff declares upon a lease by father and son, the jury find a lease by father and son, but that the father was tenant for life, remainder to the son, and so it was a lease by the father only, and a confirmation by the son, and concludes whether it was a good revocation: on such conclusion the court does not take notice of the other matter. *R. Jon. 393.*

(S 37.) *So, a special conclusion aids other defects.*] So, a special conclusion on a single point aids imperfection in other parts of the verdict: as, if the jury find a special matter, and conclude, *if the lease found be a revocation*, &c. this aids a variance between the declaration and verdict. *R. 2 Rol. 701. l. 30.*

So, such a special conclusion aids a repugnancy between one part of the verdict and another. *R. 2 Rol. 701. l. 45. Hob. 54.*

(S 38.) But a Conclusion does not aid.

(S 38.) *If it be contrary to the premises.*] Yet, the conclusion does not aid, when it is not warranted by the premises; as, in assise for rent, if the jury find a demand and refusal of the rent, *et sic disseisavit*, without finding a demand on the land, it is not sufficient; for the conclusion is only their deduction from the premises, and therefore it shall not be intended from thence that it was upon the land. *R. 2 Rol. 693. l. 50.*

And when the jury make a conclusion contrary to what the law and the court would adjudge on the special matter before found, on which their conclusion is founded, the court will judge upon the special matter. *Hob. 53. Vide 3 Leo. 112. R. Mo. 105. 269.*

As, if the jury find a receipt by the executor of rent due after the death of the testator on a lease for years, and conclude, *so assensit*, the court will adjudge for the defendant; for the rent runs with the reversion. *Dy. 362. 2 Rol. 702. l. 5.*

If it finds *A.* seised, that *B.* entred and leased to the plaintiff, and if *A.* has title, *for the plaintiff*, but does not find that *B.* entred by disseisin, which shall not be intended, and then his lease to the plaintiff is void; tho' the jury doubt of nothing but the seisin and title of *A.* yet the court will not give judgment for the plaintiff. *R. 2 Rol. 700. l. 5.*



(S 39.) *Or, if the special matter be out of the issue.*] So, a verdict which finds matter out of the issue, is void for so much, tho' thereon it concludes generally for or against the plaintiff or defendant. *Vide ante, (S 18.)*

As, in annuity by prescription, and issue on the prescription, if the jury find the prescription, but that nothing was in arrear, yet judgment shall be for the plaintiff. *Hob. 54.*

(S 40.) *Or, contrary to the general verdict.*] So, if a verdict begins with a direct verdict, and afterwards finds special matter, upon which the law will adjudge contrary to the direct verdict, and submits the whole to the court, the court will give judgment according to the special matter. *Hob. 53. Vide Dyer, 115. 370. Cro. Car. 212.*

As, if the issue be whether *A.* was taken by a *cap. ad satisfaciendum*, and the jury find that he was not taken by a *ca. sa.* but that on the same judgment he was taken by an *alias ca. sa.* and *so, &c.* *R. Hob. 53. 2 Rol. 695. l. 20.*

If issue be on an *assumpsit* to save bail harmless, and the jury find that the defendant assumed, but that the bail was condemned at the suit of another, not in the suit against him for whom he was bail. *Semb. Cro. El. 459.*

(S 41.) A Verdict needs not precise Certainty.

A verdict needs not precise certainty; as, if the jury find a commission *secundum formam statuti*, it is sufficient, tho' it does not shew the statute pursued in all points. *5 Co. 7. b. de J. Eccl.*

So, if it finds that it was not parcel, but was demised as parcel, *prætextu cujus fuit* reputed parcel, it is sufficient on issue whether reputed parcel. *R. 1 Sid. 191.*

(S 42.) Nor, Certainty in a Thing not material.

So, certainty is not necessary in a case where it is not material; as, in debt against an heir who pleads, *nothing by descent*, if the jury find that he had divers lands, without saying what, it is sufficient; for, for a false plea, there shall be a general verdict against him, without regard to assets. *R. 2 Rol. 694. l. 40. 1 Rol. 234.*

(S 43.) So, a Verdict is aided by a Finding to Part of the Declaration.

So, a verdict may be aided by taking it only upon one part of the declaration, and not upon the whole.

And it may be taken upon any part of the declaration to which the evidence is applicable. *Per Holt, 1 Sal. 133.*

[If a verdict is given generally for plaintiff, and by mistake, on a count not proved, instead of the count proved, the court will order the verdict to be entered on the right count, and not grant new trial. *Salsan v. Norton, M. 2 G. 3. 3 B. M. 1235.*]

(S 44.) By Amendment.

[If the jury find a verdict for the plaintiff with one penalty generally

rally in a penal action, and the plaintiff apply it to one count, he cannot afterwards apply it to another, tho' the former be bad in point of law, and tho' the evidence would have warranted the verdict on any other count. 3 T. R. 448.]

When a verdict shall be amended, *vide Amendment (P)*.

(S 45.) When a Verdict shall be avoided.

(S 45.) *By misdemeanor of the jury and parties.* After the departure of the jury from the bar, they may return into court to hear any evidence of which they are in doubt. 2 Rol. 676. l. 10.

But if the jury examine witnesses by themselves, tho' nothing is said but the evidence which was given in court, the verdict shall be avoided. R. Cro. El. 411. 2 Rol. 715. l. 20. 1 Leo. 305. R. 2 Rol. 262. Mo. 452. Pal. 326.

So, if a witness delivers to them a bundle of writings, which were shewn to the court, but some of them not read as evidence. R. 2 Rol. 714. l. 10.

Tho' the jury say, that it was laid aside and not inspected by them; for they ought to inform the court of it. R. 2 Rol. 714. l. 25.

So, if the jury receive money of the party or his agent, after departure, before they have agreed on their verdict, their verdict shall be avoided. *Per two J. Wray cont.* 1 Leo. 18.

Or, eat or drink at the charge of the party. Co. Lit. 227. 2 Rol. 713. l. 56. 1 Leo. 133.

Or, throw *cross* or *pile*, and give verdict accordingly. R. 2 Jon. 83. R. 2 Lev. 140. 205. Barnes, 441. [Com. 525. Pr. Reg. 409. Co. G. 124.]

[If one person, whose name was not in the box, answers for another. *Norman v. Beaumont*, C. P. M. 18 Geo. 2. Willes, 484. Barnes, 453. S. C.]

[If after the jury are retired they receive papers from one party without consent of the other, the verdict shall be set aside. *Jennings v. Waine*, P. 8 G. 2. B. R. H. 116.]

So, if a party, or any for him, delivers a letter or other writing not given in evidence to any of the jury, and a verdict is given for him. Co. Lit. 227. b.

Or, a writing shewn in court, which the judge said was not material to the issue. *Cont. per Poph. Qu. per Rol.* 2 Rol. 715. l. 15.

Or, a bundle of writings, some of which were read in court, some shewn to the court, but not read in evidence. R. 2 Rol. 714. l. 10. *Vide Lit.* 69. Pal. 326.

Tho' the jury say they did not inspect them. 2 Rol. 714. l. 25.

So, if the party gives to any of the jury, before he is sworn, an escrow of the evidence afterwards given, which he shews to his companions. R. 2 Rol. 714. l. 45. 715. l. 42. Sti. 383.

So, if the plaintiff says to the jury upon their departure, *it is as clear for me as the nose of my face*; for this is new evidence, and strongly persuades. R. 2 Rol. 716. l. 10.

A thing of such a nature as will avoid a verdict must be returned on the *posse*, and cannot be surmised. R. Cro. El. 616. 3 Leo. 267. R. 2 Rol. 262. Pal. 325.

And eating and drinking at the charge of the party ought to be alleged.



leged before the verdict received, and not afterwards. *R. Mo. 17. Semb. 15 H. 7. 1. b.*

But if such matter appears by affidavit afterwards, the verdict is usually discharged. *2 Lev. 140. 205.*

[It may be moved after motion in arrest of judgment, on new matter disclosed. *Barnes, 441. 443.*]

And if the thing, wherein the jury misdemean themselves, is by the act of the party who has benefit by the verdict, there shall be a new trial, otherwise the jury only shall be fined. *Per Holt, Sal. 645. 15 H. 7. 1. b.*

(S 46.) *When not.*] But if the jury take with them deeds, &c. given in evidence, it does not avoid the verdict, tho' it was without the direction of the court. *R. Cro. El. 411. Per Holt, Sal. 645.*

So, if they take books, writings without seal, &c. given in evidence, without the consent of the parties, or of the court. *R. Cro. El. 411. 2 Rol. 715. Co. Lit. 227. Mo. 452.*

Tho' they take them from the party or his agent. *R. Cro. El. 411. 2 Rol. 715. l. 10. 50. 716. l. 5.*

So, if they take depositions shewn in evidence, tho' all were not read in court. *Lit. 69.*

So, if a juror himself shews to his companions a writing not given in evidence; this does not avoid the verdict, if he had it not from the party or his agent. *R. Cro. El. 616. 2 Rol. 715. l. 35. Mo. 546.*

So, if the plaintiff speaks to the jury, if he says nothing of the cause. *R. 2 Rol. 715. l. 45.*

[Tho' one of the parties desire a juror to attend in his cause. *Suel v. Timbrell, M. 12 G. Str. 643.*]

Or, if a juror challenged and withdrawn stands with a jury for half an hour, if he does not give evidence. *R. 2 Rol. 85.*

So, if the jury eat or drink before the verdict, if it be not at the charge of the party or his agent. *Co. Lit. 227. b. 2 Rol. 713. l. 45. 55. R. 1 Leo. 133. 3 Leo. 267. R. Mo. 33. 599. Barnes, 441.*

Or, at the charge of the party after they are agreed. *Co. Lit. 227. b. 2 Rol. 713. l. 40.*

So, if they eat and drink in view of the judge with the consent of the court. *20 H. 7. 3. b.*

[Tho' jurymen leave the rest for some time. *Wray v. Thorn, C. P. M. 18 Geo. 2. Willes, 488. S. C. Barnes, 441.*]

[Tho' a juror be called *Henry* instead of *Harry*. *Barnes, 454.*]

[A verdict shall not be set aside on affidavit of two of the jurors, that the jury intended to give 7*s.* only, besides 23*l.* 7*s.* brought into court, instead of 23*l.* 17*s.* for which the verdict was declared and entred up. *Palmer v. Crowle, P. 12 G. 2. Andr. 382.*]

[Affidavit of jurymen confessing they tossed up for verdict, not sufficient. *Semb. Barnes, 438.*]

(S 47.) *By arrest of judgment.*] After verdict a man may allege any thing in the record, in arrest of judgment, which may be assigned for error after judgment. *2 Rol. 716. l. 30. 45. 1 Sal. 77.*

[On an information, under a private statute, a *misrecital* of the com-

commencement of the *parliament* is fatal, after verdict, on the plea of not guilty. *Doug.* 97. n.]

So, after interlocutory, before the principal judgment. *R. Cra. El.* 914. 235. 1 *Leo.* 309. *Cont.* 1 *Vent.* 253. *Acc.* 2 *Med. Ca.* 265.

And judgment shall not be entred till four days after verdict, if there are so many within the term, because the plaintiff may move in arrest of judgment. *R.* 1 *Sal.* 77.

Otherwise, if there are not four days within the term. 1 *Sal.* 77.

So, any thing which shews the writ abated; but if abateable only, it is not sufficient. *Ibid.*

If on a motion in arrest of judgment there is a rule to stay it, and afterwards the court is divided, there cannot be judgment. 1 *Sal.* 17.

Otherwise, if the court be divided on the first motion. 1 *Sal.* 17.

[After verdict, the court will do what they can to help declaration, but not after judgment by default; so, if plaintiff has not averred performance, or readiness to perform what was to be done on his part, judgment shall be arrested. *Collins v. Gibbs*, *M.* 33 *G.* 2. 2 *B. M.* 899.]

[A verdict will not aid, where the gift of the action is not laid in the declaration; but it will cure ambiguity. *Cowp.* 826. *Doug.* 683.]

[In an information for two penalties on two statutes for the same fact, and verdict *pro rege*, and one is bad, judgment cannot be arrested as to part, and given *pro rege* for the other, but must be arrested *in toto*. *Rex v. Rosevere*, *T.* 1730, *Bunb.* 286. 295.]

[If good notice of trial is given and countermanded, then second notice, but name of cause omitted; this second continued, and name of cause inserted, and cause tried, verdict set aside; the continuance cannot cure the second. *Barnes*, 297.]

[If on a bad justification in trespass there is verdict for defendant, yet it shall be set aside, and judgment entred for plaintiff. *Barnes*, 255.]

But he cannot assign error in fact in arrest of judgment. 2 *Rol.* 716. l. 20.

As, that the plaintiff is an infant, and appeared by attorney. *Br. Attorney*, 46.

[Judgment after verdict shall not be arrested for an objection that would have been good on demurrer. Thus, in debt on security-bond of a bailiff of G. hundred conditioned if he duly executes his offices *within* that hundred, and executes all warrants directed to him, and makes due return, then, &c. plea of performance; replication, that defendant had not duly executed a warrant directed to him, rejoinder he had; verdict against him; he shall not arrest judgment, because it is not alleged that the warrant was directed to him as bailiff of G. hundred. *Weston v. Mason*, *T.* 5 *G.* 3. 3 *B. M.* 1725.]

[*Per curiam*—after judgment on demurrer, defendant shall not come to arrest judgment on the return of the inquiry, for an exception that might have been taken on arguing the demurrer. *Secus* in case of judgment by default, or if the fault arises on writ of inquiry or verdict. *Edwardes v. Blunt*, *P.* 7 *G.* *Str.* 425.]

Nor,



Nor, a matter of record which does not appear by the same record; as, want of an original, warrant of attorney, &c. 1 *Sal.* 77.

[The want of a bill in the King's Bench, and the want of an original in the Common Pleas are both cured after verdict. *Cowp.* 455.]

Nor, can move in arrest of judgment, if the roll where the judgment should be entered, or the *poslea*, is not in court. *Pr. Reg.* 147. *Mod. Ca.* 2. 1 *Sal.* 78.

So, after judgment *quod capiatur* upon an indictment or information, he shall not move in arrest, for the judgment is final. 1 *Sal.* 78.

Nor, after a nonsuit. *R. Lit.* 253.

In *B. R.* he may move in arrest of judgment within four days after the *poslea* brought into court in *C. B.* only within four days after the commencement of the term. 1 *Sid.* 36. *Lut.* 11.

And if judgment is signed before, or on the fourth day, it is irregular, tho' no execution till after. *R. 5 Mod.* 205.

[*Sunday* is not esteemed one of the four days within which arrest of judgment must be moved for. *M. 7 G. 3.* 4 *B. M.* 2130. *Dougl.* 745.]

[Motion in arrest of judgment must be on the appearance-day of the return of *habeas corpus jur.* *Barnes*, 445.]

[If it is to be moved the last day of term, there must be notice given. *Barnes*, 247.]

[Defendant in an indictment may move in arrest of judgment at any time before judgment signed. *Rex v. Hays*, *T. 3 G. 2.* *Str.* 843.]

[And now in a civil action in *B. R.* a motion may be made in arrest of judgment, after a rule for a new trial has been discharged, and at any time before judgment is entered up. *Taylor v. Whitehead*, *B. R. T. 21 Geo. 3.* *Dougl.* 745.]

[In *B. R.* a rule has been obtained to shew cause why a nonsuit should not be entered, or why the judgment should not be arrested, or why a new trial should not be granted. *Cameron v. Reynolds*, *B. R. H. 16 Geo. 3.* *Cowp.* 403.]

[If there is a demurrer to one count, and a verdict for plaintiff on another, judgment cannot be arrested till the demurrer is determined, for till then the proceedings are not complete. *Goodright v. Hodgson*, *M. 12 G. 2.* *Andr.* 282.]

[After verdict, the court will suppose every thing right, unless the contrary appears on the record. *Bull v. Steward*, *M. 23 G. 2.* 1 *Wilf.* 255.]

[Judgment shall not be arrested because the defendant's name is put in two counts instead of plaintiff's. *Richards v. Simonds*, *M. 10 G. 3.* 3 *Wilf.* 40.]

[Judgment shall not be arrested, because in joining issue the defendant's name is repeated, instead of inserting the plaintiff's. *Rawbone v. Hickman*, *P. 9 G. 1.* *Probyn v. Churchman*, *M. 5 G. 2.* *Cleaver v. Jordan*, *M. 7 G. 2.* *Harvey v. Peake*, *M. 6 G. 3.* 3 *B. M.* 1793.]

[The court will not arrest the judgment in an action for words in one count, tho' some of them be not actionable. *Lloyd v. Morris*, *C. P. H. 17 Geo. 2.* *Willes*, 443.]

[*Secus* where there are two counts, and none of the words in one are

are actionable, and a general verdict is given for the plaintiff. C. P. H. 17 Geo. 2. *Willes*, 443.]

(S 48.) *By an inconsistent verdict upon another issue.*] So, a verdict may be avoided by a contrary verdict between others.

But, if there be a verdict in *quare impedit*, that *A.* was not admitted, &c. upon the king's presentation, a contrary verdict is a right of advowson between the king and others, not proper to the *quare impedit*, does not avoid the verdict in *quare impedit*. R. Cro. Car. 590.

So, if a verdict upon another issue in the same action be inconsistent: as, in trespass against two, if one pleads *not guilty*, and it is found against him, the other pleads, *given by the plaintiff*, which is found against the plaintiff, there shall be judgment against the plaintiff on the first verdict also; for the title appears against him. Hob. 54. Mod. Ca. 10. 2 Cro. 134.

Otherwise, if the defendants are sued severally. Hob. 54.

So, in *trover*, if one defendant pleads *not guilty*, and is found guilty, the other pleads a release, which is found for him, the plaintiff shall not have judgment against him who pleaded *not guilty*; for, being jointly charged, the release to one discharges both. R. 4 Mod. 379.

So, in an action against two, one is found guilty, the other pleads a justification, whereupon issue is joined on an immaterial point, and the defendant at the trial makes default, whereby being out of court; there cannot be a repleader; the plaintiff cannot have judgment against one, but the action abates against both. Mod. Ca. 10.

[*A.* and *B.* have mutual demands; each brings action, *A.* gives notice to set off, *B.* does not; both causes come on at the same sittings, but *A. v. B.* first; *A.* takes verdict for his whole demand 30 *l.*; then *B. v. A.* comes on, *A.* offers to set off, but is not allowed, and *B.* has verdict for his whole demand 11 *l.*; this verdict against *A.* shall be set aside, with costs of nonsuit; but he shall remit so much of the damages recovered by him as exceeds the balance of the mutual debt. *Brown v. Baskerville*, T. 1 G. 3. 2 B. M. 1229.]

But otherwise, if the verdict does not appear inconsistent; as, in trespass against *A.* and *B.* one pleads *not guilty*, the other justifies for preservation of the peace, and it is found for him, and for the plaintiff on the other issue; the plaintiff shall have judgment, for he might be guilty at another time. R. 2 Cro. 134.

*Indebitatus assumpsit* against *A.* and *B.* and judgment against *A.* by *nil dicit*, *B.* pleads payment, and there is verdict for him, *A.* shall not be discharged contrary to his own confession. Per Holt, 1 Sal. 23.

### (T) Postea.

BY rule 2 *Ja.* 2. in C. B. the clerk of assise, &c. shall deliver the *postea* to the prothonotary on the *quarto die post* of the return of the writ of *nisi prius* in bank, on pain of 20 *l.*

And he keeps it in the interim, and shall have 6 *s.* 8 *d.* for his attendance with it before. Mod. Ca. 24.

And he ought not to deliver the *postea* till that time to any except the clerk in court. *Ibid.*

If



If the defendant would move in arrest of judgment, he must give notice, and have the *possea* in court.

And a rule upon the *possea*, that it be brought into court, is notice. 1 *Sel.* 78.

[The court will not, at a distance of time after the trial, amend the *possea*, by increasing the damages given by the jury, altho' all the jurymen join in an affidavit, stating their intention to have been to give the plaintiff such increased damages, and that they conceived the verdict they had given was calculated to give him such a sum. 2 *T. R.* 281.]

[Where on the argument of a special verdict in ejectment the court of *C. P.* gave judgment for the lessor of the plaintiff, the court on motion staid the *possea* until the event of a writ of error (which the defendant intended to bring) should be known, on the defendant's undertaking to account for the *mesne* profits from the day of the demise. *Roe v. Jones*, *C. P. T.* 28 *G.* 3. 1 *H. Bl.* 34.]

### (V) Continuance of Suit or Process.

(V 1.) When necessary.

**A**FTER appearance the suit must be continued, till judgment from one term to another.

So, if the term be adjourned from *oct. Mich. ad mens. Mich.*, there ought to be a continuance entred from one day to the other. *R.* 1 *Rol.* 486. l. 20.

If the plaintiff declares in *Michaelmas* term, and after imparlance to another term, declares *de novo*, as the course is in *C. B.* there ought to be a continuance from one term to another. *R. Cro. El.* 412.

[Defendant in custody on *ca. sa.* discharged on written agreement; above a year after, new *ca. sa.* issues without continuance on the roll; it shall be set aside. *Barnes*, 205.]

[On *nul tiel record*, plaintiff may continue the day for bringing in the record. *Barnes*, 84.]

If judgment be on default or demurrer in *B. R.*, and a writ of inquiry awarded, a continuance shall be entred from the first to the second judgment; for the first is only an award. *R.* 1 *Rol.* 485. l. 50. *R. Yel.* 97. *R.* 11 *Co.* 6. b. *Dub.* 1 *Rol.* 408.

But after default the continuance in *B. R.* is only by *dies dat.* to the plaintiff; for the defendant is out of court. *R.* 1 *Rol.* 486. l. 5. 16. *R.* 1 *Sid.* 16. *Mod. Ca.* 9.

And in *C. B.* no continuance is necessary after judgment by default, till judgment on the writ of inquiry. *R.* 1 *Rol.* 486. l. 7. *R.* 11 *Co.* 6. b. *Acc. Cro. El.* 144.

Nor, in *B. R.* where the writ of inquiry is returnable in the same term. *R.* 1 *Rol.* 486. l. 4.

So, in an inferior court there must be a continuance from one court to another, after the writ of inquiry awarded. *R. Yel.* 97. *Noy*, 120. viz. by day to the plaintiff.

And, if judgment be confessed at one court, and not entred till the next court, there shall be a continuance to that court. *R.* 1 *Rol.* 486. l. 10.

So,

So, in a writ of error, after the parties appear and proceed, it must be continued.

[An attachment of privilege is not a continuance of a bill of *Midlesex*, so as to avoid the statute of limitations. *Smith v. Bowyer*, B. R. T. 30 Geo. 3. 3 T. R. 662.]

(V 2.) When not.

But, if the sheriff on a *pluries replevin* in *Mich.* term returns a claim of property, but nothing is done till *Easter* term, and then the defendant appears and pleads, and judgment is given, default of continuance from *Mich.* to *Hilary* term is no error, for till appearance there can be no discontinuance, for the parties have no day in court. R. 1 Rol. 485. l. 25.

So, after final judgment there need not be any continuance. R. 1 Rol. 485. l. 55.

So, between verdict and judgment there need not.

And therefore, if issue be joined by one defendant, and verdict thereon, and a demurrer by the other and several continuances entred to the demurrer, but none after the verdict, and then there is judgment on both, it is no error. R. 1 Rol. 485. l. 35. R. Cro. Car. 236.

So, if on a plea after the last continuance at *nisi prius* the jury is dismissed, and no continuance is entred till the day in *bank*, it is no error; for the day at *nisi prius* and in *bank* are the same day. R. 1 Rol. 485. l. 40.

[Continuance need not be entred in record of *nisi prius*; therefore, if after issue joined, and before day of *nisi prius*, one of defendants die; suggestion of it, and *venire fa.* between plaintiff and surviving defendant, and *jurata* at the foot agreeable thereto, is good. *Barnes*, 469.]

So, in the courts of *London* it is not necessary, tho' it is in other inferior courts. 2 Sho. 424.

(V 3.) How it shall be entred.

The continuance ought to be to a time certain; as, to the next term, &c. *Semb.* 3 Bul. 233.

So, in an inferior court, which ought to be held at a day certain; as, from three weeks to three weeks, &c. the continuance must be to the next court, viz. on such a day. R. 1 Rol. 484. l. 35. Dy. 262. b. R. 2 Cro. 571. R. Cro. El. 105.

And it is not sufficient to say at the next court generally, tho' it be said *ad quam proximam curiam*, scil. such a day, &c. R. 1 Rol. 484. l. 35. Cont. R. 1 Rol. 486. l. 35. Cro. Car. 254.

But, if the court is to be held when bailiffs please, &c. it is sufficient to make the continuance to the next court. R. 1 Rol. 484. l. 25. Cro. Car. 254.

So, in *Chester*, they are to the next court generally, and not to a day certain. Sho. 95.

So, a continuance in an inferior court must say, *coram quo* the next court is to be held. Sho. 319.

So, continuances must be entred from one term to another, without intermitting a term, and therefore the continuance of a plea on the



the prayer of the defendant, thro' one term or more *mesne*, is bad. *R. 1 Rol. 484. l. 42. Sti. 339. R. 2 Cro. 304.*

So, a continuance by *cur. adv. vult.* intermitting a term, is a discontinuance. *R. 1 Rol. 484. l. 45.*

So, if the term is adjourned to another day in the same term, as from *tres Mich.* to *mens. Mich.*, the continuance ought to be to *mens. Mich.*, and not to *oct. Hil.* otherwise it will be a discontinuance. *R. 1 Rol. 130. l. 10.*

So, if day be given, on *cul tiel record*, from *Easter* term to *Mich.* term, as it may, yet continuances ought to be entred from *Easter* to *Trinity*, and so to *Mich.* term, otherwise it is error. *R. 1 Rol. 485. l. 5.*

So, a *capias* cannot be continued, intermitting a term; for the defendant shall not stay in prison. *1 Rol. 484. l. 20. Dyer, 175. a. Sal. 700.*

Nor, a *capias utlagatum.* *Cro. El. 467.*

So, in an appeal, if the process leaves a day between, it will be a discontinuance; for if the original was returnable *quind. Mich.* which was 16 *Oct.* the *capias* must be tested the same day; for if it be tested 17 *Oct.* or the next return, tho' all in the same term, which is but one day in law, it will be bad. *R. 2 Cro. 284. Yel. 205. 1 Bul. 142.*

But an original may be returnable two or three terms after the *teste*; for the defendant has no prejudice. *1 Rol. 484. l. 15. Dy. 175. a.*

So, a *distringas.* *Dy. 175. Bro. Jour. 71.*

So, in a writ of execution, the justices may give day at their will; as, in a *scire facias* to execute a fine. *1 Rol. 484. l. 32.*

So, in *exigent*, *grand cape*, or other process in real action; for five counties, nine returns, &c. cannot otherwise intervene, as they ought, between the *teste* and return. *Dal. 104.*

So, in a *capias ad satisfaciendum*, or other process in execution; for no return is necessary. *R. Sal. 700. Vide Return, (F 1.)*

So, in an inferior court, if the continuance is by *idem dies*, instead of *eadem hora*, it will be good. *R. Mo. 459.*

So, if the continuance be to *tres Mich.*, and nothing done after till *quind. Mart.* there is no discontinuance, for it is all in the same term.

[If to declaration of *Trinity* there is imparlance to *Michaelmas* term, and defendant procures judge's order for time to plead till 15th *December*, the imparlance shall be continued to *quinden. Mart.* *Barnes, 161.]*

A continuance may be entred on the plea roll, *R. 2 Cro. 304.*

Or, on the roll of the *venire* after issue. *2 Cro. 304.*

[If proper continuances are entred on the plea-roll, the want of them on the *nisi prius* roll is not material. *French v. Wiltshire, M. 11 G. 2. Andr. 67.]*

[When the trial is deferred, if the *venire facias* is returned and filed, the proper entry is, that the jury *ponitur in respect.*; if it be not filed, enter a *non misit breve*; either way will prevent a discontinuance. *Rex v. Hare and Man, H. 6 G. Str. 266.]*

(V 4.) At what Time.

By the course in *B. R.* the continuances are used to be all entred, after

after issue or demurrer before judgment, on the back of the roll. *R. 1 Rol. 485. l. 15.*

And, if the plaintiff will not enter the continuances to avoid costs, if judgment should be against him, the defendant may enter them. *1 Rol. 487. l. 30. 1 Leo. 105.*

[If bill is of *Easter* and in *Trinity* defendant pleads, and issue joined, and paper-book delivered without continuance from *Easter* to *Trinity*, it shall not be set aside; for it may be entred at any time on the roll. *Wilkes v. Wood, M. 4 G. 3. 2 Will. 203.*]

So, if the continuances are not entred, the court may amend the roll by ordering them to be entred at any time before judgment. *R. in scire facias. 3 Lev. 430.*

So, till the plea roll, no advantage shall be taken for default of entering a continuance. *1 Sal. 179.*

So, before judgment, there shall be no discontinuance against the king; for as to matters to which there was no plea, the attorney general may take issue, or enter a *nolle prosequi* at his election. *Hard. 504.*

So, continuances may be entred on a *latitat*, or original, to avoid the statute of limitations, after the statute pleaded. *1 Sid. 53. 60.*

Or, on a *feri facias* or *elegit*, many years after, when a new *feri facias* is awarded, to save a *scire facias*. *1 Sid. 59.*

So, in *C. B.* a continuance shall be allowed to be entred within a year after issue. *Sav. 54.*

So, in the *Exchequer*.

But, it is in the discretion of the court to permit an entry of continuances or not. *R. Sav. 54.*

[And they will grant leave, after verdict, to arrive at the justice of the case. *Mears v. Dollman, B. R. E. 38 Geo. 3. 7 T. R. 618.*]

(V 5.) By what Words.

If process be tested in one term and returnable in another, it is a sufficient continuance from one term to the other. *1 Rol. 484. l. 15.*

So, by an imparlance from one term to another.

By *prece partium*.

By *dies datus*. *3 Leo. 14.*

By *curia advisare vult*.

By *vicecomes non misit brev*. *Lut. 290.*

By *jur. ponit. in respectu*. *Yel. 97.*

So, if an appeal, &c. before justices of gaol-delivery be removed by *certiorari* into *B. R.* by the return of the *certiorari* a discontinuance is prevented, tho' it be *sine die*. *R. 1 Sal. 62.*

But in a writ of inquiry there cannot be a continuance by *jur. ponit. in respectu*, but only by *vicecomes non misit brev*. *R. Yel. 97. Noy, 120.*

(W) Discontinuance.

(W 1.) What shall be.

**I**F the continuances are not properly entred, the suit is discontinued, which is error.

[It is not a discontinuance, tho' no day is given to the tenants in



in dower to appear on the return of the writ of inquiry, or it is aided by *stat. 4 & 5 Ann. c. 16. Dobson v. Dobson, P. 7 G. 2. B.R. H. 19.*

(W 2.) To Part.

So, if a plea or replication does not answer to the whole matter of the bar or declaration, it will be a discontinuance for the whole. *Vide ante. (W 1.—F 4.)*

[In *assumpsit* for three several sums of 36*l.* the defendant pleads as to two several sums of 36*l.* it is a discontinuance. *Woodward v. Robinson, P. 6 G. Str. 302.*]

[But though a plea doth not answer the whole promise, and is therefore a naughty plea, yet if it is pleaded *quoad* the whole promise, it will not make a discontinuance; and *vice versa. Ibid.*]

So, if a demurrer or issue does not go to the whole. *Vide ante, (Q 3.)*

So, if a day be given to the plaintiff, but the *idem dies* to the defendant is omitted, it will be a discontinuance. *R. 1 Rol. 486. l. 30. 50.*

Otherwise, where it is the king's suit, and a day given to the defendant, but *idem dies* to the plaintiff is omitted; for the king is always present. *R. 1 Rol. 487. l. 3. Cro. Car. 390.*

If the demandant omits in his demand a part contained in the original, it is a discontinuance for the whole. *1 Rol. 487. l. 35.*

So, if the defendant vouches for part, and says nothing for the residue. *1 Rol. 487. l. 40.*

Or, if process on voucher goes only to parcel. *1 Rol. 487. l. 42.*

So, if the plea be in bar, and after replication the defendant demurs, and concludes in abatement. *1 Sal. 4.*

So, in *replevin*, on a taking in two places, if the defendant answers only to one. *R. 1 Sal. 94. 179.*

So, if the plaintiff in a replication to a plea in abatement concludes with praying debt and damages. *R. 1 Sal. 177. Carth. 138.*

Or, to a plea in abatement demurs in bar. *R. 1 Sal. 218.*

So, if the plaintiff demurs to the defendant's demurrer to his declaration. *R. 1 Sal. 219.*

But if there be a discontinuance, the plaintiff need not take judgment; for if he joins in demurrer, the court will give judgment for him. *R. 1 Sal. 4.*

So, if there be an issue for part, and a discontinuance for other part, the court will not give judgment against the plaintiff, till issue tried; for the discontinuance will be aided by a verdict. *1 Sal. 218.*

[Where in an action of *assumpsit*, on a bill of exchange with the usual money counts, the defendant pleads *nil debet* to the first count, and discontinues as to the others, after a verdict for the plaintiff, the defendant shall not take advantage of his own mispleading in arrest of judgment. *Harvey v. Richards, C. P. T. 31 Geo. 3. 1 H. Bl. 644.*]

[*Assumpsit* against three; two pleaded a debt of record by way of set-off. The plaintiff replied *not tuel record*, and gave a day to the two defendants, but entred no suggestion respecting the third. It was holden on demurrer, that the action being discontinued, judgment

ment must be given against the plaintiff, even though the defendants' plea were bad. *Tippet v. May*, C. P. E. 39 Geo. 3. 1 Bos. & Pull. 411.]

[So, if the plea does not cover the whole, and plaintiff replies, and defendant demurs; though it is a discontinuance, yet, if it be a record of the same term, plaintiff may take judgment by *nil dicit* for what is uncovered. *Woodward v. Robinson*, P. 6 G. Str. 302.]

So, in a suit by the king, as, *quo warranto*, &c. if there is an issue for part, and nothing said to other part, it will not be a discontinuance; for the attorney-general at any time before judgment may proceed, or enter a *nolle prosequi*, for the other part. *Hard.* 504.

### (W 3.) To one Person.

So, in an action against several, a discontinuance of the process against one defendant is a discontinuance to all. 1 Rol. 488. l. 10. R. Cro. El. 762.

So, in error on an outlawry for felony, if a *scire facias* goes against the mediate lords, and there be a continuance as to the king and party, but not as to the lords, it is a discontinuance as to all. 1 Rol. 488. l. 15.

But, if there are several *præcipes* in a writ against several, a discontinuance as to the defendant in one *præcipe* is no discontinuance to the others. 1 Rol. 488. l. 25.

So, it will be a discontinuance, tho' day be given to him, who was not in court: as, in an inferior court, if the defendant be *essoigned*, and at the day makes default, and day be given to him, upon his default, to the next court, it will be a discontinuance, tho' day be given to a subsequent court by the custom of the court; for there cannot be a custom contrary to the law.

So, if day be given to the defendant by *essoign*, and *idem dies dat. querenti* be omitted, it will be a discontinuance. R. Carth. 172.

### (W 4.) The Effect of a Discontinuance.

A discontinuance shall be peremptory: as, in an appeal. Carth. 56. Discontinuance or miscontinuance of a plea or process is error. 1 Rol. 485. l. 20.

And discontinuance of process shall not be aided by appearance. 2 Cro. 284. D. cont. Sho. 319.

But, misconveying of process, viz. of one process for another, or misreturn, may be aided by the party's appearance. 2 Cro. 284.

### (W 5.) When it shall be by Leave of the Court.

But the plaintiff may discontinue his suit by leave of the court.

[Rules should be drawn up, "*have leave or be at liberty*" to discontinue, not "*shall discontinue*." Barnes, 170.]

So, if plea is not continued upon the roll for a year after demurrer, the court usually grants a discontinuance upon the prayer of one party, if the other does not pray the contrary. 1 Rol. 487. l. 25.

Yet, if the other prays the contrary, it is in the discretion of the court. 1 Rol. 487. l. 27.

[The court may grant it after special verdict argued, but will



not do it in a hard action. *Boucher v. Lawson*, H. 9 G. 2. B. R. H. 194.]

[They will not permit the plaintiff to discontinue after a special verdict, in order to adduce fresh proof in contradiction to the verdict. 2 Bl. 815.]

[Plaintiff may discontinue, though defendant has been arrested a second time before discontinuance. *Barnes*, 169.]

[The court will not permit an executor to discontinue in any case where he has knowingly brought his action wrong, but on payment of costs. *Harris v. Jones*, H. 4 G. 3. 3 B. M. 1451.]

[The court will give leave to executor to discontinue without paying costs, after undertaking to try peremptorily, he having discovered there was a deed against him; and being bound not to bring new action without leave. *Bennet v. Coker*, M. 7 G. 3. 4 B. M. 1927.]

After rule for judgment *nisi*, the plaintiff shall not be allowed to discontinue. 1 Sal. 179.

And, after issue and a verdict for him, the plaintiff cannot discontinue without the consent of the defendant; for if the plaintiff will not enter up judgment, the defendant may. R. 1. Rol. 487. l. 25. Sal. 178.

Nor, after demurrer joined without leave of the court. 1 Bul. 217. Anciently. 1 Sal. 179.

But, after demurrer argued, the court have permitted a discontinuance on payment of costs, where there was a misprision in the plaintiff in point of pleading. 2 Lev. 124. 209. 1 Lev. 191, 192. 3 Lev. 440.

And this in escape. 1 Sid. 306.

After demurrer argued and allowed, on payment of costs. *Butler v. Maliffy*, H. 4 G. Str. 76. *Henderson v. Williamson*, M. 5 G. Str. 116.

[After judgment on demurrer for plaintiff, and error brought, plaintiff may discontinue on costs in action and error. *Barnes*, 169.]

So, after a special verdict; for it is not complete, but is *de gratia*. *Semb.* 1 Sal. 178.

So, after a writ of inquiry executed and returned, the plaintiff cannot discontinue without the defendant's consent, tho' it be not filed. R. Sho. 63. *Carth.* 86, 87.

[After judgment on demurrer in replevin for avowant, plaintiff cannot discontinue. *Barnes*, 169.]

[Whether discontinuance may be entred without leave? *Qu.* *Barnes*, 170.]

[Plaintiff may enter *nil capiat per breve* on a plea in abatement without leave, but not in other cases. *Barnes*, 257.]

[Plaintiff cannot move to discontinue, after defendant has moved for judgment as in case of nonsuit. *Barnes*, 316.]

[Also, whether plaintiff in replevin can discontinue? *Qu.* *Barnes*, 171.]

[Serving a rule to discontinue does not of itself discontinue an action, but there must also be an appointment to tax the costs. *Whitmore v. Williams*, B. R. T. 36 Geo. 3. 6 T. R. 765.]

## (W 6.) When it shall be aided.

By the *st.* 32 *H.* 8. 30. after verdict, judgment shall proceed notwithstanding any miscontinuance, discontinuance, misconveying of process, &c. *Vide Amendment (I).*

[This statute extends to discontinuance in a penal action. *Doug.* 115. (100.)]

[This *stat.* extends to discontinuances made after verdict, if the original process is returnable at a common return, and the *scire facias* in error is returnable at a day certain, this discontinuance is aided by the statute. *Bern v. Bern*, *M.* 8 G. 2. *B. R. H.* 72.]

So, by the *st.* 4 & 5 *An.* 16. judgment by confession, *nil dicit*, *non sum informatus*, or writ of inquiry.

But before this statute it was not aided upon a general demurrer. *Vide ante*, (E 1.)

Nor, now upon a special demurrer.

[If after judgment by default on a bill against an attorney in *C. B.* where the proceedings are on a day certain, the writ of inquiry is returnable at a general return, it is miscontinuance, and aided by the statutes. *Launder v. Cripps*, *H.* 6 G. 2. *Str.* 947. *Vide post.* (3 B 16.)]

## (X) Nonfuit.

## (X 1.) What shall be.

**I**F the demandant or plaintiff does not appear at the day when he is demandable, he shall be said to be nonsuited, *quia non est prosecut.* &c. *Co. Lit.* 138. *b.*

And this may be before the defendant's appearance: as, at the return of the writ. *Ibid.*

Or, if the plaint is removed by *pone*, at the return of the *pone*. *Yel.* 2.

So, at the return of an assize, if the plaintiff is not ready to make plaint, on demand of the tenant, he shall be nonsuited. *R. Sal.* 82.

And the plaintiff may be demanded the day of the return of the writ, tho' the defendant not till *quarto die post.* *R. Garth.* 172.

Or, he may be nonsuited after appearance: as, at any day of continuance; for the plaintiff is then demandable, and is the first agent. *Co. Lit.* 138. *b.*

[Judgment as in case of a non-suit may be entred up against the demandant in a writ of right; and the court will not relieve him, if in the course of the proceedings he has conducted himself unfairly towards the tenant. *Alengill v. Pierfon*, *C. P. M.* 38 *Geo.* 3. 1 *Bos. & Pull. Rep.* 103.]

[Rule to declare in *C. B.* must be in the office where plaintiff's attorney practises. *Barnes*, 312.]

[*Non prof.* for want of declaration demanded in the country, shall be set aside. *Barnes*, 311.]

So, at the day of *nisi prius*.

[But if the plaintiff appear at *nisi prius*, he cannot be nonsuited against his consent. 2 *T. R.* 275.]

[A nonsuit at *nisi prius* must be recorded by the judge of *nisi prius*,  
M m 2 and



and cannot afterwards be recorded in bank. *Gardener v. Davis*, P. 24 G. 2. 1 *Wils.* 301.]

[None but the defendant can demand the plaintiff. If neither plaintiff nor defendant appear after cause called, and jury sworn, the only way is to discharge the jury. *Arnold v. Johnson*, H. 6 G. Str. 267. *Smith v. Whistler*, T. 9 G. 2. B. R. H. 305.]

[If it appears on the record that no issue is joined, the jury must be dismissed. *Heath v. Walker*, T. 12 G. 2. Str. 1117.]

So, at the day given by *cur. advisare vult* after demurrer. Co. Lit. 139. b. 1 *Leo.* 105.

So, after an interlocutory judgment; as, *quod computet*, &c. Co. Lit. 139. b.

But by the *stat.* 2 H. 4. 7. at the day-by *cur. advisare vult* after a verdict, the plaintiff cannot be nonsuited. *Ibid.*

[By *stat.* 14 G. 2. c. 17. if plaintiff neglects to bring issue to trial according to the course of the court, the court, on motion on notice, shall give judgment as in case of nonsuit, unless they allow farther time, and defendant to have costs as in nonsuit.]

[When issue is joined early in the term, notice of trial must be given in the same term. *Frampton v. Payne*, C. P. T. 28 Geo. 3. 1 H. Bl. 65.]

[If issue in a London cause be joined early enough in a term to enable the plaintiff to give notice of the trial for the sittings after that term, the defendant is not entitled to judgment as in case of a nonsuit for not proceeding to trial, unless the plaintiff has in fact given notice of trial. *Munt v. Tremamondo*, B. R. H. 32 Geo. 3. 4 T. R. 557.]

[The plaintiff has the whole of the term, next to that in which issue is joined, to try his cause in. *Baker v. Newman*, C. P. H. 29 Geo. 3. 1 H. Bl. 123.]

[To support, in the next term after that in which issue is joined, a rule for judgment as in case of a nonsuit, for not proceeding to trial, the affidavit must state that issue was joined early enough in the preceding term for the plaintiff to have proceeded to trial in that term. But in the third term, a general affidavit, stating that issue was joined in the former term, is sufficient. *Woulfe v. Sholls*, C. P. T. 29 Geo. 3. 1 H. Bl. 282.]

[Judgment as in case of a nonsuit for not proceeding to trial, cannot be moved for till the third term after that in which issue is joined, where the affidavit is general, that issue was joined in that term. *Da Costa v. Ledstone*, C. P. M. 36 Geo. 3. 2 H. Bl. 558.]

[A peremptory undertaking to try, is alone sufficient cause to shew against judgment, as in case of a nonsuit for not proceeding to trial, if it be the first default. *Mallett v. Hilton*, G. P. M. 33 Geo. 3. 2 H. Bl. 119.]

[Where the plaintiff does not countermand notice of trial, but withdraws the record, after the cause is called on, the court will make it a condition of discharging a rule for judgment, as in case of a nonsuit, (on a peremptory undertaking to try,) that he shall pay the defendant the costs incurred by the omitting to try, though the practice of the court is, not to grant a rule for costs for not going on to trial; and also a rule for judgment, as in case of a nonsuit, at the same time. *Jordaine v. Sharpe*, C. P. H. 34 Geo. 3. 2 H. Bl. 280.]

[The plaintiff in a *qui tam* action on the *stat.* 7 Geo. 2. c. 8. withdrew

drew his record, because the broker who negotiated the illegal bargain for stock refused to give evidence for fear of subjecting himself to a penalty on the same act; this was holden a sufficient reason to discharge a rule for judgment as in case of a nonsuit for not proceeding to trial, although the witness's liability to be sued would not be removed till after the three succeeding terms. *Raynes v. Spicer*, H. 37 Geo. 3. 7 T. R. 178.]

[There may be a judgment, as in case of a nonsuit against an executor plaintiff, for not going on to trial, but without costs. *Howard v. Rathbone*, C. P. H. 15 Geo. 2. Willes, 316. *Barnes*, 130. S. C.]

[But if in action against two on a joint promise, there is judgment against one by default; and on plaintiff's neglecting to bring issue joined by the other on to trial, rule is obtained for judgment as in case of a nonsuit, yet costs cannot be taxed; for plaintiff could not have been nonsuited on a trial. *Weller v. Goyton*, T. 30 & 31 G. 2. 1 B. M. 358.]

So, in *trespass* against several, if any suffer judgment by default, the plaintiff cannot be nonsuited as to the rest, tho' verdict may be given against him. *Cowp.* 483. *Vide Doug.* 169. n. 3 T. R. 662.]

[If defendant has obtained a rule for costs for not proceeding to trial, he cannot afterwards move for judgment as in case of nonsuit. *Barnes*, 131. 314. 316.]

[The court of C. P. will make the payment of costs for not proceeding to trial, a term of discharging a rule for judgment, as in case of a nonsuit. *Jolliffe v. Morris*, C. P. E. 37 Geo. 3. 1 Bos. & Pull. Rep. 38.]

[On motion for judgment, as in case of nonsuit, rule for plaintiff, to enter issue; if he does not, defendant may have *non prof.*; if he enters it, the roll must be produced, and defendant may move for nonsuit; if court admits cause, why nonsuit should not, &c. they appoint day for trial; on such motion, there must be affidavit that the cause is not tried. *Barnes*, 313. 316.]

[The defendant may rule the plaintiff to enter the issue, and move for judgment, as in case of a nonsuit in the same term. *Peeters v. Throgmorton*, C. P. E. 39 Geo. 3. 1 Bos. & Pull. 387.]

[Sickness of plaintiff—marriage of *feme* plaintiff—that the bankrupt did not attend assignees, plaintiffs—that material witnesses were ill—or if record offered to be entred, tho' a little out of time—sufficient to prevent judgment as of nonsuit. *Barnes*, 313, 314, 315, 316. 464.]

[If a rule to shew cause why there should not be judgment as in case of a nonsuit be discharged on an affidavit, which contains an answer false in itself, the court will not afterwards open the matter on an affidavit which disproves the contents of the former one. *Davis v. Cottle*, B. R. M. 30 Geo. 3. 3 T. R. 405.]

[So, *insolvency* of the defendant happening after the action brought, *Dough.* 671.]

[In *replevin*, as both parties are actors, and either may carry down the cause for trial; there is no judgment as in case of nonsuit. 1 Bl. 375. *contra Barnes*, 458. acc. 3 T. R. 661. 5 T. R. 400.]

[Judgment as in case of a nonsuit may be given in a traverse of a return to a mandamus. *Rex v. Stafford*, E. 32 Geo. 3. 4 T. R. 689.]



[If defendant has obtained a rule for judgment *nisi*, the court will not give plaintiff leave to amend his declaration by striking out allegation, but judgment shall be absolute. *Barnes*, 318.]

[Judgment as in nonsuit may be moved for without term's notice, tho' no proceedings in a year. *Barnes*, 308. 2 *Bl.* 1223. *semb. cont. Barnes*, 314. *Hutchings v. Dunning*, *M.* 18 *Geo.* 2. *Bar.* 308. *Phillips v. Moser*, *B. R. E.* 34 *Geo.* 3. 5 *T. R.* 624.]

[*Quere.* Whether after payment of money into court on the whole declaration, there can be a nonsuit? *Gutteridge v. Smith*, *C. P. M.* 35 *Geo.* 3. 2 *H. Bl.* 374.]

[If plaintiff was ready, but the cause did not come on, because the view was not returned by six jurors, judgment shall not be signed. *Barnes*, 498.]

[Where plaintiff has carried the record down once for trial, the court will not give judgment as in case of a nonsuit, for not carrying it down a second time, even tho it was made a *remanet* the first time. 3 *T. R.* 1.]

[Nonsuit shall not be set aside because plaintiff thought defendant was mistaken. *Barnes*, 295.]

[Judgment as in case of a nonsuit cannot be entred on the plaintiff's neglecting to carry the record down to trial, where the defendant might have carried it down by proviso. 1 *T. R.* 492.]

[If a cause is tried by proviso, there must be a rule given in the office, *fiat nisi prius per proviso si querens fecerit defaultam*; and if there is not, and plaintiff is nonsuited, the nonsuit shall be set aside. *Dodson v. Taylor*, *M.* 10 *G.* 2. *Str.* 1055.]

[Where a judge at *nisi prius* nonsuits plaintiff and is mistaken, the court on motion may set it aside. *Sadler v. Evans*, *M.* 7 *G.* 3. 4 *B. M.* 1984. *Cont. Barnes*, 311.]

(X 2.) *Retraxit*, what shall be.

If the demandant or plaintiff acknowledges, *quod non vult alterius prosequi*, this is a *retraxit*. *Co. Lit.* 139. a. *R.* 2 *Cro.* 211. 3 *Leo.* 177.

So, at any day when he appears in court, (for then he continues present there till a day is given over and may be demanded,) if, on demand, he makes default, this is a *retraxit* in contempt of the court. *Co. Lit.* 139. a.

So, in trespass or other personal action, a *nolle prosequi* against one defendant will be a discharge to both. *R. Cro. El.* 762.

If a defendant or tenant, being present in court, be demanded and makes default, this is a departure in contempt of the court. *Co. Lit.* 139. a.

But a *retraxit* cannot be after plaint before declaration. *R. Dal.* 78.

Nor, by attorney, for he must be in person. *Per two J.* 2 *Cro.* 211. 8 *Co.* 58. b.

[If there are several defendants, and all found guilty, plaintiff may enter *nolle prosequi* against any one; therefore, if in *trover* against a defendant executor, and other defendants, not executors, there is a verdict against these, and the executor is found not guilty, judgment shall not be arrested, for plaintiff may enter *nolle prosequi* as to him. *Dale v. Eyre*, *T.* 24 & 25 *G.* 2. 1 *Wils.* 306.]

[The court will not allow a defendant to strike out the entry of a judgment

judgment of *nolle prosequi* entered by the plaintiff, as to one of the counts of his declaration after it has been demurred to. *Milliken v. Fox*, C. P. M. 38 Geo. 3. 1 Bos. & Pull. Rep. 157.]

[Nor, will the court in that stage of the proceedings determine a question of costs respecting such a count. *Ibid.*]

(X 3.) Who may be nonsuited.

The king cannot be nonsuited; for he is always in court. *Co. Lit.* 139. b. *Sav.* 56.

But a common informer may be nonsuited. *Co. Lit.* 139. b.

And the attorney-general may enter a *nolle prosequi*, which has the effect of a nonsuit. *Co. Lit.* 139. b. *Hard.* 504.

And this after issue joined. *Hard.* 504.

Or, the jury charged upon the trial. *Dub.* 3 *Mod.* 117.

The plaintiff may be nonsuited at any day, when he is demandable. *Co. Lit.* 138. b.

After interlocutory judgment. *Sal.* 455.

If one issue is found for the plaintiff, he may be nonsuited as to other issues or a demurrer. *Sal.* 456.

If several defendants plead severally, he may enter a *non prof.* against one before the record is sent down to trial. *Sal.* 457. *Doug.* 169. n.

[But, in such a case, one defendant cannot sign judgment of *non prof.* as to himself, and take out execution; or if he do, the court will set it aside on motion within the same term: but in a subsequent term the application is too late, and the redress must be by writ of error. *Doug.* 169. n.]

Yet, wherever it can appear that the action is not a joint action, judgment of *non prof.* may be signed by all or any of the defendants named in the writ. 2 *T. R.* 257.

So, on the return of a *withernam*, the plaintiff may be nonsuited; for tho' the *replevin* and *alias* have not any day given to the party, (for they are *vicontiel*,) yet the *pluries* has, and the day of return is the day for both parties. *Sal.* 583.

But he cannot be nonsuited against one defendant, after final judgment against all. *Sal.* 455.

[In a joint action he cannot be non-prossed by one or some of the defendants without the others. *Doug.* 169.

[Therefore, where the plaintiff had sued out a bailable writ against three on which one was arrested, and put in bail, and for want of a declaration within two terms, signed judgment of *non prof.* the other two defendants not having appeared to the writ, this *non prof.* was set aside. *Ibid.*]

[The rule is, that if plaintiff do not declare within two terms after the return of the writ, the defendant may sign judgment of *non prof.* but if no advantage is taken of the plaintiff's neglect, the plaintiff may still deliver his declaration within the year. *Worley v. Lee*, B. R. M. 28 Geo. 3. 2 *T. R.* 112. *Sherfon v. Hughes*, B. R. M. 33 Geo. 3. 5 *T. R.* 36.]

[The statute, 13 Car. 2. st. 2. c. 2. enabling a defendant to sign judgment of *non prof.* for want of a declaration in due time, extends to all cases. *Oldham v. Burrell*, B. R. M. 37 Geo. 3. 7 *T. R.* 26. *Vide supra*, (C 3.)

[In a *qui tam* action, judgment as in case of a nonsuit may be



entred on a rule to shew cause. *Watson v. Johnson*, P. 25 G. 2. 1 *Wils.* 325.]

(X 4.) When a Nonsuit is peremptory.

After nonsuit the plaintiff may begin the same suit again. *Co. Lit.* 139. a.

Tho' it be in assise. 1 *Sal.* 82.

But not after a *retraxit*. *Co. Lit.* 139. a.

So, in an appeal of murder, robbery, &c. a nonsuit after appearance shall be peremptory *in favor. vite.* *Ibid.*

So, in an appeal of *mayhem*; for the writ says, *felonice maihemavit.* *Ibid.*

So, in *nativo habendo*, in favour of liberty. *Ibid.*

So, in *quare impedit*, for thereon the defendant has a writ to the bishop. *Co. Lit.* 139. a. *Cont. per Dy.* within six months. *Dal.* 81. *Acc.* 1 *Brownl.* 161. *R. Sal.* 559.

So, in *attaint*. *Co. Lit.* 139. a.

Otherwise, a nonsuit before appearance. *Co. Lit.* 139. a. 1 *Sal.* 64. *Garth.* 173.

As, if the plaintiff in an appeal declares by attorney, and is demanded, and does not come into court. 1 *Sal.* 64.

[If after nonsuit on the merits and motion for new trial denied, plaintiff brings new action in another court, it will stay proceedings till costs of the nonsuit paid, for this is vexatious. *Melchart v. Halfey*, H. 11 G. 3. 3 *Wils.* 149.]

[After a nonsuit in trespass the court will stay proceedings in a second action between the same parties for the same cause, until the costs of the nonsuit be paid; notwithstanding the plaintiff be a prisoner at the time of bringing the second action, and sue *in formâ pauperis.* *Weston v. Withers*, B. R. E. 28 Geo. 3. 2 T. R. 511.]

(X 5.) When a Nonsuit of one of the Plaintiffs shall be a Nonsuit of the other.

So, generally, in personal actions the nonsuit of one plaintiff is the nonsuit of both. *Co. Lit.* 139. a.

So, in *nativo habendo* and *quid juris clamat.* *Ibid.*

But in real or mixt actions against several, if the demandant is nonsuited as to one, he shall not be nonsuited as to all; for there ought to be a summons and severance. *Ibid.*

Not in an *audita querela*; for it goes in discharge. *Ibid.*

Nor in error, attaint, or *scire facias* on real or mixt actions; for they follow the nature of the actions on which they are founded. *Ibid.*

So, a *nolle prosequi* before judgment against one shall be a discharge to all. *R. Hob.* 70.

So, after judgment against all, if the plaintiff enters a *nolle prosequi* to one, it shall be a discharge to all. *Hob.* 70.

So, in trespass against several, if the plaintiff is nonsuited before declaration, there shall be only one nonsuit as against all the defendants; for tho' he may declare severally, it shall not be presumed till he does so. *R. Sal.* 455. [*Com.* 74. S. C. *Pryce v. Foulkes*, B. R. E. 9 Geo. 3. 4 *Burr.* 2418.]

So,

So, in trespass against several, if one pleads *not guilty*, and there is a verdict and judgment against him, and the other defendants justify, the plaintiff may enter a *nolle prosequi* against those who justified, and not discharge him who pleaded not guilty; for by the judgment the suit was ended as to him. *R. Hob. 70.*

## (Y) Judgment.

(Y 1.) When it shall be upon Default.

**I**N real actions, upon default before appearance, a *grand cape* issues, and if the tenant does not appear thereon, there shall be judgment against him. *Mod. Ca. 4. Vide ante, (B 11.)*

On default after appearance in a writ of right, there shall be final judgment.

So, in other real actions, upon default after a verdict for the demandant.

Or, on a departure in despite of the court.

But, generally, in other real actions, a *petit cape* issues before judgment.

In personal actions, where an outlawry lies, process issues against the defendant till he appears, or is outlawed.

If judgment be by default, the entry shall be *ideo confid. quod recuperet* by default.

Or, if the default is entred, and afterwards *ideo conf. quod recuperet*, without saying *by default*, it is sufficient. *R. 2 Cro. 36.*

In personal actions, after appearance, if the defendant does not plead, judgment shall be entred up against him on *nihil dicit. Vide ante, (E 42.)*

Or, the attorney, to save him from damages in a writ of deceit, may say *quod non est informatus per magistrum suum* of an answer, and thereupon there shall be judgment against the defendant. *F. N. B. 98. 7.*

(Y 2.) When upon Confession.

So, a defendant may confess the action.

But after issue and *venire facias*, the defendant cannot by a *relucta verificatione* confess the action without the plaintiff's consent. *R. 1 Brownl. 196.*

So, if the defendant, being executor of his own wrong, pleads that he has 10 l. (which is more than the debt demanded,) which he retains to satisfy a debt to himself, and has no assets *ultra*, there shall be judgment for the plaintiff on the defendant's confession; for an executor of his own wrong cannot retain for his own debt, and then he confesses assets to the value of the debt. *R. Tel. 138. Vide ante, (E 42.)*

So, in all cases, where the defendant by his plea confesses the cause of action, and offers a bad justification. *Mod. Ca. 10.*

If the defendant gives a warrant of attorney to confess the action, the judgment will be good, tho' the defendant dies the same day before judgment signed. *R. Ray. 18.*

So, if the defendant dies in the vacation, and judgment is entred as of the prior term, before the effoin day of the next term. *1 Sal. 87.*

And,



And, if the warrant be general, it may be confessed in any term.  
1 Mod. 1.

So, the warrant will be good, tho' the attorney be afterwards made a knight. *Per Brown, Ow.* 31.

If the warrant be by a woman, who afterwards takes husband, the bill may be filed, and judgment entred against both. *Sho.* 91. cont.  
1 Sal. 117. 399.

So, if the warrant is to acknowledge judgment to a woman who marries, it is no countermand. *R.* 1 Sal. 117.

[If warrant of attorney is given to confess judgment to a *feme-sole*, who afterwards marries, and judgment is entred up by husband and wife, it is irregular, and must be set aside, if it is so entred up without leave of the court. *Marder v. Lee*, P. 4 G. 3. 3 B. M. 1469.]

If the warrant is by a woman, a sole, it shall not be avoided for that she is *covert*, without a writ of error. 1 Sal. 400.

If the warrant is given on an arrest, and the defendant countermands it, before judgment confessed, yet the court will protect the attorney, if he pleads *non sum informatus*, whereby judgment may be entred up against the defendant. *Latch*, 8.

So, if after warrant given the plaintiff tears off the seal, an attachment lies. 1 Vent. 3.

If a warrant be to acknowledge judgment on an agreement to stay the execution for a year, it must be in writing. *Mod. Ca.* 14.

And if the plaintiff uses the judgment contrary to his agreement, the court will avoid the judgment. 1 Sal. 400.

So, if the agreement is to stay execution, and he brings debt, it will be a breach. *Sal.* 596.

Otherwise, if the agreement was subsequent to the judgment given. 1 Sal. 400.

But the warrant must be strictly pursued; and therefore, if it is to confess judgment in *Trinity* term, without more, it cannot be done in any other term. 1 Mod. 1.

So, generally, the defendant's death is a countermand of the authority. *D.* 1 Vent. 310. 1 Sal. 87.

[If defendant dies in term-time, judgment may be entred after his death, that same term. *Fuller v. Jocelyn*, M. 4 G. 2. Str. 882. *Fuller v. Johnson*, M. 9 G. 2. B. R. H. 158.]

[Court refused to set aside judgment, signed after death of defendant, because a judgment of the precedent term, when defendant was alive. *Traver v. Atkinson*, C. P. M. 17 Geo. 2. Willes, 427.]

[Judgment cannot be entred on a warrant of attorney, after plaintiff's death. *Wild v. Sands*, M. 13 G. Str. 718. *Cowie v. Alloway*, B. R. E. 39 Geo. 3. 8 T. R. 257.]

[If judgment on warrant of attorney is entred after defendant's death, the court will not set it aside, tho' they would not make a rule for it. *Barnes*, 270.]

[Judgment on a warrant of attorney entred in *Easter* vacation against a defendant who died in *Easter* term, is good; but execution cannot be taken out until it be revived against defendant's representative by *scire facias*. *Heapy v. Parris*, B. R. T. 35 Geo. 3. 6 T. R. 368.]

[If a rule is made to enter up judgment on an old warrant of attorney, on affidavit that the party is alive, and it afterwards appears that he

he died some hours before, the court will not discharge it. *Chancery v. Needham*, M. 11 G. 2. Str. 1081. *Andr.* 53.]

[If there is warrant of attorney to confess judgment to two, and one dies before judgment entred, and it appears that it was given to indemnify them against a bond entred into by them in behalf of defendant, the court will give leave to the survivor to enter up judgment. *Todd v. Dodd*, M. 25 G. 2. 1 *Willf.* 312. *Vide Barnes*, 45. 51, 52, 53.]

[Warrant from two, one dies, leave to enter against the survivor. *Barnes*, 53.]

[Satisfaction may be entred *nunc pro tunc* on a warrant, plaintiff being dead, and his administrator a lunatic. *Barnes*, 258.]

[If judgment at the suit of an executor is entred up, as of a term in testator's lifetime, it shall be set aside. *Gainsborough v. Follyard*, M. 13 G. 2. Str. 1121.]

[On warrant to enter, at the suit of A., his heirs, executors, &c. executor shall have leave to enter. *Barnes*, 44.]

[If judgment is neglected to be entred on the roll, and the roll is lost, the court will order the clerk of the judgments to sign a new roll. *Douglas v. Yellop*, H. 32 G. 2. 2 B. M. 722.]

[The clerk of the judgments, having received his fees, is liable to an action by a purchaser become liable to a judgment which he did not find entred up; the attorney is liable to the clerk of the judgments. *Ibid.*]

[On warrant from one to ten years old, leave may be given by treasury-rule; above ten, motion in court; above twenty, rule to shew cause. *Barnes*, 41. 47.]

[Judgment may be entred on an old warrant, on affidavit of execution, &c. and that defendant was alive in Ireland two months before. *Barnes*, 53.]

[Or, in Jamaica four months before. *Barnes*, 256.]

[Leave may be granted if plaintiff is lunatic, on affidavit of the person who has received the interest. *Barnes*, 42.]

[The court will not give leave to enter judgment on an old warrant, on an affidavit sworn in Ireland before an Irish commissioner. *Sibthorp v. Adams*, C. B. T. 10 G. 2. *Barnes*, 40.]

So, if a man under arrest confesses judgment, it will be irregular, if an attorney of B. R. or C. B. is not present. *Mod. Ga.* 85. 1 *Sal.* 402.

[The presence of attorney of C. B., at executing (in custody) warrant to enter up judgment in B. R., is sufficient. *Bland v. Pakenham*, M. 9 G. Str. 530. *Barnes*, 44.]

[But he must be attorney for defendant. *General Rule*, P. 4 G. 2. Str. 902.]

[No excuse can be allowed against this rule. *Per Hardwicke C. J.* *Woodin v. Colledge*, M. 9 G. 2. B. R. H. 177.]

[Nor, tho' the warrant is executed in a foreign country. *Fitzgerald v. Plunket*, H. 19 G. 2. Str. 1247.]

[But defendant in execution, paying part of the debt, may give warrant of attorney to confess new judgment for the rest, tho' no attorney is present, both the standing rules of court of Car. 2. and 4 G. 2. intending only to arrests on *mesne process*. *Watkins v. Hanbury*, H. 19 G. 2. Str. 1245. *Vide Cowp.* 281. *Crompton v. Steward*, B. R.



*B. R. M. 37 Geo. 3. 7 T. R. 19. Birch v. Sharland, B. R. E. 27 Geo. 3. 1 T. R. 715.]*

[And in the case of a warrant of attorney given by a person in execution, if he has been prevailed on to acknowledge it for more than was due, the court will give relief under circumstances. *Cowp. 281.*]

[But this rule extends only to the particular cause whereupon defendant is in custody, and not to giving warrants of attorney to confess judgments in other actions. *Holcombe v. Wade, M. 6 G. 3. 3 B. M. 1792, 2 Ld. Raym. 797.*]

[If defendant practises as an attorney, no other need be present; but plaintiff an attorney is not sufficient. *Barnes, 37.*]

[Attorney's clerk is not sufficient. *Barnes, 42.*]

[But the court will not set aside a warrant of attorney on account of its being given by a defendant in custody without an attorney present on his part, if it was executed by the defendant purposely with a view to cheat the plaintiff. *Cowp. 141.*]

[Interlocutory judgment being signed against a prisoner in custody of the marshal, the plaintiff's attorney took a *cognovit* from him for 200 l., with a defeazance on paying 40 l. (the real debt) and costs; but no attorney was present on the part of the defendant: tho' this case was not strictly within the rule 15 Car. 2. which mentions only prisoners in the custody of *sheriffs' officers*, yet the court interfered for the relief of a prisoner. *Parkinson v. Caines, B. R. E. 30 Geo. 3. 3 T. R. 616.*]

[But at the plaintiff's request they permitted him to alter his judgment to the real debt, on paying the costs. *Ibid.*]

[A warrant of attorney to confess judgment executed by a prisoner in custody on criminal process, is good, tho' he have no attorney present. *Charlton v. Fletcher, B. R. M. 32 Geo. 3. 4 T. R. 433.*]

[When a defendant in custody executes a warrant of attorney to confess a judgment, there must be an attorney present on his part; the presence of the plaintiff's attorney is insufficient, tho' the defendant consent to his acting also as his attorney. *Hutson v. Hutson, B. R. M. 37 Geo. 3. 7 T. R. 7.*]

[If a defendant in custody being about to execute a warrant of attorney to confess judgment, is informed that it must be done in the presence of an attorney on his part, and thereupon produces a person as such, in whose presence he executes the warrant; the court will not set aside the proceedings thereon, because the person so produced by the defendant was not an attorney. *Jeyes v. Booth, C. P. M. 38 Geo. 3. 1 Bos. & Pull. Rep. 97.*]

If he is arrested by process of an inferior court, and confesses judgment in a court at *Westminster. Mod. Ca. 85. 1 Sal. 402.*

So, if he is discharged only in appearance, or apprehends himself not discharged. *Mod. Ca. 85.*

So, if confession of judgment is obtained by practice, tho' an attorney is present. *Ibid.*

[If the warrant has been obtained by fraud, the court will order it to be delivered up, before any use has been made of it. *Doug. 198.*]

But this does not extend to a warrant of attorney to give judgment as a security to A. and not to the plaintiff. *5 Mod. 144.*

But B. R. do not examine warrants for judgment in C. B. or *contra. 1 Sal. 402.*

[If

[If defendant under arrest on a *latitat*, gives warrant of attorney to confess judgment in C. B., no attorney but plaintiff's being present, B. R. cannot set aside the judgment, but will grant attachment against plaintiff and his attorney, till satisfaction is entred, or judgment set aside, with costs. *Woodin v. Colledge*, M. 9 G. 2. B. R. H. 177.]

So, a judgment, tho' regular, shall be quashed on payment of costs, when a trial has not been lost. 1 *Sal.* 402.]

And regularity shall not be examined into, after error brought. *Ibid.*

[On motion to set aside judgment, the warrant being obtained on usurious contract, (which is not pleadable to *sci. fa.*) court will direct issue to try facts. *Barnes*, 277.]

[The court set aside a warrant of attorney, and judgment given to secure a loan which was sworn to be usurious, in order to bring the question of usury before a jury; but refused to order a bill of exchange to be delivered up, which had been given to procure the defendant's release out of execution on the judgment. *Edmonson v. Popkin*, C. P. E. 38 Geo. 3. 1 *Bos. & Pull. Rep.* 270.]

[If plaintiff enter up judgment in debt on a *mutuatus*, on a warrant of attorney "to enter up judgment in debt on bond," the court will set it aside as irregular. *Paris v. Wilkinson*, B. R. H. 39 Geo. 3. 8 *T. R.* 153.]

[If defendant pleads not guilty, and also by his plea confesses the trespass, and justifies under a custom, upon which a verdict is found for him, yet if the custom is void in law, the court shall give judgment for plaintiff, award writ of inquiry of damages, and give final judgment for damages and costs, *nullo respectu habito veredicto*. As to not guilty, defendant *eat sine die*. On error from C. B. judgment affirmed unanimously in B. R. *Wilkes v. Broadbent*, P. 17 G. 2. *Wils.* 63. *Barnes*, 267.]

[It is not necessary that a warrant of attorney to confess a judgment should be read over to the party giving it, notwithstanding the Rule 14 & 15 Geo. 2. to the contrary. *Taylor v. Parkinson*, C. P. M. 35 Geo. 3. 2 *H. Bl.* 383.]

[Though a judgment has been irregularly signed without filing common bail for the defendant, according to the statute, till after the succeeding term after the writ was returnable, and after the judgment itself had been entred up, yet the defendant, having given a *cognovit*, is estopped from objecting to the irregularity, if before the time of making such objection the plaintiff has filed common bail *nunc pro tunc*. *Davis v. Hughes*, B. R. E. 37 Geo. 3. 7 *T. R.* 206.]

[Judgment entred up on a warrant of attorney against defendant in *Jamaica*, on an affidavit that he was alive four months ago. *Rown-dell v. Powell*, C. P. H. 11 Geo. 2. *Willes*, 66. *Sir G. Co.* 145. *Barnes*, 256. *S. C.*]

(Y 3.) When upon the Declaration, Plea, &c.

When there shall be judgment on the declaration, plea, or replication, *vide ante*, (M. 1, 2, 3.)

When error in a judgment shall be amended, *vide Amendment (R).*

When a motion shall be allowed in arrest of judgment, *vide ante*, (S 48.)



If judgment is irregularly signed or obtained, the court will set it aside.

But not because the attorney appeared without warrant. *Mod. Ca.* 16.

[The court will set aside a judgment, on putting the plaintiff in as good a condition. *Fox v. Glasf.* H. 2 G. 2. *Str.* 823. (The leading case in B. R.)]

[The court will not restrain a defendant from pleading the statute of limitations, on setting aside a regular interlocutory judgment. *Maddocks v. Holmes*, C. P. E. 38 Geo. 3. 1 *Bos. & Pull. Rep.* 228.]

[If defendant is not served with process, but is served with declaration, and judgment is signed, it shall not be set aside; for defendant should have come in and taken advantage of it. *Matthews v. Lucas* P. 9 G. 2. B. R. H. 240.]

[After error brought, the court will not set aside judgment for irregularity; for it admits a judgment, and is a waiver of the irregularity. *Keate v. Watson*, M. 12 G. 2. *Andr.* 296.]

[So, is taking out a rule to be present at taxation of costs. *Semb. ibid.*]

[Judgment shall not be set aside for a small mistake; (as, if declaration is intitled of the 19th of G. 2. instead of the 18th and 19th,) *Johnson v. Bridgewater*, T. 18 G. 2. *Wils.* 104.]

[If defendant pleads sham plea, and plaintiff obtains the common rule that defendant shall plead the morrow, and such plea shall not be waived, and defendant takes no notice of it, and plaintiff signs judgment, it is irregular, and shall be set aside; for the first plea stands. *Webb v. Holt*, T. 18 G. 2. *Str.* 1234.]

[In *assumpsit*, if defendant pleads general issue, and statute of limitations; and issue found against him, and on the special plea, replication, rejoinder, surrejoinder, demurrer thereto by defendant, in which plaintiff joins, he need not give notice of making it a *concilium*, or putting it in the paper, and judgment shall not be set aside for want of it; not on payment of costs, and offer to waive error. *Forbes v. Ld. Middleton*, M. 19 G. 2. *Str.* 1242.]

[The court will not set aside the proceedings in ejectment for irregularity, because the notice at the foot of the declaration is subscribed in the name of the nominal plaintiff, instead of that of the casual ejector. 3 T. R. 351.]

[If defendant pleads *non assumpsit*; and statute of limitations, and delivers it to plaintiff, who makes up issue, and delivers it with notice of trial to defendant, who pays for it, and then plaintiff pays clerk of the papers his fees, makes up record, and goes to trial; the court will not set it aside, tho' defendant makes no defence, for he was in the first fault, in not leaving the pleas in the office. *Thompson v. Tiller*, P. 20 G. 2. *Str.* 1266.]

## (Z) Writ of Inquiry.

(Z 1.) When necessary.

**I**F there be judgment by default or confession, and the certainty of the demand appears upon record, the court may assess damages without awarding a writ of inquiry, if they will. 2 *Sand.* 107.

[But

[But this must be done with the consent of the plaintiff. *Blackmore v. Flemyng*, B. R. M. 38 Geo. 3. 7 T. R. 446.]

[After judgment by default in an action of debt on a judgment, the plaintiff may sue out a writ of inquiry. *Ibid.*]

So, if there be judgment for the plaintiff on demurrer.

[Demurrer to one count (on a bill of exchange), and judgment for the plaintiff, plea to the other counts on which issue was joined; and it was referred to the master to see what was due to the plaintiff on the former, though he had not entered a *nolle prosequi* as to the latter. *Dufevry v. Johnson*, B. R. H. 38 Geo. 3. 7 T. R. 473.]

[Where there are issues in fact and in law, the plaintiff may waive the issues in fact, and take out an inquiry on the demurrer. *Fleming v. Langton*, B. R. M. 9 Geo. 1. 1 Str. 532.]

As is the usual course in debt. 1 Rol. 579. l. 5. R. 2 Sand. 107. That it be debt upon a judgment. 1 Sid. 442.

So, it may be in trespass, where the trespass is not denied: as, upon a judgment by *nil dicit*, *non sum informatus*, &c. Tel. 152. 1 Rol. 573. l. 10.

So, upon a *recordari*, for cattle taken, &c. 1 Rol. 571. l. 40.

So, for a defendant in replevin, who avows for rent R. 3 Leo. 213.

[If a defendant suffers judgment by default in an action on a bill of exchange, the court of B. R. will refer it to the master, to see what is due on principal and interest, without executing a writ of inquiry. *Shepherd v. Charter*, B. R. E. 31 Geo. 3. 4 T. R. 275. *Rafleigh v. Salmon*, C. P. T. 29 Geo. 3. 1 H. Bl. 252. *Andrews v. Blake*, C. P. M. 31 Geo. 3. 1 H. Bl. 529. *Longman v. Fenn*, C. P. H. 31 G. 3. 1 H. Bl. 541.]

[A bond dated on a day certain, in a penal sum, conditioned for payment of a less sum generally, without naming any day of payment, is payable on the day of the date; and in any action brought upon it, the court of B. R. will refer it to the master to compute principal, interest, and costs thereon, and on payment of the same, stay the proceedings. *Farquhar v. Morris*, B. R. H. 37 Geo. 3. 7 T. R. 124.]

[So, in an action of covenant on a mortgage deed. *Berthen v. Street*, B. R. T. 39 Geo. 3. 8 T. R. 326.]

[So, in actions of covenant for the payment of a sum certain. *Holdipp v. Otway*, 2 Saund. 106. *Thellusson v. Fletcher*. Dougl. 316. *Vide Bruce v. Rawlins*, 3 Wils. 61.]

[On an interlocutory judgment, in debt on a judgment in an action brought on a bill of exchange, the court refused to refer it to the master. *Nelson v. Sheridan*, B. R. M. 40 Geo. 3. 8 T. R. 395.]

[Reference to the master, to compute what is due in covenant for non-payment of rent, allowed. *Byrom v. Johnson*, B. R. M. 40 Geo. 3. 8 T. R. 410.]

[The defendant having suffered judgment by default in an action of *assumpsit*, on a foreign judgment, the court would not refer it to the master to see what was due, and give the plaintiff leave to enter up final judgment for such sum, without executing a writ of inquiry. *Messin v. Massareene*, B. R. M. 32 Geo. 3. 4 T. R. 493.]

[Again, in an action on a bill of exchange for 200*l.* Irish money, where judgment had been suffered to go by default, the court discharged



discharged a similar rule. *Maunsell v. Massareene, B. R. M.* 33 Geo. 3. 5 T. R. 87.]

And, tho' the defendant will not consent to it, it does not signify, if the plaintiff consents. 2 Sand. 107.

Tho' the defendant is executor, and has no assets. R. 2 Sand. 107. *Semb. Skin.* 561.

Yet, if the plaintiff does not consent, there may be a writ of inquiry. 2 Sand. 107.

But where the demand is not certain upon the record, a writ of inquiry must issue; as, in trespass, where the defendant pleads *not guilty*. *Tel.* 152.

In trespass on the case, replevin, &c. *Pr. Reg.* 558. R. 3 *Leo.* 213. R. *Lut.* 213. 211.

So, on judgment affirmed on a writ of error, a writ of inquiry may issue, if it would lie on the first judgment. *Pr. Reg.* 559.

In debt for such goods, or the value, a writ of inquiry shall issue to inquire the value. R. 11 H. 7. 5. b. R. *Cro. El.* 536.

[And even in cases where there is no necessity for a writ of inquiry, that proceeding is of use, when the plaintiff goes for interest, which the jury assesses in the name of damages, by *Buller J. Thebluffon v. Fletcher, Dougl.* 316.]

Yet, where issue is joined, a writ of inquiry never issues; for the jury, which tries the issue, must assess the damages, and the omission cannot be supplied by a writ of inquiry; for then, if they should be excessive, the defendant will lose the benefit of his attain. R. 10 Co. 119. a. 2 *Rol.* 722. l. 10. R. 11 Co. 6. a. *Heydon*, 56. a. *Bentham*. *Vide Damages*, (E 1, 2.)

[If there are several breaches, some confessed, others denied, and *venire tam, &c. quam, &c.* and the jury omits to inquire of the damages on the breach confessed, writ of inquiry may issue. *Barnes*, 228.]

So, where one defendant pleads to issue, and the other makes default, a writ of inquiry is awarded to avoid a discontinuance, but does not issue; for the jury which tries the issue shall assess the damages. 1 *Leo.* 141. R. 11 Co. 6. a. *Heydon*.

So, in detinue, if the jury find damages, but not the value of the goods, it cannot be supplied. *Sal.* 206. cont. 5 *Mod.* 76. *Skin.* 595.

Yet there may be a writ of inquiry, tho' issue is joined, where the plaintiff is nonsuited. 5 *Mod.* 77. 118. 1 *Sal.* 205. *Skin.* 595.

[In an action against an overseer of the poor, if there is a verdict for him, and no damages assessed, a writ of inquiry shall issue. *Valentine v. Fawcett*, T. 8 G. 2. *Str.* 1021. And a suggestion shall be entered on the roll for that purpose. B. R. H. 139. *Vide* 2 *Bl.* 763. 921.]

[The want of a writ of inquiry is aided by the statute of jeofails. *Mallory v. Jennings*, M. 4 G. 2. *Str.* 878.]

(Z 2.) How it shall be executed.

If a writ of inquiry issues, notice of the executing it shall be given to the defendant, if he lives within 40 miles of *London* or *Middlesex*, and the inquiry is there, eight days exclusive of the day of notice. *Per Rule*, 1654. *Mills*, 29. *Mod. Ca.* 146.

If the defendant lives above 40 miles from *London*, 14 days' notice shall be given exclusive. *Mills*, 29. *Mod. Ca.* 146.

[Tho' defendant is an attorney. *Barnes*, 264.]

And in all writs of inquiry *in pais*, or inquiry in dower or waste, there shall be eight days' notice exclusive. *Mills*, 30.

Tho' it be 40 miles' distance, eight days' notice is sufficient. *Mod. Ca.* 146.

So, notice shall be given in a *scire fieri* inquiry. 2 *Mod. Ca.* 366.

[There must be the same notice of executing a *scire fieri* writ of inquiry, as a common writ of inquiry. *Biron v. Philips*, *M.* 6 *G. Str.* 235. *Stead v. Lateward*, *P.* 11 *G. Str.* 623. *Barnes*, 304.]

[Where a term's notice of trial is required, there must, at the same distance of time, be like notice of executing writ of inquiry. *Peyton v. Burdus*, *M.* 12 *G. 2. Str.* 1100.]

[If no proceedings within 12 months, a term's notice must be given. *Barnes*, 291. 294. 304.]

[Notice given in the country is good. *Barnes*, 305.]

[If plaintiff's name is mistaken in notice, inquiry shall be set aside. *Barnes*, 310.]

[Notice to execute before judge of assise must be general, not on a day certain. *Barnes*, 135.]

[Notice is bad, if the hour is not specified, tho' defendant said he would make no defence; and the time between hour and hour must not be above two. It must express the name of the house, the county, town, and street. Two days at least given to attorney, not to defendant, if appearance. Notice for eleven is good, if executed before twelve. *Barnes*, 293. 295, 296, 297. 299, 300, 301, 302. 309. 311.]

[For on notice to execute a writ of inquiry at a certain hour, the party is not tied down to the precise time fixed by the notice, because the sheriff may have more business which carries him beyond the time. *Doug.* 198.]

[If notice of a writ of inquiry to be executed at a particular hour and place, be continued, the notice of continuance need not express any hour or place. *Jones v. Chune*, *C. P. H.* 39 *Geo.* 3. 1 *Bos. & Pull. Rep.* 363.]

[If there is notice to execute writ of inquiry by *ten o'clock*, and no defence made, the court will set it aside for uncertainty. *Ison v. Fowen*, *M.* 14 *G. 2. Str.* 1142.]

[Irregularities in notice, or in appointment of deputy, are cured by defendant's making defence. *Barnes*, 233. 309. 413.]

A writ of inquiry, and other inquests of office, may be executed before a greater or less number than twelve. *F. N. B.* 107. *C. R.* 2 *Vol.* 673. *l.* 53. *Cro. Car.* 414.

[For no attain lies. *Chester v. Crawley*, *M.* 15 *G. 2. Str.* 1159.]

[So, award of writ of inquiry, to inquire by the oaths of honest men, omitting *twelve*, is good. *Moore v. Paine*, *T.* 9 *G. 2. B. R. H.* 288.]

And there shall be no challenge to the array or *polls*. 2 *H. 4. 2. b. Per Holt*, *Mod. Ca.* 43.

Except in a writ of inquiry for waste. *Co. Lit.* 158. *b. Dal. b.*

And the inquiry shall be by any jurors of the county; and therefore default of a *venue* is not material after a writ of inquiry awarded. *R. Lut.* 237.



If a jury don't appear, the plaintiff may have an *alias* and *pluries*, but cannot have a *habeas corpus*; for it is error. *R. Yel.* 130.

If the inquest appear, it cannot be continued *per ponit. in respect.*, but only by *vicecomes non misit breve*. *R. Yel.* 97.

[It may be adjourned after entred upon, like a coroner's inquest, or commission of lunacy, it being but an inquest of office. *Coleman v. Mawby*, *H. 3 G. 2. Str.* 853.]

The plaintiff ought to appear on every continuance of the jury in *B. R.* or an inferior court, otherwise it is error. *R. Yel.* 97. *Vide ante*, (V 1, &c.)

But no day is given to the defendant; for he is out of court. *Yel.* 97. *R. 1 Sid.* 16.

If it be executed on the return-day before the court rises, it is sufficient. *R. Cro. El.* 468. 761.

[The execution of a writ of inquiry on a *Sunday* is void, and the court are bound to take notice of it, without being specially assigned for error. *Hoyle v. Lord Cornwallis*, *T. 6 G. Str.* 387.]

If a writ of inquiry be returned executed, it is sufficient, tho' it is not said under the seal of the sheriff and jurors. *R. 1 Rol.* 408.

If it be *per sacramentum 12 proborum et legalium*, omitting *hominum*. *R. 1 Rol.* 408.

[*Non assumpsit*, and *non assumpsit infra sex annos* pleaded, an original replied, and, on *nul tiel record*, judgment for plaintiff; he cannot execute writ of inquiry till trial of the other plea. *Barnes*, 229.]

[It cannot be executed till judgment on demurrer is actually signed. *Barnes*, 229.]

[On *nul tiel record* replied, plaintiff may give notice of inquiry on the back of his replication. *Barnes*, 249.]

(Z 3.) *What proof necessary.*] If a writ of inquiry issues upon confession of the action, in trespass for taking goods, the plaintiff need not prove the property of the goods, but only the value. *R. Yel.* 152. *Dal.* 9. *Dougl.* 510.

[On a writ of inquiry on judgment by default, defendant shall not give evidence of fraud in the plaintiff; for he has admitted the contract to be as plaintiff has declared. *East-India Company v. Glover*, *M. 11 G. Str.* 612.]

So, tho' the judgment be on *non sum informatus*, or *nil dicit*; for by the judgment *quod querens recuperet*, the property is affirmed. *R. Yel.* 152. 2 *Cro.* 220.

But in inquiry of waste, the jury may find *no waste*, if the waste be not confessed. *Dal.* 9.

And, in *indebitatus assumpsit*, if the judgment be by *nil dicit*, or *non sum informatus*, the plaintiff must prove his debt. *R. 1 Vent.* 347.

[Where the declaration is on a bill of exchange or promissory note, it is sufficient to produce the bill or note; the only purpose of such production is to see whether any part of the money has been paid; and it seems not even necessary to produce the bill or note; for if part be paid, it ought to be pleaded. *Vide* 2 *Str.* 1149. *Barnes*, 233, 234. 2 *Bl.* 748. 2 *Wils.* 372. 3 *Wils.* 155. *Dougl.* 316. 3 *T. R.* 301.]

So, on a writ of inquiry upon judgment against an executor or administrator by default, he shall not give in evidence *no assets*. *Mod. C.* 308.

A writ

A writ of inquiry shall not be for more than is contained in the judgment: as, in trespass for breaking a house, and taking and carrying away goods, if a demurrer is joined on breaking the house and taking the goods only, and by writ of inquiry damages are found for the carrying away also, it is error; for there was a discontinuance as to the carrying away. *R. Yel. 5.*

So, if the writ of inquiry recites a judgment for 400 l., where it was only for 40 l. tho' the bill was 400 l. it is error. *R. 2 Cro. 294.*

[If damages are given for necessities provided after the writ of inquiry executed, or after the action commenced, it is error. *Baker v. Bache, P. 11 G. 2 Ld. Raym. 1382.*]

[The jury may give interest on note, bill of exchange, and money lent. *Per curiam.* And on *indeb. assump.* for goods sold. *Per Montague C. B. Dissent. two B. Vernon v. Cholmondely, M. 1722, Bunb. 119. Barnes, 228.*]

[But not on balance of account. *Barnes, 228.*]

[After judgment on demurrer it is not competent to the defendant to controvert any thing but the amount of the sum in demand. *De Gaillon v. L'Aigle, C. P. H. 39 Geo. 3. 1 Bos. & Pull. Rep. 368.*]

[Where judgment has gone by default on a promissory note, no irregularity previous to the judgment can be shewn as cause against referring the note to the prothonotary. *Pall v. Brown, C. P. H. 39 Geo. 3. Ibid. 369.*]

(Z 4.) *Before whom it shall be executed.*—[The under-sheriff cannot appoint a deputy to see execution of inquiry; if he does, the court will grant attachment. *Barnes, 231.*]

But if deputy is appointed under seal of sheriff's office, it is well. *Barnes, 232.*

[Verbal appointment bad; it should be under hand and seal. *Barnes, 413.*]

[If defendant, an esquire, desires inquiry to be executed before judge at next assize, the court will grant it without affidavit. *Barnes, 235.*]

So, if a writ of inquiry be executed before him who has no authority, it is error: as, in an inferior court, if it is directed to the *serjeant at mace*, and is executed before the mayor, who is judge of the court. *R. Yel. 69.*

So, if a *capias ad satisfaciendum* be issued before the writ of inquiry is returned, it is error. *R. Yel. 71.*

If a writ of inquiry is erroneous, it shall not be amended; but the plaintiff may have another writ. *Pr. Reg. 559.*

But misentry of a clerk shall be amended. *R. 3 Mod. 112. R. 2 Cro. 372. R. Mod. Ca. 306. Adm. 1 Rol. 408. Vide Amendment (S).*

(Z 5.) When it may be quashed.

[A motion to set aside an inquisition may be made at any time before final judgment signed. *Denny v. Trapnell, P. 8 G. 3. 2 Wils. 378.*]

A writ of inquiry may be quashed after execution, for misdemeanor in the plaintiff. *2 Leo. 214.*

Or, if there was not a regular notice. *Sti. Pr. Reg. 558.*



So, for misdemeanor in the sheriff; as, if he refuses to examine a witness. *Pr. Reg.* 559.

If he permits the plaintiff himself to be the only witness. *Per C. B. M. 7 Ann.*

[If it is taken before two persons appointed under-sheriffs extraordinary, it shall be set aside. *Denny v. Trapnell*, *P. 8 G. 3. 2 Wils.* 378.]

[So, if it is taken before an under-sheriff extraordinary, when the sworn under-sheriff lives in the same town. *Ibid.*]

[So, if the under-sheriff, who returns the jury, is attorney in the cause. *Baylis v. Lucas*, *B. R. T. 14 Geo. 3. Cowp.* 112.]

So, if the damages against the defendant are excessive. *2 Leo.* 214. *3 Leo.* 177.

[As, if in dower one third of the value of the land be given without deducting reprises; and for costs, the attorney's bill. *Barnes*, 234.]

[Two hundred and fifty pounds deemed excessive for twenty-six days' false imprisonment, and inquiry set aside for that cause. *Barnes*, 233.]

[But on 100*l.* damages given against custom house officers for entering and searching plaintiff's house with a writ of assistance without a constable, in the day-time; court would not set it aside for excessive damages. *Bruce v. Rawlins*, *P. 10 G. 3. 3 Wils.* 61.]

Or, for time subsequent to the action brought. *2 Mod. Ca.* 349.

But it shall not be quashed at the request of the plaintiff, for that the damages are too small. *R. 2 Leo.* 214. *3 Leo.* 177. *Sal.* 647.

[If the jury find *no* damages, it may be quashed, but not for smallness. *Barnes*, 230.]

[After no damages found, a special inquiry cannot issue without leave. *Barnes*, 231.]

[It may be set aside for smallness of damages, occasioned by sheriff's admitting improper evidence for defendant. *Barnes*, 448.]

[So, if some of the jury impannelled were debtors taken out of custody for the purpose of attending the inquiry. *Stainton v. Beadle*, *B. R. M. 32 Geo. 3. 4 T. R.* 473.]

[If the witness plaintiff thought could prove his demand declines it, and the sheriff refuses to adjourn, whereby plaintiff has but one penny damages for a large demand, the court will set aside the verdict. *Markham v. Middleton*, *T. 19 G. 2. Str.* 515.]

[If plaintiff is surprised with a defence, and not prepared to prove his whole demand; the court will set it aside. *Hall v. Stone*, *P. 8 G. Str.* 515.]

[On a contract for stock between *A.* and *B.* they deposit 200*l.* each in defendant's hands; *B.* does not perform, and *A.* sues for deposit, and had judgment on demurrer, and writ of inquiry; but the jury, on a notion that the depositant could not pay the money without consent of both parties, gave one penny damages, which the court set aside; for the rule of not setting aside verdicts for smallness of damages does not extend to a case where the jury mistake in point of law. *Woodford v. Eades*, *P. 7 G. Str.* 425.]

Yet where the covenant is for a certain sum, whereon debt might be brought, a new writ of inquiry shall be awarded, if the whole debt is not found. *Sal.* 647. *Per C. B. Tr. 4 Geo. 2 Mod. Ca.* 197. 213. [It

[It shall not be set aside, because returnable on a return-day, instead of day certain. *Barnes*, 230.]

[When executed, it is good, tho' the day and year are omitted in the *teste* of the writ. *Barnes*, 425.]

[It shall not be set aside, because taken in the name of plaintiff, who became bankrupt after inquiry awarded, but before it is executed. *Bibbins v. Mantel*, *M.* 8 *G.* 3. 2 *Wils.* 358.]

[Nor, because it has been altered, if released and not used before. *Barnes*, 232.]

(Z 6.) When there shall be Judgment upon it.

After a writ of inquiry executed, there must be four days exclusive before the plaintiff can sign the judgment. *R.* 1 *Sal.* 399.

Tho' the writ was executed the last day of the term. *Sal.* 399.

So, the plaintiff may give a rule for signing judgment, *nisi causa* within four days. *Sal.* 399.

[If an action be brought on a judgment which is irregular, the whole proceedings may be set aside in one rule. *Barlow v. Kaye*, *B. R. E.* 32 *Geo.* 3. 4 *T. R.* 688.]

## (2 A) Proceeding and Pleading in particular Actions.

**P**Leading in an action by or against an attorney, *vide Attorney*, (B 21, 22.)

By or against an administrator, *vide post.* (2 D 10, &c.)

(2 A 1.) In Actions by and against Husband and Wife.

(2 A 1.) *In an action by husband and wife.*] When husband and wife should join in an action by or against them, or when one shall sue or be sued alone, *vide Baron and Feme* (V—W—X).

If a woman sues or is sued alone, when she is *covert*, or a husband, when the wife ought to join or be joined, the writ shall abate. *Vide Abatement*, (E 6.—F 2.—F 7.)

[An action of trespass for an injury done to the property of the wife, *while sole*, should be brought by the husband and wife. But if such action be brought by the wife alone, the defendant must plead the coverture in abatement and not in bar. 3 *T. R.* 627.]

[Two actions, one against a man and his wife, and another against the man alone, cannot be consolidated. 2 *Wils.* 227.]

In an action by husband and wife, it is good, if the husband and wife appear in proper person; for tho' the husband has no privilege when his wife is joined, yet any one may sue in person. *R. Cro. El.* 537.

If husband and wife, seised for their lives, and to the heirs of the husband, allege a prescription in both; for tho' she has only for life, she was seised jointly with her husband who had the fee. *R. Cro. El.* 112.

So, in *assumpsit* by husband and wife *ut administratrix*, the declaration may say that the money was received *ad usum prædict.* husband and wife, *ut administratrix.* *R.* 4 *Mod.* 376.

So, it is sufficient to say *ad respond.* husband and wife, *cui administratio*, &c.; for *cui* refers to the wife, who is last named. *R. Latch*, 212.



If the declaration alleges a seisin in right of the wife, it ought to allege that both are seised (and not the husband only) in right of the wife. *R. Lut. 1425. Per Lut. D. Lut. 1596.*

And, if the seisin is for the life of the wife, it ought regularly to be averred that the wife is alive. *Lut. 1596.*

But a declaration by husband and wife is not good, if it alleges that the husband and wife *passessionat. fuerunt de bonis, &c.* in trover. *Semb. 1 Sal. 114.*

So, if in trespass it alleges battery of both; for the wife ought not to be joined for a battery of the husband. *1 Rol. 782. l. 10.*

If in breach it be alleged that he did not execute to the wife while sole, nor to the husband and wife since marriage, without saying *aut eorum alteri. R. Lut. 415.*

If in trespass, *assumpsit, &c.* where the wife need not join, it is alleged *ad dampnum ipsorum. R. 2 Cro. 473. R. 2 Cro. 644. R. 1 Sal. 114. R. 2 Rol. 250.*

So, *assumpsit* for money lent by husband and wife *ad dampnum ipsorum*, is bad. *2 Mod. Ca. 341.*

If, in trover, the conversion is alleged *ad dampnum ipsorum. R. 1 Sal. 114.*

If in trespass by them, it be *quare clausum fregit et herbam suam, &c.*

If, in battery by them for a battery of the husband and wife, it is alleged *ad dampnum ipsorum. R. Mod. Ca. 149. Comb. 184.*

Yet in trespass *quare clausum fregit et herbam ipsorum inde pervenien., &c.* is good; for as they may join in a *clausum fregit*, so they may in the profits *inde. Dan. 719.*

So, if in an action for words of husband and wife, it be *ad dampnum* of both, it will be good. *R. Jon. 409.*

So, where the action survives, they may declare *ad dampnum ipsorum. Dan. 720. R. 1 Sid. 387. 3 Mod. 120. Per two J. two cont. Pal. 339.*

So, in trespass by husband and wife for the battery of the wife, *et alia enormia eis intulit*, is good. *R. 2 Cro. 664.*

So, a defect in a declaration by husband and wife may be aided by verdict. *Vide ante, (C 87.)—Vide Action (G).*

[In action for a demand not accruing to the wife *dum sola*, wife only taken in execution for costs, shall be discharged. *Barnes, 207.*

(2 A 2.) *In an action against husband and wife.]* In an action against husband and wife, the husband shall give bail for himself and his wife.

[If husband and wife are arrested for her debt whilst sole, she shall be discharged, and he lie till he puts in bail for both. *Harrison v. Bearcliffe, T. 21 G. 2. Str. 1272. Vid. 2 Bl. 720.]*

It ought to be against them in the *debet and detinet*, tho' it be for the debt of the wife *dum sola. Vide post. (2 W 8.)*

In trover against them, it may be supposed that the conversion was by them; for it is a *tort* for which both may be charged. *R. Tel. 165. R. 1 Rol. 6. l. 10.*

But a declaration against husband and wife is bad, if the process was against the husband alone. *1 Sal. 115.*

If the conversion be alleged *ad usum ipsorum. R. 2 Cro. 661. Jon. 16. 264. R. Cro. Car. 254. 494. R. 1 Rol. 6. l. 10. 15. 27. R. Pal. 343. R. Jon. 443.* [Yet,

[Yet, trespass against husband and wife for taking goods, is good, tho' the conversion is laid to be to *their* use; for the conversion is not the gift of the action, as in trover. *Smally v. Kerfoot*, T. 11 & 12 G. 2. *Andr.* 242.]

And a suggestion of a *devastavit* by husband and wife executrix, *quod devastaver. et converterunt ad usum ipsorum*, is good; for the *devastaverunt* is the only material word, and that both may do. R. 2 *Vent.* 45.

(2 A 3.) *Plea*, &c.—[A defendant who has appeared by attorney as a *feme-sole* shall not plead in *proper person*, as a *feme-covert*, after a rule to stay proceedings on pleading issuably. 2 *Bl.* 724.]

[If A. and B. are sued as husband and wife, A. cannot plead *ne unques accouple en loyal matrimony*, for the legality of marriage is not triable in personal actions, because a husband *de facto* is liable to his wife's debts. *Norwood v. Stevenson*, T. 11 & 12 G. 2. *Andr.* 227.]

In action against husband and wife, both ought to join in plea; and therefore if the wife alone comes and pleads, there shall be a repleader. *Yel.* 210. *Dan.* 720.

[The court cannot give leave to the wife to plead separately from her husband even where her estate is settled on her, and confirmed by order of house of lords to her separate use, subject to demands on husband on her account; she must plead in the name of husband, and if he disavows, enforce the order of the lords. *Gordon v. Halpen*, P. 8 G. 2. *B. R. H.* 101.]

So, if the entry be *quod* husband and wife *ven. et defend. vim et injuriam et predict.* wife *dicit quod ipsa non est inde culpabilis*. 2 *Cro.* 288.

Tho' the *tort* be supposed by the wife only; as, in battery against husband and wife for a battery by the wife.

So, in *assumpsit* against husband and wife, upon a promise of the wife *dum sola*. R. 2 *Cro.* 288. *Yel.* 210.

So, in an action for words spoken by the wife only. R. *Yel.* 210.

So, in battery against husband and wife and others, if the wife and others plead *not guilty*, and the husband, *son assault*, it will be bad. R. 1 *Brownl.* 197.

So, in battery against husband and wife, if the husband justifies in aid of his wife, and the wife only pleads *son assault*, it is bad. R. 2 *Cro.* 239.

So, they ought to join in the averment, *et hoc parati sunt verificare*. *Semb. Cro. Car.* 594.

But where the *tort* is supposed by the wife alone, tho' both join in pleading, yet the issue ought to be, that the wife is not guilty; and therefore, in trover upon a conversion by the wife, if the husband and wife plead, *quod ipsi non sunt culpabiles*, it is bad, and a repleader shall be awarded, for it ought to be *quod ipsa non est culpabilis*. R. *Cro. El.* 883. R. *Hob.* 126. R. 2 *Cro.* 5. R. *Cro. Car.* 417. *cont.* in an action for words by the wife, for both are chargeable with a wrong done by the wife. R. *acc.* in action for words by the wife. 1 *Brownl.* 6. *Pal.* 68.



Yet, in debt against them, they may plead *quod nil debent*. *Nay*, 41.

And issue *quod ipsi non sunt culpabiles* cannot be amended. 2 *Cro.*

530. *R. cont.* 1 *Brownl.* 7.

But if the dogget be *quod* husband and wife *placitant* not guilty, and the roll be *quod* the wife *dicit*, omitting the husband, it shall be amended; for it was only the misprision of the clerk; for the dogget was a warrant to him to enter on the roll a plea for both. *R.* 2 *Cro.*

530.

So, if the verdict finds that the wife alone is guilty, it aids the plea. *R. Pal.* 68.

In an action against husband and wife, if it be only for the wife's act, and she is found guilty, both shall be in *misericordia*; as, for words by the wife. *Hob.* 127. 1 *Roll.* 215. l. 25.

In trover for a conversion supposed by the wife. 1 *Roll.* 215. l. 45. 2 *Cro.* 439.

So, if there ought to be a *capitur*, it shall be against both. *R. Cro. El.* 381. *Mo.* 704. *R.* 2 *Cro.* 203. 440. 1 *Roll.* 221. l. 35. *R. Cro. Car.* 407. but it shall be against the husband only. *Cro. Car.* 513. against both. 9 *Co.* 72. a. 2. *Hob.* 98. and it was against the wife alone. *Hob.* 101.

So, if the wife is executrix or administratrix, and there is judgment *de bonis testator si, &c. et si non tunc custag. de bonis suis propriis*, tho' properly the wife has no goods; for she will be liable after the death of her husband. *R.* 2 *Cro.* 191.

[In trover, if there is judgment and execution against both, the court will not discharge the wife, unless there is fraud and collusion between plaintiff and the husband to keep her in custody. *T.* 15 *G.* 2. *Str.* 1167.]

[So, in battery by defendant's wife, of plaintiff's wife the court will not discharge the wife who is only in execution, if it appears there is no design to screen husband. *Finch v. Dudding*, *M.* 19 *G.* 2. *Str.* 1237. *Lansfaff v. Rain*, *M.* 20 *G.* 2. *Wils.* 149.]

[If husband and wife are taken in execution, the wife cannot be discharged. *Barnes*, 203.]

[But if husband and wife, after judgment, be rendred in discharge of their bail, and they be not charged in execution, the wife shall be discharged on motion. 3 *Wils.* 124.]

[If husband and wife be outlawed in debt on a bond given by the wife while sole, and goods sworn to be her separate property be taken in execution; the law adjudges them to be the goods of the husband: if she have any equitable right she must have recourse to a court of equity. 2 *Wils.* 127.]

[So, after a solemn declaration by a woman that she was married to a man, and that goods in his possession were his goods in her right, she shall never be allowed to say, as against creditors, that she was not married to him, and that the goods were her sole property. *Corp.* 233.]

(2 B 1.) In Actions by and against a Corporation.

(2 B 1.) *In an action by a corporation.*] In an action by a corporation they ought to sue by the name of incorporation. 2 *Inst.* 666. *Win. Ent.* 1100.

And

And may sue by that name, tho' enabled to sue by another name. *Sal.* 451.

And the christian name of the mayor or head is not necessary. *12 Ed.* 4. 10. *Dy.* 86. b.

Tho' it be in ejectment on a demise by a corporation. *Skin.* 2.  
But a corporation may prescribe to be incorporated by one name, and to be impleaded by another. *Th. Dig.* l. 3. c. 9. f. 9.

Or, may claim it by grant. *Th. Dig.* l. 3. c. 9. f. 12.

A sole corporation must always shew *quo jure* he is seised. *R.* 2 *Lev.* 68.

And shall be named by his name of baptism. *Dy.* 86. b.

And if persons are incorporate to the use of an hospital, they must say, seised *jure corporationis sue*, not *jure hospital.* *R.* 10 *Co.* 34. a.

But mayor and commonalty need not allege seisin *jure corporationis*; for name imports an incorporation. *1 Leo.* 153.

So, *custos et colleg.* *Omnium Animarum Oxon.* need not allege seisin *jure collegii.* *R. Cro.* 232. *Pl. Com.* 102.

(2 B 2.) In an action against a corporation.] In an action against a corporation, they must be sued by the name of incorporation. 2 *Insh.* 666.

And, if it be an aggregate corporation, it is not well to name the proper name of the head. *Bro. Corporation,* 6.

But if it is a sole corporation, the proper name may be mentioned. *Bro. Corp.* 5. 30.

And so it must be in personal actions, where outlawry lies.

If a corporation be misnamed, it may be pleaded, but it is only in abatement. 26 *H.* 8. 1. b. *Bend. pl.* 89.

So, it may be pleaded in abatement, if the name of the head be added and mistaken. *Bro. Corp.* 6.

Or, if a corporation and another are joined; for there is different process against him. *Adm.* 45 *Ed.* 3. 2, 3. *Cont.* 46 *Ed.* 3. 23. b.

Tho' the person joined be a member of the corporation. *Bro. Corp.* 13. 24.

Or, in an action upon a specialty, if the name varies from the specialty. *Th. Dig.* l. 6. c. 12. f. 16.

To *misnomer* in a personal action, the plaintiff may say, known by one name or the other. *Th. Dig.* l. 6. c. 12. f. 14. 16.

Otherwise in a real action; for he cannot hold the land but by his true name. *Th. Dig.* l. 6. c. 12. f. 14.

And he, who pleads an act of a corporation by one name, and afterwards by another, ought to shew how the name was altered.

3 *Lev.* 243.

[For a duty or charge on a corporation every particular member is not liable; but process ought to go in their public capacity. 1 *Ventr.* 351. cited *Corwp.* 85.]

The process against an aggregate corporation is distress. 45 *Ed.* 3. 3. a.

But process of outlawry does not lie against an aggregate corporation. 45 *Ed.* 3. 2, 3.

And therefore trespass does not lie against them, but only against particular persons; for a *capias* and *exigent* do not go. *Bro. Corp.* 43.

So,



So, a *subpœna* does not lie; for it has no conscience. *D. 2 Bul. 233.*

But in *Chancery*, if it has nothing whereby to be distrained, on a petition to the lords in parliament, it may be ordered, that if the corporation do not appear on a *distringas* issued, the bill shall be taken *pro confesso*. *Ca. Cha. 205.*

[Proceedings in *Chancery* against a corporation for a contempt, cannot lie against the offending parties *personally*, but must be by sequestration of their effects and estate. *Cowp. 377.*]

It is not sufficient, if the particular persons distrained appear at the return of the process. *Bro. Corp. 28.*

Or, if all the members of the corporation appear in person. *Bro. Corp. 28.*

But the corporation must appear by an attorney, appointed under their common seal. *Bro. Corp. 28.*

In pleading, a mayor and commonalty may prescribe, that they and their predecessors, &c. tho' the commonalty have no predecessors. *39 H. 6. 14.*

If a man makes cognizance as bailiff to a corporation, he need not shew how they were incorporated. *R. 3 Lev. 107.*

If a man pleads an act by a corporation, he need not allege a deed; for it shall be intended; as, if he makes cognizance as bailiff to a corporation. *3 Lev. 107. Bro. Corp. 1. 51.*

If he pleads a presentation to a church by a corporation. *Bro. Corp. 24.*

A lease for life, without a deed to make *livery*. *Pl. Com. 149. b.*

A feoffment to them, without a deed to receive *livery*. *2 Cro. 411.*

Entry for a forfeiture. *Cro. Car. 169.*

Acceptance of rent, or of a man to be their tenant. *2 Sand. 305.*

A fine levied or deed inrolled. *1 Leo. 184.*

What things a corporation may do without deed or not, *vide Franchises, (F 11, 12, 13.)*

But if he justifies under a corporation he ought to shew a deed. *Bro. Corp. 54.*

As, an entry by command of dean and chapter. *Bro. Corp. 59.*

#### (2 C 1.) In Actions by and against an Infant.

(2 C 1.) *In an action by an infant. Must sue by guardian or prochein amy.* If an action be commenced by an infant, he must sue by guardian or *prochein amy*, as the court pleases. *Co. Lit. 135. b. F. N. B. 27. H. Adm. 2 Cro. 641. Dy. 56. a. 2 Inst. 261. Semb. Cro. Car. 86. R. Cro. Car. 161. Semb. 1 Sid. 69. Lit. 60. R. Jon. 177.*

And the king may appoint him a general guardian. *F. N. B. 27. L.*

So, he may appoint him two or three to be guardians jointly or severally, or to appoint others under them. *F. N. B. 27. L.*

A *prochein amy* shall be appointed by virtue of the *stat. W. 2. 13 Ed. 1. 15.* which enacts, that if an infant who would sue be assigned that he cannot do so in person, his *prochein amy* may be admitted to sue for him. *2 Cro. 641.* and was appointed before in assise by the *st. W. 1. 48.* And

And this extends to all cases where an infant sues, tho' he be not *esloigned*. 2 *Inst.* 390. 261.

So, he ought to appear to be an infant; for if he sues at full age by guardian or *prochein amy*, it is error. 2 *Inst.* 261. *Semb.* 2 *Cro.* 580. 1 *Bul.* 24.

If an infant sues or defends by a guardian, such guardian must have a warrant. *F. N. B.* 27. *J.* 2 *Inst.* 261. 3 *Mod.* 236.

And therefore such guardian must be admitted by the court. *Cro. Car.* 86.

So, must a *prochein amy*. 2 *Inst.* 261.

But a *prochein amy* need not have a warrant. *F. N. B.* 27. *J.*

[A general admission of *prochein amy*, to prosecute and defend all suits, is sufficient. *Archer v. Frowde*, *P. 6 G. Str.* 304.]

And if he sues by guardian, without saying *per curiam hic specialiter admitt.*, it is error. 1 *Lev.* 224. *Semb.* 4 *Co.* 53. *b.* 3 *Mod.* 236.

And the defendant need not plead, till the plaintiff shews the rule for his admittance by guardian or *prochein amy*. *Sti. Pr. Reg.* 264.

If the court appoints a guardian for an infant, <sup>(the infant)</sup> he ought to be in person in court. 2 *Leo.* 189.

And if he has not a guardian by *foeage*, &c. the court may assign an officer of the court to be guardian or *prochein amy* for him. 2 *Inst.* 261.

If the guardian by *foeage* or by testament acts, no other shall be assigned, unless he misbehaves himself. 1 *Sid.* 424.

But, if the declaration says, *per curiam specialiter admitt.*, it is sufficient, tho' there be no admission on the roll. *R. in B. R. where there are many precedents acc. which make the law in such case.* 4 *Co.* 53. *b.* for it shall not be error, but only a misdemeanor in the agent employed in the cause. *P. 21 Car. 2. Pr. Reg.* 38.

So, in *C. B.* *R.* 1 *Sid.* 173.

And if there was an admission, tho' no entry thereof on the record, it shall be amended. *R. Cro. Car.* 86. *Hut.* 92. 1 *Lev.* 224.

If an infant sues by guardian or *prochein amy*, he cannot afterwards remove his guardian or disavow his *prochein amy*. *F. N. B.* 27 *K.*

But an infant may have a writ out of *Chancery* to remove him. *F. N. B.* 27. *M.*

Or, the court may remove him at their discretion. *Ibid.*

As, in an appeal by an infant, the court may discharge the guardian assigned, and discontinue the suit. *R.* 1 *Rol.* 288. *D.*

And therefore, if an infant sues by attorney, it may be pleaded in abatement.

And this since the *st. 21 Ja. 13.* which aids a suit by him by attorney after a verdict. 2 *Sand.* 213.

So, if an infant sues by attorney, it is error. *R. in exch.* 2 *Cro.* 5. *R.* 1 *Rol.* 287. *l.* 25. *Adm.* 2 *Cro.* 250. *R. Cro. El.* 424.

Tho' judgment be given for the infant.

So, if he sues without saying by whom, which shall be intended in proper person. *R.* 1 *Vent.* 103. *D. Sho.* 165.

So, if he commences a suit by attorney, and afterwards proceeds by guardian. *R. Mo.* 665.

Or,



Or, commences by guardian, and afterwards, during his infancy, proceeds by attorney; for this will be a discontinuance. *R. 2 Cro. 252. Co. Ent. 289.*

So, tho' he sues in another right, as executor or administrator. *R. cont. Cro. El. 541. 1 Rol. 288. l. 10. but a quare is made. 1 Rol. 288. l. 10. Agr. 2 Sand. 212. R. M. 1649. Colt and Sherwood and inter Peyton and Dorce, cited 1 Vent. 103. 1 Mod. 298. And so are the precedents. Lut. 227. 368. 371. R. Carth. 122. D. 1 Vent. 54. Acc. F. g. 1.*

So, tho' he sues a writ of error. *D. 1 Rol. 287. F. N. B. 27. H. 2 Cro. 250.*

But, if an infant sues by guardian, and after his full age proceeds by attorney, it is well. *R. Ma. 665. 2 Cro. 580.*

So, by the *st. 21 Jac. 13.* in ejectment or personal actions, if an infant sues by attorney, it shall be aided after verdict.

And by the *st. 4 & 5 Ann. 16.* after judgment by confession, *nil dicit, non sum informatus*, or after writ of inquiry executed.

So, if several sue jointly, and some are within age, and some of full age, and all appear by attorney, it is no error; for those of full age may make an attorney for all. *R. cont. 2 Cro. 303. Dub. 2 Cro. 289. Semb. cont. 1 Keb. 940.*

As, husband and wife may sue by attorney, tho' the wife is an infant. *D. 2 Sand. 213.*

So, several executors or administrators may sue by attorney, tho' some are within age; for all represent the person of the testator, and sue in another right. *R. Cro. El. 378. 1 Rol. 288. l. 15. R. per three J. Twissd. cont. 2 Sand. 213. 1 Vent. 102. 1 Mod. 296. 1 Lew. 299.*

So, in replevin, if the defendants as bailiffs to *A.* make cognizance by attorney, and one is an infant, it is no error; for they are in the nature of plaintiffs, and make cognizance in another right. *Dub. 3 Mod. 248. R. per three J. Holt cont. Sho. 170.*

So, the defendants avow in their own right, and one is an infant. *Semb. cont. Yel. 58.*

[Plaintiff's attorney must give defendant's notice of guardians place of abode. *Tomlin v. Brookes, P. 22 G. 2. 1 Wils. 246.*]

(2 C 2.) *In an action against an infant. Must defend by guardian.* So, in an action against an infant, he must appear only by guardian, for he has not knowledge of his own affairs, or to chuse a man to plead well for him, and may have an action against his guardian, if he loses, by mispleading. *R. sapius, 2 Rol. 287. l. 10. 20. Dy. 104. b.*

And therefore, if he appears by *prochein amy*, it is bad. *F. N. B. 27. H. R. 2 Cro. 641. Co. Lit. 135. b. Semb. Cro. Car. 86. 161. Hut. 92. R. 2 Rol. 257.*

So, in all actions real, personal, or mixt against an infant, if he appears by attorney, it is error. *D. 8 Co. 58. b. D. 9 Co. 30. b. R. 2 Cro. 10. R. sep. 1 Rol. 287. l. 20. 747. l. 10. R. Cro. El. 569. Mo. 460. R. in error upon a judgment in Ireland. 3 Keb. 384. R. 2 Leo. 189. Adm. Yel. 211. 2 Cro. 254. R. Jon. 432.*

Tho' there was not any warrant of attorney upon record. *R. Jon. 432.*

Tho'

Tho' he be sued in another right, as executor, or administrator. R. 2 Cro. 441. 1 Rol. 287. l. 50. 1 Rol. 380. Poph. 130. Per two J. 3 Bul. 180.

[An infant-executor, tho' joined with another of full age, cannot be sued by attorney, tho' they might sue. *Frescobaldi v. Kinafton, M.* 1 Geo. 2. Str. 783.]

So, if several defendants appear by attorney, and one is an infant, it is error, and the judgment shall be reversed against all. R. 2 Cro. 289. 1 Rol. 776. l. 25. R. 2 Cro. 330. R. Al. 74. R. 1 Lev. 294. R. F. g. 1.

So, if husband and wife being vouched in a common recovery, appear by attorney, and the wife is within age. Dub. 1 Rol. 288. l. 20. 1 Rol. 303. R. 5 Mod. 209.

So, in a personal action, if husband and wife appear by attorney, when the wife is within age. R. 1 Vent. 185. 2 Lev. 38. R. cont. Sh. 13.

So, in replevin, if two avow by attorney, and one is an infant. Dub. Sh. 13. 3 Mod. 248. R. that it shall not be assigned for error; for it was pleadable in abatement. 1 Sal. 93. 205.

And it is sufficient, if he was an infant at the time of the judgment, tho' he arrived at full age before error brought. Per two J. Cro. El. 569. Dub. Cro. El. 853. 5 Mod. 209.

And such error shall be tried by the country, and not by inspection.

[If an attorney undertakes to appear for an infant, and enters it *per attornatum*, it may be amended, and made *per guardianum*. *Stratton v. Burges, M.* 5 G. Str. 114.]

[But if there is not an exprefs undertaking to appear, it cannot be done. *Powver v. Jones, T.* 7 G. Str. 445.]

If an infant, defendant, appears and pleads by guardian, regularly he ought to be admitted such before he appears or pleads. Sti. Pr. Reg. 265.

But if he is not admitted, it is not error, but only a misdemeanor in the attorney. Sti. Pr. Reg. 265.

And regularly the admission ought to be *ad defendendum*; for if the guardian for the defendant is admitted *ad prosequendum*, it is bad. R. 2 Cro. 641.

Yet if a guardian is admitted *ad sequendum*, it is good; for this may be applied indifferently to the plaintiff or defendant. R. in a common recovery. 2 Sand. 95. 1 Sid. 446.

Or, *ad prosequendum*; for he prosecutes his defence. R. 2 Mod. Ca. 25.

[If an infant does not name a guardian to appear by, the court will give leave to plaintiff to do it. *Stone v. Atwell, T.* 10 G. 2. Str. 1076.]

[If infant served with process to appear by attorney, appears by attorney, the court will make rule for him to appear by guardian, or plaintiff to be at liberty to name one to appear and defend. *Barnes,* 418.]

[Plaintiff's attorney should apply to defendant to name guardian, and if he does not in six days, apply to the court to oblige him to do it. *Shipman v. Stevens,* 30 G. 2. 2 Wilf. 50.]

In an action against a defendant, who is an infant, the plaintiff may declare, as against another person; for if he is not chargeable in



in respect of infancy, the defendant shall plead that he is within age. *Vide post.* (2 G 3.—2 W 22.)

And therefore by his declaration he need not alledge that the thing done by him was for necessities; for, after nonage pleaded, the plaintiff may shew in his replication that it was for necessities. R. Jon. 146.

If in an action against an infant, he demurs, he may waive it in the said term, and plead to issue. R. 2 Bul. 69.

[After plaintiff has proceeded to judgment against an infant, as if he was of age, he cannot have the appearance in person struck out, and have appearance by guardian entred. *Barnes*, 413.]

[A plaintiff cannot convert an action founded on a contract into a tort, so as to charge an infant defendant. *Jennings v. Rundall*, B. R. M. 40 Geo. 3. 8 T. R. 335.]

[Therefore where the plaintiff declared that at the defendant's request he had delivered a mare to the defendant to be moderately ridden, and that the defendant maliciously intending, &c. wrongfully and injuriously rode the mare so that she was damaged, &c. it was holden that the defendant might plead his infancy in bar, the action being founded on a contract. *Ibid.*]

(2 D 1.) In Actions by and against an Executor or Administrator.

(2 D 1.) *In an action by an executor.*] What actions he shall have or not, *vide Administration*, (B 13.)

In an action by an executor for a thing which he demands in right of his testator, he ought to name himself executor, otherwise the defendant may plead in abatement. *Vide Abatement*, (E 21.)

And it is not sufficient to name him executor in the *alias dictus*. 20 H. 6. 5.

If there are several executors, all must join in the action. *Reg.* 140. d. b. *Vide Abatement*, (E 13, 14.)

Tho' some do not prove the will, but refuse before the ordinary. R. 9 Co. 37. R. 1 Lev. 161.

Tho' one was within age. R. 2 Sand. 213. 1 Sid. 449.

Tho' the executor, who proves the will, takes administration during the minority of the other executor, who was within age, and not joined in the probate of the will. R. 1 Brownl. 101. Yel. 130. R. cont. 2 Lev. 240.

In all actions by an executor, (as executor,) the writ must be in the *detinet* only, tho' the duty accrued in his own time. R. 5 Co. 31. b. *Reg.* 139. b. F. N. B. 119. M.

As, if an executor brings debt against a lessee for rent incurred after his testator's death. 5 Co. 31. b. R. Cro. Car. 225. R. 1 Lev. 250. *Semb. cont. Skin.* 5.

Or, for an escape on a recovery by himself as executor. R. 5 Co. b. Cro. El. 326. Sav. 130. but *Periam cont.* R. 2 Cro. 546. R. Sho. 57. Carth. 49. Comb. 114. R. Hob. 272.

[So, debt in the *debet and detinet* for an escape in the time of the testator is ill after verdict. *Semb. Ld. Raym.* 698.]

Or, for money due on a sale by him of the goods of the testator. *Reg.* 140. a.

So, in all cases where the money recovered is *assets*, it may be in the *detinet*. R. 1 Lev. 231.

Yet,

Yet, in action upon his own contract, it may be in the *debet* and *detinet*, tho' he is named executor: as, in debt for rent on his own lease of land, which he had as executor. *R. 2 Cro. 685.*

In debt on the *st. Ed. 6.* for not setting out tithes, where he has the rectory as executor. *Cited to be R. 2 Cro. 545.*

And, if the action be in the *debet* and *detinet*, where it should be in the *detinet* only, or *à contra*, it is substance. *R. 2 Cro. 546.*

But now, it is aided after verdict by the *st. 16 & 17 Car. 2. 8. R. 1 Sid. 342. 379. 1 Lev. 251.*

And by the *st. 4 & 5 Ann. 16.* on a general demurrer.

[If executor brings action of debt in the *debet* and *detinet*, instead of *debet* only, it is aided after judgment by confession, by *stat. 4 Ann. c. 16. Lee v. Pilmy, H. 1 G. 2. Ld. Raym. 1513.*]

So, if the plaintiff omits *proferet in cur. litteras testamentarias*, it is bad, on a special demurrer. *Vide ante, (O 3.—O 17.)*

[But where an executor brings an action which will be in his own right, tho' he name himself executor, he need not make proferet of the letters testamentary. *Ld. Raym. 1215.*]

Tho' it be on a *scire facias* upon a judgment by the testator. *R. Sho. 60.*

[In a *scire fieri* inquiry, on judgment recovered by an executor, it is not necessary that it be alleged that the testator is dead. *Morfoot v. Chivers, T. 11 G. 2. Str. 631.*]

But in an action by an executor for an escape out of execution on a judgment by him as executor, he need not; for this is a *tort* to him, tho' the damages recovered are assets. *R. Hob. 38.*

[So, if money belonging to a testator be received by another person after the testator's death, his executor may maintain an action for money had and received in his own right. *2 T. R. 476. Shipman v. Thomson, C. P. T. 11 & 12 G. 2. Willes, 103.*]

[In such an action the defendant cannot set off a debt due to him from the testator. *Ibid.*]

And if the plaintiff names himself executor or administrator, when the suit is in his own right, it will be but surplage. *1 Vent. 119.*

[If the executor of the surviving executor do not shew that the first executors proved the will, it is bad; but it is aided after verdict. *Graddell v. Tyson, M. 13 G. 2. Str. 716. Ld. Raym. 1441.*]

[An executor cannot add a count in his own right. *Hooker v. Quilter, T. 21 G. 2. Str. 1271. 1 Wils. 171.*]

[In *assumpsit* brought by an administrator *de bonis non*, the promise may be laid to have been made to the first administrator. *Hirst v. Smith, B. R. E. 37 Geo. 3. 7 T. R. 182.*]

(2 D 2.) *In an action against an executor.* What actions lie against him, *vide Administration, (B 14, 15.)*

So, in an action against an executor, as executor, he must be named executor. *Vide Abatement, (F 20.)*

Or, must be shewn to be executor; for, if the declaration shews the defendant to be executor, tho' it does not name him executor in the beginning, it is sufficient. *Semb. 1 Sand. 112.*

[In *B. R.* calling defendant executor in the declaration, is sufficient, without a special averment. *Holiday v. Fletcher, M. 1 G. 2. Str. 781. Ld. Raym. 1510.*]

If the defendant be executor *de son tort*, he shall be named executor generally; for there is no other form of writ or count. *R. 5 Co. 31. a.*

If



If an action be against several executors, and only one appears, or is taken, the plaintiff may proceed and have judgment against all. *R. 1 Sal. 312.*

In an action against an executor for a mere personal thing, as executor, the writ shall be in the *detinet* only. *1 Bul. 22. Reg. 139. b.*

So, an action against an executor for rent due, part in the life of the testator, part in his own time, may be in the *detinet* only. *R. Al. 76.*

So, debt for rent in the *debet* and *detinet*, when the rent is more than the value of the land, is bad; for if this appears upon the plea it ought to be in the *detinet* only. *R. Pol. 133.*

But if the duty accrues in the time of the executor, it shall be in the *debet* and *detinet*. *R. 5 Co. 31. Cro. El. 712.*

But judgment was reversed (for another cause as it seems). *Vide Cro. El. 712. Dy. 81. b. in marg. 2 Cro. 546. 4 Co. 31. b. in marg. 1 Bul. 23. R. 2 Cro. 238. 1 Bul. 22. R. 2 Cro. 411. 549. R. Al. 34. R. 1 Mod. 185. Pol. 129.*

Yet it may be in the *detinet* only. *R. Dy. 81. b. in marg. R. Al. 34. 42. Pol. 129.*

So, if the action be against an executor, on a judgment *de bonis propriis*, it shall be in the *debet* and *detinet*. *1 Rol. 603. l. 12.*

So, in debt against an executor, upon a suggestion of a *devastavit*. *R. 1 Sand. 217. 1 Sid. 398. R. 1 Lev. 147. 256.*

The plaintiff cannot have an action in *detinet* for part, and in *debet* and *detinet* for the residue. *R. 3 Lev. 74.*

In an action against an executor, the plaintiff need not allege *assets*, for it shall be intended. *9 Co. 24. a.*

So, if it be against an executor of an heir, on a bond of his ancestor. *R. Dy. 344. b.*

[In debt on bond, the plaintiff must aver, that it is not paid by the testator's heirs, or that it is still due. *Tully v. Sparkes, M. 2 G. 2. Ld. Raym. 1546.*]

[In an action against an administrator, on promises of the intestate, an *in simul computassent* with the administrator, *as such*, of money due from the intestate, does not make him personally liable. *Secar v. Atkinson, C. P. H. 29 Geo. 3. 1 H. Bl. 102.*]

[An executor cannot be charged *as such*, either for money had and received by him, money lent to him, or on an account stated of money due from him *as such*; those charges making him personally liable. *Rose v. Bowler, C. P. H. 29 Geo. 3. 1 H. Bl. 108.*]

[Where a declaration is demurred to on account of the counts being misjoined, the plaintiff cannot enter a *nolle prosequi* as to some, and leave the others remaining. *Ibid.*]

[*Qu.* Can an executor be sued *as such* for a legacy left by the testator? *Ibid.*]

(2 D 3.) *Pleas to an action by an executor.*] If an action be brought by an executor, the defendant may plead in abatement that the plaintiff is not executor. *Vide Abatement, (E 22.)*

Or, another executor not named. *Vide Abatement, (F 13.)*

So, defendant may plead in bar, that she had the goods as wife *pro apparatu*, and there are *assets ultra*.

That *A.* administered before probate, and gave or sold the goods to him. *Dub. Carth. 104.* So,

(2 D 4.) *To an action against the executor. In abatement. Administrator not executor.*] So, if an action is brought against an executor, he may plead in abatement that he is administrator, not executor. 2 Vent. 178. 1 Sal. 296. 1 Leo. 69.

In such plea he must shew that administration was well granted to him.

And therefore, if the archbishop granted it, he must shew in what dioceses the intestate had *bona notabilia*, whereby it may appear that it was in his province. R. Lut. 30. Semb. 2 Leo. 155. Cro. El. (456.)

But this is no plea for an executor of his own wrong, if he afterwards takes administration. R. Cro. El. 102.

So, he shall shew in what diocese the intestate died: Lut. 30. Semb. Pl. Com. 277. a.

And at what time administration was committed. R. 2 Vent. 180.

And that he had *bona notabilia* to such value; for to say that he had generally, is not sufficient. R. 8 Co. 135. a.

So, he shall shew that the archbishop had authority to grant, for that there were *bona notabilia*, &c. 2 Leo. 155.

Or, that the bishop had good authority. Cro. El. 791.

But the defendant need not traverse *absque hoc* that he administered as executor, for this is more proper from the other side. Semb. Hob. 49. Lut. 30. R. inter Bower and Cook in B. R. M. 7 W. 3. 5 Mod. 145. 1 Sal. 297. R. cont. Lut. 890. Semb. cont. Yel. 115. 2 Vent. 180. Cont. 7 H. 6. 13. R. 1 Sal. 298.

Nor, that A. made him executor. Semb. cont. Yel. 115. R. acc. 5 Mod. 145.

Otherwise if he is sued as administrator, and pleads that he is executor to A. and not administrator, he must traverse *absque hoc quod A. obiit intestat.* 9 H. 6. 7. 7 Ed. 4. 13. 3 H. 7. 14. 4 H. 7. 13. a. R. per tot. Cur. Yel. 115. Dub. Dy. 202. a. Semb. Dy. 236. b. 5 Mod. 145.

And in such plea he need not produce the letters of administration. R. upon a special demurrer. Lut. 16. Vide ante, (O 17.)

(2 D 5.) *Administration to a stranger, and not to him.*] So, the defendant may plead that administration was committed to a stranger, and not to him.

(2 D 6.) *Another executor not named.*] So, he may plead another executor not named. [But it must be added that the other has administered. 1 Lev. 161. 3 T. R. 560.] Vide abatement, (F 10.)

But he cannot plead another action against himself as heir. R. 3 Lev. 304.

[So, to an action brought against him as administrator generally, where he is administrator *durante minori etate*, he may plead that in abatement, but he must aver that he continues administrator *durante*, &c. 1 Ld. Raym. 265.]

(2 D 7.) *In bar. Ne unques executor, &c.*] So, to an action against an executor he may plead in bar, *ne unques executor.* Cl. Aff. 74. Win. Ent. 341.



That he renounced, and *nulla bona devenerunt ad manus.*

But an executor, who proves the will, tho' he does not otherwise administer, cannot plead *ne unques executor.* 27 H. 8. 11. a.

So, if there are two executors, and the one proves it in the name of both against the will of the other; yet he cannot plead *ne unques executor, nor administrated as executor.* R. cont. 27 H. 11. a.

So, an executor shall not plead that his testator was outlawed, R. Hut. 53.

If a man is administrator, he cannot safely plead *ne unques executor*, tho' it was antiently done, 5 Mod. 145. R. 1 Sal. 296.

If another be administrator *durante minori etate* of an executor to whom the defendant has accounted, he cannot plead that fact with a traverse that he never administrated *alio modo*; for the plea does not admit him ever chargeable as executor. R. Sav. 121.

To a plea of *ne unques executor*, the plaintiff may reply that the defendant has administrated. Win. Ent. 341.

(2 D 8.) *Non est factum, non assumpsit.*] So, an executor may plead in bar the same bar that his testator might have pleaded; as, *non est factum testator, non assumpsit testator, &c.*

And if he says *non est factum suum*, it is good; for *suum* refers to the testator. R. after verdict. Latch, 125.

So, *non assumpsit* generally is good; for it shall be referred to the testator. R. 1 Lev. 184. 1 Sid. 292.

[An executor having pleaded *non assumpsit*, and a specialty which covered the assets, shall be permitted to withdraw the first plea, on payment of such costs only as were occasioned by that plea. 2 Bl. 1275.]

(2 D 9.) *Plene administravit.*] So, an executor may plead in bar, *plene administravit.* 2 Sand. 220. Bro. V. M. 215.

[And that, in whatever manner he dischargeth himself of the estate that was the testator's. Semb. 1 Mod. 174. Atkins cont.]

[As, where a special verdict found that the defendant being executor, *durante, &c.* had paid such and such debts and legacies, and had delivered over *totum residuum status personalis* of the testator to the infant executor when he came of age. *Id. ibid.*]

But this is no plea, if he is sued in the *debet and detinet.* R. 1 Sid. 334. 1 Mod. 185.

Otherwise, if sued as executor, tho' chargeable otherwise. Dub. 1 Sal. 317.

Or, a special *plene administravit*, viz. a judgment, statute, specialty, or retainer, and no assets *ultra.* 1 Sand. 329. 333. 2 Sand. 49. Co. Ent. 146. a.

A judgment on a simple contract. R. 1 Sid. 333. R. 3 Mod. 115. 1 Lev. 200. R. Vau. 94.

So, a judgment against one only, where there are several executors. Semb. Cro. El. (471.) R. 1 Sid. 404. Cont. Cro. El. 41. but there the judgment was *pendente lite.*

So, a judgment against himself as administrator; for he need not plead in abatement, if it was a just debt. R. 1 Lev. 261. R. Cro. El. 646. R. 1 Sid. 404. Acc. Co. Ent. 149. a.

So, a specialty before the day of payment. R. 3 Lev. 57. Cro. Car. 363. So,

So, a judgment confessed by him to a creditor upon a suit, after the present action commenced. *R. 1 Sid. 21. Vau. 95. R. 1 Sal. 310. 1 Lev. 201. [Com. 87.]*

[But if to a *scire facias* against him on a judgment against the testator, he plead *plene administravit* generally, without shewing how, it will be ill on special demurrer. *Ld. Raym. 3, 4.*]

[So, where the defendant bound himself as administrator to abide by an award to be made touching matters in dispute between his intestate and another, and the arbitrators awarded that he as administrator should pay, &c. he cannot plead *plene administravit* to debt on the bond; for by submitting to the award he has admitted assets. *1 T. R. 691.*]

[He may plead judgments without setting forth the consideration of them. *Williams v. Fowler, M. 7 G. Str. 407.*]

[An erroneous judgment is a good bar, if not fraudulent. *Ibid. Per Eyre J.*]

[If an executor does not plead a judgment against his testator, to the action, he shall not afterwards plead it to the *scire facias*. *Earl v. Hinton, M. 13 G. Str. 732.*]

But an executor *de son tort* shall not plead payment of debts, tho' he may give it in evidence upon *plene administravit*. *Per Holt, Carth. 104.*

[Such an executor cannot discharge himself from an action brought by a creditor, by delivering over the effects to the rightful executor after the action is brought. *3 T. R. 587.*]

If an executor has a term for years of less value than the rent, and he is sued for the rent in the *debet* and *detinet*, he may plead that he has no assets, and the land is of less value, and pray judgment if he shall be charged, excepting the *detinet*. *1 Sal. 297. 317.*

If an executor pleads *plene administravit*, the plaintiff may pray execution of assets *cum acciderint*. *2 Sand. 216. Cont. Cro. Car. 373. Acc. 8 Co. 134. a. Hob. 199. R. 1 Sid. 448. 1 Vent. 94. 1 Lev. 286. 1 Sal. 312.*

If he pleads *plene administravit prater* so much, which exceeds the demand in the declaration, the plaintiff shall take judgment by confession. *R. Yel. 138.*

Or, reply assets or assets *ultra*, &c. *Co. Ent. 148. b. Vide Ent. 176. 1 Sand. 334.*

And he must allege the venue, where the assets are. *R. 3 Lev. 311.*

So, the plaintiff may reply that the statute, &c. is burnt. *Per three J. Vau. cont. 1 Mod. 186.*

That it was performance of covenants which are not broken. *Co. Ent. 147. 152. Win. Ent. 307.*

Or, that the judgment, &c. was obtained or continued by fraud. *Cont. Cro. Bl. (462.) Acc. Lut. 662. Cont. Mo. 705. if it be not traversed. R. Jo. 92. R. 8 Co. 132. b.*

That the statute was extended, and a *liberate* sued and accepted. *R. 3 Lev. 269.*

And he may, by replication, answer to one only, or to every judgment pleaded. *R. 1 Lev. 281. R. 1 Sand. 337. 2 Sand. 50. R. 4 Mod. 64. 1 Sal. 310. [1 Ld. Raym. 263.]*

[But where the defendant as administrator pleaded six judgments against



against him *ultra quæ* he had not assets, and the plaintiff replied that four were obtained by fraud, and that there were assets beyond the other two, and concluded to the country, this was held ill on special demurrer; for by pleading six judgments he confessed assets over five, and the plaintiff by replying assets beyond two, tendred an issue, which would be against the defendant by his own confession; but if plaintiff had concluded by a verification it would only have been surplusage. 1 *Ld. Raym.* 263.]

Or, say that only so much is due on all the judgments, and he has assets *ultra*. *R. 3 Lev.* 311. *Semb. per C. B. M.* 9 *An. Cont.* 3 *Lev.* 368. for the whole is due for which the judgment or penalty was.

Or, that he paid so much on one judgment, and so much on the other, and the judgments are continued by fraud, tho' he speaks of them jointly. *R. 2 Mod.* 36.

Yet, a rejoinder that the judgments are not continued by fraud, is bad; for it ought to say, *that they or any of them*, &c. *R. Cart.* 221. *R. 5 Mod.* 64.

So, the defendant in his rejoinder must not traverse the inducement, but the fraud. *R. Jon.* 92.

That he brought another action which abated, and he sues now by *journeys accompts*, and that the defendant had assets at the time of the first original sued. *R. 2 Rol.* 187.

To which the defendant ought to rejoin *no assets at the day of the first original*, and cannot say *et prædict.* *D. similiter.* *R. 2 Rol.* 186.

If the plaintiff replies that the judgment was by fraud, he may rely upon the fraud generally, or traverse the special matter. *R. 2 Sand.* 50.

[If to an action brought by a creditor to the testator the executor pleads judgments recovered and no assets *ultra*, &c. to which the plaintiff replies *per fraudem* generally; it is not conclusive evidence of fraud that the judgments as pleaded were confessed for more than the just debts; but the defendant may shew that they were entred into by mistake for more than was due, and that circumstance was made known to the plaintiff before the bringing of the action. *Pease v. Naylor*, *B. R.* 33 *Geo.* 3. *M.* 5 *T. R.* 80.]

[Where in a plea by an executor of a former judgment recovered, a less sum by mistake is stated than the judgment was really for, if it clearly appear that a greater sum was recovered, the court will permit the defendant to amend the record, by inserting the real sum in the plea, tho' the application for such amendment be not made till three years after the record has been made up; and they will in such case allow the plaintiff to reply *per fraudem*. *Skutt v. Woodward*, *C. P. E.* 29 *Geo.* 3. 1 *H. Bl.* 238.]

[And the defendant in his rejoinder must traverse the fraud. *Ld. Raym.* 678.]

So, the plaintiff may say, that the judgment was given after the testator's death, and continued by fraud; for such judgment is void. *R. 2 Mod.* 308.

So, the plaintiff may conclude his replication *et sic per fraudem*, or rely on the special fact, which is fraud. *R. Lut.* 1637.

In what order debts are to be paid, *vide Administration*, (C 2.)

If the plea of *plene administravit* is, that the defendant *nulla habet bona*, without more, it is bad.

Or, that *plene administravit*, omitting *et quod nulla habet*, &c. R. 3 Lev. 28.

Or, *nulla habet bona nec habuit, die impetrationis billa*, without saying *nec unquam postea*, it is bad. R. on demurrer. 2 Cro. 132.

So, *nulla bona die exhibitionis billa*, for he should say *die impetrationis*. R. Lut. 1637, 8.

Nor, shall it be aided by a verdict, except where it is expressly found that he had no assets before plea. 2 Cro. 132.

So, if he pleads a judgment against the intestate upon a *scire facias* against himself on the *st. 8 & 9 W. 3. 11.* it will be bad; for the judgment ought to be against the executor or administrator himself, and so it must be pleaded. R. 1 Sal. 42.

But *nulla habet bona, qua fuerunt testatoris tempore mortis sue*, is good; for it shall not be intended that goods are come to him, which the testator had not at his death, and if it be so, it shall be shewn on the other side. R. 2 Cro. 132.

And that he had no goods when he first had notice of the plaintiff's suit, is sufficient. Pl. Com. 279. a. Sho. 184.

If the defendant pleads a judgment, he must shew in what court, and when obtained. R. 1 Mod. 50.

If several judgments, and one is not well pleaded, it will be bad on a general demurrer. 1 Mod. 50.

If an executor or administrator suffers judgment by default; he admits assets. Mod. Ca. 306. R. 1 Sal. 310. [Com. 87.]

So, if he does not plead *plene administravit*. R. 1 Sal. 310.

[If to an action on bond, he plead payment, omitting to plead *plene administravit*, and a verdict be given against him on such plea, it operates as an admission of assets, in an action founded on that judgment suggesting a *devastavit*. 3 T. R. 685.]

Tho' the judgment be against him *pendente lite*; for he should have pleaded it. R. 1 Sal. 310. [Com. 87.]

If he pleads twenty judgments, he admits assets for all. R. 1 S. L. 312.

If he pleads a judgment for 1700 l. for principal and interest, and that he has only 40 l. if the judgment as to interest be bad, the plaintiff shall have judgment; for assets shall be intended for the residue, it not being expressly averred to the contrary. R. 2 Lev. 40.

So, if the defendant pleads no assets *ultra*, &c. it is not well to say, that he has no assets *prater bona quae non attingunt*, or *non sufficien. ad satisfaciendum* the judgment, statutes, &c. pleaded; for no issue can be joined upon such uncertainty. 8 Co. 132. b. R. 9 Co. 109. b. Per 2 G. 2 Cro. 626. Per Vau. 104. R. 1 Lev. 132.

Or, that he has no assets *ultra* what will satisfy. Per Vau. 104. R. 1 Sid. 210.

So, if he says that *nulla habet bona prater bona ad valentiam*, and after says *nulla alia bona habet prater bona quae non sufficiunt*; for this is repugnant. R. 9 Co. 109. b.

But he ought to say that he has not assets, *prater*, so much, (naming the sum certain,) which is liable to the judgment, &c. 1 Sid. 210.

Or, *prater bona sufficien. ad satisfaciendum* the judgments, &c. for this imports



imports that he has sufficient for all the judgments, &c. pleaded. *Per Vau. 103. R. 9 Co. 109. b.*

But then, if the plaintiff replies that one of the judgments was satisfied, and the defendant demurs, it will be against the defendant, for his plea is falsified. *Per Vau. 103. 9 Co. 109. b.*

So, *no assets præter bona ad valentiam denar. solut. ad satisfaciendum the judgments, &c.* is good, tho' one of the judgments be discharged. *Per Vau. 104.*

And, *no assets præter bona non attingen. ad 5 l.* when the judgment was for 100 l. is good on a general demurrer. *Per two J. Hob. 133.*

And *præter bona quæ non attingunt, or non sufficiunt, &c.* is form only. *R. 1 Lev. 132.*

[If he plead *plene administravit præter* a certain sum, and afterwards, to another action brought in the same term, *plene administravit præter* the same sum, and as to that sum, state, that he had confessed it in another action, this is a good bar. *Doug. 452*]

In *plene administravit*, if the defendant alleges a judgment, he need not shew that it was for a just debt. *Per two J. Dod. cont. 2 Cro. 626, R. 1 Lev. 200. Qu. if it is not misprinted. 1 Sid. 333. Lut. 662. R. on a special demurrer. Carth. 8.*

So, if he alleges a statute acknowledged, he need not shew that it was *pro vero et justo debito*; for it may be for performance of covenants. *R. 2 Cro. 835. R. cont. on demurrer. 2 Cro. 102.*

[In an action of debt on bond against an administrator, the defendant pleaded a bond debt due to himself and a retainer, and it was holden unnecessary to aver in such plea that the bond was given for a just and true debt. *Picard v. Brown, B. R. H. 36 Geo. 3. 6 T. R. 550.*]

So, if he alleges a debt due to the king. *R. cont. 2 Cro. 182.*

So, in *plene administravit*, the defendant need not allege that his testator *per scriptum obligat. concessit*; for it is not traversable: and no one shall plead *non est factum* but the party himself, his heir, executor, or administrator. *R. Lut. 662.*

If he pleads several judgments, he may conclude each with an averment, or it may be more properly at the conclusion of the whole. *1 Sal. 312.*

But if the defendant pleads several judgments, and no assets *ultra*, if any judgment be defective, the plaintiff shall have judgment: as, if one of the judgments was against the testator and others, and it does not appear that the testator survived, so that he might be chargeable. *R. 2 Sand. 50. R. 1 Sal. 312.*

If one of the judgments was in an inferior court which does not appear to have jurisdiction. *R. 8 Co. 133. a. R. 3 Lev. 141.*

[If to debt on bond defendant plead, that creditor by simple-contract had obtained judgment against him in the sheriff's court, in debt as upon *concessit solvere*, according to the custom of London; he must add, that administrator is bound to pay it, as if due on obligation; and he must shew that the contract was made within the city, or it will be bad. *Scudamore v. Hearne, H. 12 G. 2. Andr. 340.*]

[A plea of judgment recovered on a simple-contract pleaded to debt on bond, must aver that such recovery was had before notice of the bond debt. *1 T. R. 690.*]

If a recognizance was by the testator and another, and it is not averred that the other was not paid. *R. 9 Co. 110. b.*

If one of the judgments be found fraudulent; for tho' he pleads that he has only *5 l. ultra* all the judgments, this is only form, and not traversable. *R. 1 Sal. 312. R. 1 Brownl. 49.*

If one of the judgments was in debt, where it ought to be in *assumpsit*. *R. 1 Vent. 198.*

And the fairest way is to plead the judgment, and shew how much is due thereon. *R. 1 Sal. 312.*

[Where a bond is forfeited in the life-time of testator, the penalty is the legal debt, and on issue what is due, must cover so much assets; but on a bond where the day of payment is not come, the assets are covered only for the sum in the condition. *Bank of England v. Morice, H. 9 G. 2. Str. 1028. B. R. H. 219. 5 T. R. 309.*]

[To *assumpsit* against an executrix she pleaded that her testator became bound to *A.* in 2800 *l.* conditioned among other things, to indemnify him against another bond for 800 *l.* which *A.* had executed jointly with the testator to *B.*, but for the proper debt of the testator; that the 800 *l.* became due in the testator's life-time, and was still unpaid; that upon the testator's death the indemnity bond became forfeited, and the money therein contained was still unpaid; and that the defendant had administered all, except so much as would satisfy the indemnity bond, and was holden a good plea. *Cox v. Joseph, B. R. T. 33 Geo. 3. 5 T. R. 307.*]

To a special *plene administravit*, if the plaintiff replies that the judgment was obtained, or continued, by fraud, it is sufficient to allege generally that it was by *covin*, without shewing the special matter. *9 Co. 110. a.*

So, it is sufficient to say, it was by *covin* of the executor or administrator only. *R. 9 Co. 110.*

So, it is sufficient to say that the recognizance, &c. was for payment of a less sum or for performance of covenants generally, and that the sum is paid in satisfaction, or no covenant broken, without mentioning the time or manner. *R. 9 Co. 110. a.*

And payment in satisfaction is sufficient, without saying that the consuee was ready to acknowledge satisfaction. *R. 9 Co. 110. a.*

And acceptance in satisfaction is a sufficient ground to say that the recognizance is continued by *covin*. *9 Co. 110. a.*

If the defendant pleads several judgments, the plaintiff may reply to each severally, or to all, or part, or one, at his election. *R. 1 Sal. 298. R. Sho. 289. Skin. 299.*

If he replies to part, continued by fraud, he cannot reply to the others, *assets ultra*; for this is admitted. *R. 1 Sal. 298.*

[If an executor pleads bonds and judgments, and no *assets ultra* the judgments, and the plaintiff replies that the bonds were fraudulent, and that the defendant had *assets ultra* the judgments, and the first issue is found for the defendant, the plaintiff cannot have judgment tho' the assets are found to be *ultra* the judgments pleaded. *C. P. Chambers v. Shaw, E. 10 Ann. Com. 206.*]

If the plaintiff replies, obtained, or continued by *covin*, the defendant may traverse or join issue thereon. *9 Co. 110. a.*

If an executor pleads *plene administravit*, and, after issue *relicta verificatione*



*ficatione* confesses judgment, this is a confession of the debt, but not of assets, *R. 1 Rol. 929. l. 25. Hob. 178.*

If the plaintiff replies after judgment pleaded, that he prays execution *cum assets acciderint*, assets afterwards shall be in the first place applied to the judgments, *R. 1 Sal. 312.*

If the plaintiff on a *plene administravit* does not pray execution, when assets shall happen, but joins issue that there are assets, and it is found against him, the judgments shall be, *quod querens nil capiat*, *1 Rol. 929. l. 20. Cro. Car. 373. Hob. 199.*

If assets are found, tho' to a small value, there shall be judgment for the whole debt. *1 Rol. 929. l. 15.* but the execution shall be only for the assets found. *R. acc. Cro. El. 318.* but the clerks say, that the precedents are otherwise. *Vide Precedents otherwise, Town. Jud. 68. R. acc. Cro. Car. 167, 373. R. 8 Co. 134. Dub. Mo. 246, Cro. El. 592.*

[But now, on a plea of *plene administravit*, the executor shall be liable only to the amount of the assets in his hands. *3 T. R. 688.*]

If there are two executors, and one is outlawed, and the other pleads *plene administravit*, there shall be judgment against both for the debt, but for damages and costs against him only who pleads, *R. 1 Rol. 928. l. 47. 930. l. 5.*

So, if both plead, and it is found that one has, and the other has not assets, there shall be judgment against both. *R. 1 Rol. 929. l. 30.*

Otherwise, if they plead severally by several attornies; for then he, who has not assets, shall be quit, *R. 1 Rol. 929. l. 50.*

[If plaintiff can only have judgment *de bonis testatoris*; *plene administravit* is a good plea in covenant, tho' the breach assigned is for non-payment of rent incurred in their own time. *Lyddall v. Dunlapp, H. 16 G. 2. 1 Wils. 4.*]

[If executor or administrator suffers judgment by default or confession, and an action is brought on that judgment, suggesting *devastavit*, he cannot plead *plene administravit*; and so if he dies, and the action is against his executor or administrator. *Skelton v. Hawling, H. 23 Geo. 2. 1 Wils. 258.*]

[After rule to plead issuably, he may plead judgment confessed on bond since rule. *Barnes, 330.*]

[But after such rule the court will grant further time, that another judgment may be perfected, that he may plead it. *Barnes, 333.*]

(2 D 10.) *In an action by an administrator.*] In an action by administrator, he ought to be named administrator.

[Administrator shall bring an action on an assignment of bail-bond given to him, as administrator, and not in his own name. *Rush v. Rush, P. 6 G. 2. C. B. Fort. 370.*]

If administration be granted to him upon refusal of the executor, who died intestate, it may be omitted. *Reg. 141. a.*

Yet, if it is not omitted, it is not bad. *Dub. Dy. 236. b.*

If there are several administrators, all must be joined. *Reg. 140. a.*

[So, he must shew by whom administration was granted, *2 Cro. 89. R. 1 Sal. 38.*]

And it will not be aided on a general demurrer. *R. 1 Sal. 38.*

And, if it be granted by a peculiar jurisdiction, he must say at least,

least, *cui pertinuit*, &c. or *loci illius ordinari*.; for by such an one *sane*. theolog. professor., or by such an one *decan. abbat*, &c. is not sufficient. 35 H. 6. 46. R. Mo. 367. Cro. El. 431. 791. D. 2 Cro. 556. D. 1 Sid. 228. R. Lut. 408. R. Sho. 355.

Yet, the omission of *cui pertinuit*, &c. shall be aided after verdict. R. 4 Mod. 133. Sho. 355. Skin. 551.

*Et debito modo commissi* imports it. R. upon demurrer. 1 Sal. 40.

But if administration be alleged to be granted by the king, it is sufficient, without more; for his authority is known. R. upon demurrer, Al. 53. 1 Sid. 302.

So, if alleged to be granted by an archbishop or bishop. R. Cro. El. 6. 907. 879. Adm. Cro. El. 791. Semb. cont. Cro. El. (456.) R. 2 Leo. 155. D. 1 Sid. 302. R. Cro. El. 838. R. Lut. 1266.

Or, by an archdeacon; for he is *oculus episcopi*. R. 2 Cro. 556. 1 Sid. 302. R. 1 Lev. 193. R. 2 Rol. 150.

Or, by the official or commissary of a bishop. R. 2 Mod. 65. R. Lut. 9. 1 Sal. 41.

Or, by the vicar-general of a bishop; for this means his chancellor. 1 Leo. 312.

Yet, tho' a general allegation of grant of administration by an archbishop or bishop is sufficient in a declaration, or inducement to a traverse, it is not sufficient in a bar or replication, for that must shew how he has authority. 2 Leo. 155. Cro. El. (456.) 791. 838. *Vide ante*, (2 D 4.)

So, it must appear when administration was granted.

But grant of administration of the goods *quæ fuerunt intestati tempore mortis* is sufficient, without saying it was granted *post mortem*, &c. for the other words import it. R. Cro. El. 907.

So, if an administrator sues in the *debet* and *detinet*, except on his own contract, it will be bad. *Vide ante*, (2 D 1.)

So, if the plaintiff omits *profert litteras administ.* in his declaration, it will be bad on a special demurrer. *Vide ante*, (O 17.)—(2 D 1.)

But default of shewing by whom administration was granted, shall be aided after a verdict, by the *st.* 16 & 17 Car. 2. 8. 1 Sal. 38.

Or, by plea of *non est factum*, or other collateral matter. R. 1 Sal. 38.

An administrator, *durante minori etate* A. the executor must allege that A. is under the age of seventeen years: for under twenty-one is not sufficient. R. 5 Co. 29. a. Cro. El. 602. Agr. 2 Cro. 590. Vau. 93. *Vide Administration* (F).

And if he be administrator during the minority of several, he must allege that all are under seventeen; for an averment that three are, and nothing said of the fourth, is not good. Dub. 5 Co. 9. Dub. after verdict, 1 Sid. 185. R. 2 Jon. 48.

And the defendant may plead that the executor has attained his age of seventeen years. *Per three J.* Cro. Car. 516. 1 Rol. 910. l. 30.

So, an administrator *pendente lite*, or during the absence of A. must shew that A. is absent, &c. R. Mod. Ca. 304. 1 Sal. 42. [Ld. Raym. 1071.]

But an averment that A. is within age generally, is sufficient after verdict. Cro. Car. 240. So,



So, no averment, if the defendant does not take exception to it, but pleads in bar, is good; for thereby he admits the plaintiff to be able to sue him. *R. Lut. 632. Per Ch. J. 2 Rol. 466.*

And the judgment is not void. *R. 1 Rol. 910. 1. 20.*

So, in an action by an administrator *durante minori etate* of *A.* who is no executor, but only entitled to administration, it is sufficient if he alleges that *A.* is under twenty-one years; for in such case the administration does not determine at the age of seventeen years. *R. inter Freahe and Thomas, P. 13 W. 3. Rot. 102. (1 Ld. Raym. 667.) inter Edmonds and Shaler, C. B. Tr. 7. An. Rot. 340. (Com. 159.) Vide Administrator, (B 6.)*

[If administrator or executor has a verdict, judgment shall be arrested; for there should be administration *de bonis non.* *Barnes, 444.*]

(2 D 11.) *In an action against an administrator.*] In an action against an administrator, it must be alleged that administration was granted to the defendant. *R. 2 Vent. 84.*

[Naming defendant administrator in declaration, sufficient averment, without setting out that administration was committed to him. *Barnes, 159, 160.*]

But *debita juris forma concessit* is sufficient, without saying by whom it was granted. *Cont. 2 Cro. 10. R. acc. 2 Jon. 1. R. Lut. 301. R. 1 Sid. 228.*

And in an action against an administrator, if he pleads, original purchased before administration granted, there is no occasion to shew by whom it was granted; for the plaintiff by his action against him admits him to be a legal administrator. *Lut. 9.*

[In an action against the defendant as administrator, it is not necessary for him, in his plea, to set out letters of administration; for the plaintiff, by his declaration, admits him to be a lawful administrator. *Picard v. Brown, B. R. H. 36 Geo. 3. 6 T. R. 550.*]

And if the action be against an administrator during the minority of another, he need not allege that the other is within 17 years, for a stranger cannot know when his authority determines, and if it be determined, the defendant ought to shew it. *R. after verdict, 2 Cro. 590. R. Tel. 128. R. Hob. 251. Per Wind. 1 Sid. 57. R. Vau. 93.*

And therefore he may be charged by a stranger as administrator *durante minori etate*, if he continues in possession after the executor attains 17 years. *Semb. 1 Sid. 57. Vide Administration (F).*

Or, may be charged upon the special matter. *1 Sid. 57.*

(2 D 12.) *Pleas by an administrator. In abatement.*] To an action against an administrator, he may plead in abatement that he is not administrator, but executor. *Vide Abatement, (F 20.)—Vide ante, (2 D 4.)*

If he be sued as administrator generally, who is administrator during the minority of another. *Lut. 20.*

Who administered *circa funeralia tantum, &c.* *37 H. 6. 28. a.*

Another administrator not named. *Vide Abatement, (F 10.)*

If he pleads that he administered in a special matter only, and  
traverses

traverses the administration *modo et forma*, he must shew that he did that which would be an act of administration. *R. 37 H. 6. 28. a.*

That the original is *tested* before the administration granted. *Lut. 8. Vide Abatement, (G 6.)*

(2 D 13.) *In bar.*] So, an administrator may plead in bar *ne unques administrator. Aff. Ent. 286. Cl. Aff. 117. Vide ante, (2 D 7.)*

*Plene administravit* general or special. *Vide ante, (2 D 9.)*

But if he pleads *retainer*, it is not sufficient to say that administration was committed, without saying that it was committed to him. *R. 2 Jon. 23.*

So, it is no plea in bar that he is executor, not administrator. *R. Skin. 365.*

[An administrator trustee in intestate's marriage-settlement, who covenanted to leave by will, or that his executors, &c. should pay 700*l.* to trustees, to pay the interest to his wife for life, then to divide among the children, and if none, as he should direct, may plead *plene administravit*, and give *retainer* in evidence, and plaintiff will be nonsuited, and cannot have judgment of assets *quando acciderint*; for if defendant dies before the widow and the co-trustee, the money will be out of his hands at her death. *Plumer v. Merchant, P. 3 G. 3. 3 B. M. 1380.*]

(2 D 14.) *Pleas to an action by an administrator.*] So, to an action by an administrator the defendant may plead in abatement that there is another co-administrator living not named. *Vide ante, (2 D 2.)—Vide Abatement, (E 14.)*

But he cannot plead that another has the right to the administration. *R. 1 Mod. 231.*

[Yet he may plead that another is executor: but if the property be laid in the intestate, he cannot give in evidence that there is an executor; it should have been pleaded in abatement. Otherwise if the property be laid in the administration. *Per Holt, Ld. Raym. 824.*]

Or, in bar, that administration was never committed to the plaintiff. *Han. Ent. 105. Cl. Aff. 117.*

And this, if it was committed by a bishop or peculiar, when it does not belong to him. *Vide Administrator, (B 5.)*

So, that the intestate at his death resided out of the diocese of the bishop who granted the administration. *1 Sal. 37.*

So, that administration was granted to another. *1 Sal. 38.*

(2 D 15.) *Judgment against an executor or administrator. When de bonis propriis.*] In an action against an executor, or administrator, if the defendant pleads a matter in bar, which lies within his knowledge, and is false, judgment shall be for the debt as well as for damages and costs *de bonis testatoris si, et si non, tunc de bonis propriis*: as, if he pleads *ne unques executor*, and it is found against him. *R. 1 Rol. 930. l. 40. 933. l. 28. Off. Ex. 263. Town. Jud. 57. or ne unques administrator. Town. Jud. 71. 1 Sand. 217.*

If an action be against divers executors, and one pleads *ne unques executor*, and the others *plene administravit*, and it is found against them, there shall be judgment against all *de bonis testatoris si, &c. et si non,*



non, who pleaded *ne unques executor, de bonis propriis*. 1 Rol. 932. l. 52.

[In an action against several executors, if one appear and the others are returned *not found*, the plaintiff may proceed against him that appears, and if he recover, he shall have judgment against all; and all must join in a writ of error. *Ld. Raym.* 870.]

[One executor pleads a good plea, the other a bad one; judgment shall be against one executor only. *Baldwin v. Church*, P. 1 G. Str. 20.]

If an executor pleads *ne unques executor*, and it is found against him, the judgment shall be *de bonis propriis*, tho' he has neither proved the will nor administered. *Off. Ex.* 264.

And tho' he has refused before the ordinary. *Dub. Off. Ex.* 264.

Otherwise, if an action is brought against the executor of B. who was the executor of C. who pleads *B. ne unques executor*. *Qu. 2 Lev.* 133.

Otherwise in a *scire facias* against an executor, if he pleads *ne unques executor*, and it is found against him, the judgment shall not be for the debt *de bonis propriis*, for the plaintiff demands execution *de bonis testatoris*. *R. 1 Rol.* 933. l. 30. *R. Lit.* 53.

So, if an executor or administrator pleads a release to himself, and it is found against him, the judgment shall be for the whole *si non de bonis propriis*. *D. Mo.* 70. *2 Cro.* 672. *Off. Ex.* 265.

Or, payment or performance by himself. *Off. Ex.* 265. *Dub. Mo.* 70.

So, in all cases on the return of a *devastavit* against an executor, or administrator, there shall be judgment against him for the debt as well as damages and costs *de bonis testatoris, si, &c. et si non, de bonis propriis*. *R. 1 Rol.* 932. l. 32. 35. *R. Mo.* 299. *Dy.* 105. b.

Or, upon a return that the goods are *esloined*. 1 Rol. 932. l. 30. *R. 2 Sand.* 403.

And, if there be judgment against husband and wife executrix, and a return that the husband wasted, it shall be *de bonis suis propriis*. 1 Rol. 932. l. 25.

If a return that the wife wasted *dum sola*, it shall be *de bonis propriis* of both. 1 Rol. 931. l. 5. *R. Cro. Car.* 519.

And if the first judgment was *de bonis testatoris, si, &c. et si non, tunc dampna de bonis propriis* against husband and wife executrix, and afterwards a *devastavit* is found, the judgment shall be against them *de bonis propriis*. *R. 1 Rol.* 930. l. 50. *Cro. Car.* 519.

If there be a *devastavit* by one executor only, the judgment shall be of his proper goods. *Dy.* 210. a. *R. Cro. El.* 318.; for the other executor shall not be charged for the wrong of his co-executor.

Yet, if a *devastavit* be charged against two executors, and found *quoad* one, and nothing said *quoad* the other, it is bad. *Semb. Skm.* 571.

So, where an executor or administrator is charged for his own proper act or default, the judgment shall be for the debt and damages *de bonis testatoris, et si non, de bonis propriis*: as, in *detinue* for a detainer after the testator's death. 1 Rol. 928. l. 37.

[In *assumpsit* by legatee against executor in his own right on a special promise in consideration of assets, judgment shall be *de bonis propriis*. *Cowp.* 292.]

In debt, for rent incurred after the death of the testator. 1 Rol. 931. l. 3.

In covenant for a breach after the death of the testator. R. 1 Sand. 112. R. 2 Cro. 648. *Vide post.* (2 D 16.)

If an executor acknowledges satisfaction upon a judgment to the testator, which is afterwards reversed, there shall be restitution, *si non, &c. de bonis propriis.* 2 Rol. 400.

And if the act or default of the executor or administrator is the foundation of the action, the judgment shall be *de bonis propriis* only; as, in *assumpsit* against an executor on his promise upon good consideration to pay the debt of the testator. 1 Rol. 930. l. 15. 9 Co. 93. a. R. 2 Lev. 122. D. 1 Leo. 240. R. Cro. El. 406. Mo. 419. 1 Leo. 94.

In covenant against an executor or administrator, for a breach by him of a covenant in a lease which he has as executor or administrator. R. 1 Sal. 309.

When the judgment is *de bonis propriis*, and upon a *feri facias*, *nulla bona* is returned, the execution shall be by *capias* or *elegit.* Dy. 185. b.

What shall be a *devastavit*, and how found, *vide Administration*, (1 1, 2.)

[If judgment on verdict is signed after testator's death, a second in debt, on that judgment *de bonis testatoris*, whereupon error and judgment affirmed; a third suggesting *devastavit de bonis propriis*, and a fourth on debt on the last, and executor held to bail; all is regular, Barnes, 248.]

(2 D 16.) *When not.*] But in all cases where the action is against an executor or administrator, merely as executor or administrator, the debt shall be recovered only *de bonis testatoris*, and the damages, which are for the delay, *de bonis testatoris, et si non, de bonis propriis.* 1 Rol. 928. l. 35. D. 1 Sal. 309. 1 Brownl. 50.

Tho' the executor or administrator pleads a false plea; as, *plene administravit*, and it is found against him. 1 Rol. 931. l. 27. Off. Ex. 266. Town. Jud. 57.

Or, it is determined against him upon demurrer. Dy. 32. a.

So, if he pleads a judgment, and no assets *ultra*, and it be replied that it was by *covin*, and found against him. R. 1 Rol. 931. l. 40. 1 And. 150.

So, if he pleads *non est factum testatoris.* 1 Rol. 931. l. 35. Semb. Dy. 32. a. in marg. Off. Ex. 266.

Or, a payment after the testator's death. R. 2 Cro. 191.

Or, in *quare impedit* makes title by a false grant to the testator. 1 Rol. 928. l. 45.

Or, pleads in abatement, *another executor not named.* 1 Rol. 931. l. 25.

So, if the breach be by the executor himself; as, if *A.* covenants to pay 50 *l.* if he or his executor sells the land, and the executor sells it. R. 2 Rol. 415.

Tho' the executor might be charged as assignee as well as executor. Semb. 1 Sal. 317.

So, if an executor or administrator is charged in an action, where the



the recovery is wholly in damages. 1 Rol. 928. l. 40. and the costs only shall be *si non*, &c. *de bonis propriis*.

So, in covenant, upon a breach by the testator. R. 1 Rol. 931. l. 45.

So, in covenant against an executor upon the testator's deed, if the breach be alleged in *nonfeasance* by the executor himself, the judgment shall be *de bonis testatoris tantum*; as, for not repairing. R. 1 Rol. 932. l. 5. Dy. 324. b. R. Hob. 188. [Clements v. Walker, H. 8 G. 3. 4 B. M. 2154.]

For not making offer of a presentation. R. 1 Rol. 931. l. 50.

So, in debt upon a bond, for non-performance of covenants. R. 2 Cro. 647. R. Hob. 283.

So, tho' the breach be for a voluntary neglect, or act of the executor; for the charge is founded upon the deed of his testator. R. 2 Cro. 671. Adm. 1 Sand. 112. R. Hut. 35.

In all cases where the plaintiff is delayed, tho' the demand be *de bonis testatoris*; yet the costs or damages given for the delay shall be *de bonis propriis non*, &c. 1 Rol. 928. l. 35.

Tho' the executor or administrator suffers judgment against him by *nihil dicit* or *non sum informatus*. Off. Ex. 268. 1 Rol. 933. l. 5. R. 2 Sand. 107. Ash. Ent. 282.

So, if he confesses the action. 1 Rol. 933. l. 10.

So, if he appears at the return of the summons, and pleads in abatement, and on the *respondeas ouster* suffers judgment by *nil dicit*. R. Cro. Car. 519.

So, if an action be brought against husband and wife, as executrix, or administratrix, the judgment shall be for damages and costs, *si non*, &c. *de bonis propriis* of both. *Ibid*.

But if an executor or administrator makes no delay or default, the costs or damages as well as the debt shall be *de bonis testatoris tantum*; as, if he at the return of the summons acknowledges the action and says that he has not assets, and it is found so. 1 Rol. 933. l. 15.

If at the return of the summons he pleads, that he was always ready, and yet is. *Ibid*. l. 20.

If the judgment be *de bonis testatoris*, *si*, &c. *et si non tunc damna de bonis propriis*, the sheriff may not levy the damages *de bonis testatoris*, if he cannot levy the whole debt also *de bonis testatoris*; for the damages in such case shall be of the goods of the executor. R. 1 Lev. 7.

And if the sheriff does otherwise, his return and all proceedings thereon will be bad. *Ibid*.

#### (2 E 1.) In Actions by and against an Heir.

(2 E 1.) *In an action by an heir.*] In an action by an heir, who sues upon a grant or covenant to his ancestor and his heirs, he must be named heir.

Otherwise, if he sues in his own right, tho' he comes to the right by descent; as, in *detinue* of charters, which he claims as heir. *Th. D. l. 3. c. 6.*

So, he must shew how heir. 1 Sal. 355.

Debt by the heir or successor shall be in the *debet* and *detinet*. 47 Ed. 3. 23. b. (2 E 2.)

(2 E 2.) *In an action against an heir.*] In an action against an heir, the defendant must be named heir. *Vide Abatement, (F 20.)*

But it is sufficient if he is so named in the count, tho' not in the writ. *Reg. 140. a.*

And if it be against the heir of an heir, the plaintiff must shew how heir specially, for against him as heir generally to *A.* if he pleads that he has *riens per descent* from *A.* it shall be found for the defendant. *R. Cro. Car. 151.*

If it be against an heir in *gavelkind*, it shall be against all the sons together. *Bro. R. 195. Bend. pl. 205.*

By the *st. 3 & 4 W. & M. 14.* an action may be brought against the heir and devisee of the land jointly. *Clift. 243.*

[A devisee of all the devisor's lands, &c. in trust to sell and pay all the devisor's debts, &c. cannot be sued under this statute. *Gott v. Atkinson, C. P. H. 18 Geo. 2. Willes, 521. Barnes, 164. S. C.*]

[An action of covenant will lie against an heir on a covenant by which the ancestor bound himself and his heirs. *Dyke v. Swerting, C. P. M. 19 Geo. 2. Willes, 585.*]

[In such an action it is not necessary to allege in the declaration that the heir had lands by descent; if he had none, he must plead it. *Ibid.*]

So, in an action against an heir on a bond, &c. of his ancestor, the plaintiff must shew that the heir was bound.

So, in an action upon an *assumpsit* to pay the debt of his ancestor. *R. 2 Sand. 136. R. cont. 1 Sid. 31.*

And the omission shall not be aided after verdict. *R. 2 Sand. 136. Ray. 128. 1 Vent. 159.*

But it may be amended. *Lut. 508.*

Debt against an heir on the bond of his ancestor shall be in the *debet* and *detinet*. *Pl. Com. 441. a. Dy. 344. b. R. 1 Sid. 342. 2 Leo. 11. R. 1 Lev. 130. R. Jon. 87. Reg. 140. a.*

And if the heir received sufficient out of the land, and died before recovery against him, debt lies against his executor. *Semb. Dy. 344. b.*

And there is no need to shew in a declaration that the heir had assets; for it shall be intended *prima facie*. *Dy. 344. b.*

But in an action against an heir, it is sufficient that he is named heir to him who was last seised.

So, if *A.* tenant for life, remainder to his eldest son in tail, remainder to *A.* in fee, dies, and the eldest son enters and afterwards dies without issue, debt lies against the youngest son, as heir to *A.* without naming his elder brother. *R. Sho. 248. 3 Lev. 286, 287. 3 Mod. 253.*

So, the plaintiff need not shew how the defendant is heir; for it does not lie within his knowledge. *R. 1 Sal. 355.*

So, the omission of *debet* shall be aided after verdict. *Semb. 1 Sid. 342. R. 2 Mod. Ca. 356.*

(2 E 3.) *Pleas by an heir.*] In an action against an heir in the place of his ancestor, if he is within age, he may pray that the *parol* may demur till his full age. *Cl. Ass. 401. Vide Infant, (D 1.)—Vide Assets (A—B).*

So,



So, in debt against heirs in gavelkind, if one be within age. *Aff. Ent. 241. Bro. R. 195.*

Or, against parceners. *3 Co. 13. a.*

But if all are outlawed, and the others are pardoned, but not the infant, the *parol* shall not demur for the nonage of the infant. *R. Mo. 74. Dy. 239. a. Bend. pl. 205.*

And at the full age of the infant there shall be a re-*summons* against all the co-heirs. *Bro. R. 196.*

But the heir cannot plead that the executor or administrator has assets. *Pl. Com. 439. b. R. Dy. 204. b. 1 And. 7.*

Or, that there is an executor or administrator; for the obligee may sue one or the other. *R. 3 Lev. 189. R. Bend. pl. 142.*

Or, that there is another action depending against him as executor. *R. 3 Lev. 303, 4.*

Or, that the plaintiff has recovered part against the executor or administrator. *Semb. 3 Lev. 304.*

The safest way for the heir is to confess the action, and shew the certainty of the assets descended to him. *Pl. Com. 440. a.*

Or, if he has no assets, to plead *riens per discent*. *Lut. 290. Bro. R. 195.*

Or, if he has only a reversion after an estate tail; for he may plead generally, *nothing by descent*. *3 Lev. 287.*

[Or, that he has paid debts to more than the value of the lands descended to him. *R. on demurrer. In C. B. Buckley v. Nightingale, M. 12 G. Str. 665.*]

So, he may plead *nothing but a reversion after an estate for life or years*. *Aff. Ent. 261. Dy. 373. b. Lut. 443.*

Or, except such lands and also a reversion. *Tho. Ent. 208.*

But he cannot plead a recovery of dower by a decree in *Chancery*. *R. 1 Sal. 355.*

So, an heir may plead a release to himself.

Or, a release to the executor or administrator of the obligor. *Co. Lit. 223. a.*

Or, a bond by the executor, or administrator, for the same debt. *R. 1 Mod. 221. 225. Vide post. (2 W 46.)*

Or, retainer for his own debt. *Qu. 2 Ver. 62.*

[To debt by an obligee of his ancestor the heir cannot plead that he has laid out money in repairing the premises and claim to retain on that account. *1 T. R. 454.*]

If the heir confesses assets, he ought also to confess the action. *Semb. Lut. 444.*

If he has a reversion, that the lessee entred and the reversion descended. *Dub. Lut. 444.*

And he cannot pray a delay of execution during the term. *R. 1 Sal. 355.*

(2 E 4.) *Replication.*] To *riens per discent* the plaintiff may reply, *assets descended*. *Aff. Ent. 240. Dy. 344. b. Bro. R. 195.*

Or, a writ purchased by *journeys accompts*, and that he had assets at the purchase of the first writ. *Lut. 290. &c.*

So, if he pleads, *riens per discent præter a reversion after an estate tail*, the plaintiff may say, that assets descended generally; for *præter* is idle, and the plaintiff shall answer to the material part only. *R. 2 Mod. 50.*

So,

So, by the *ft. 3 & 4 W. & M. 14.* the plaintiff may reply that the defendant had assets by descent before the original purchased.

After *riens per discent* pleaded, the plaintiff may pray execution of assets *cum acciderint.* 8 *Co.* 134. a. 2 *Sand.* 226. 1 *Sid.* 448. 1 *Rol.* 57.

Or, if *riens per discent prater*, he may pray execution of assets confessed.

Or, reply that the defendant had assets *ultra.* 2 *Mod. Int.* 222.

And if he replies assets *ultra*, he may waive it, and pray judgment of assets confessed *cum acciderint.* 1 *Rol.* 57.

And now, by the *ft. 3 & 4 W. & M. 14.* that he had assets before the original purchased, or bill filed, and if it be found so, tho' the heir has aliened, the plaintiff shall recover against him to the value of the sale, tho' the alienation made *bonâ fide* shall be in force.

And such replication shall conclude to the country. *Qu. 5 Mod.* 123.

And it need not say, to the value of the debt; for the value is not material. *Semb. Ibid.*

So, the defendant cannot by rejoinder say that he has paid another debt to the value of the assets sold. *Qu. Ibid.*

(2 E 5.) *Judgment against an heir.*] If the heir confesses the action, and shews the certainty of assets, he shall not be charged in person, goods, or other land, except what he had by descent from his ancestor. *Pl. Com.* 440. a. *Town. Jud.* 67. 2 *Rol.* 71. l. 50. 70. l. 35.

If he pleads, *riens prater a reversion*, the plaintiff may take judgment for debt and damages *de reversion. prædict. levand. cum acciderit.* *Dy.* 373. b.

But, if the heir pleads a false plea, which he knows of his own knowledge to be false, there shall be judgment against him generally, and execution of his own proper lands and goods, and against his body, by *capias ad satisfaciendum*, like as for his own proper debt. *Pl. Com.* 440. a. 2 *Rol.* 70. l. 40.

So, if he pleads *riens per discent*, and it is found against him. *Pl. Com.* 440. a. *Dy.* 149. a. 2 *Leo.* 11.

So, if he pleads payment by his ancestor, and it is found against him. *R. per three J. Dobb. cont. Sho.* 78. *Vide infra.*

Or, payment by another bond. *R. Carth.* 93.

Tho' the assets found are small, and not to the value of the debt.

So, if his plea be falsified in part by a jury of *H.*, tho' the trial ought to be by a jury of *H.* and *M.* *Semb.* 2 *Lev.* 178.

So, if the plaintiff shews to the court, that the defendant has received from the death of his ancestor, before the original sued, assets out of the profits of lands which descended, and the defendant does not deny it. *R.* 2 *Rol.* 71. l. 5. *Per Dy.* 344. b.

So, if judgment be against the heir by *nil dicit.* *Pl. Com.* 440. a. *Cont. Dy.* 81. a. but *R. acc. in marg. ibid. R. Mo.* 522. *Cro. El.* 692. *Vide ft. 3 & 4 W. & M. 14. sect. ante-penult. Cont. Jon.* 88. *Acc.* 2 *Rol.* 71. l. 45. 70. l. ult. *Cont. Poph.* 255.

Or, by *non sum informatus.* *Pl. Com.* 440. a. *Cont. Dy.* 81. in marg. *Acc. Dy.* 344. b. *Cont. Jon.* 88. *Acc.* 2 *Rol.* 71. l. 45. 70. l. 50.

Or, by confession. *Pl. Com.* 440. a. if he does not also shew the certainty of the assets. *Dy.* 344. b. *Vide ft. 3 & 4 W. & M. 14. Cont. Jon.* 88. *Acc.* 2 *Rol.* 71. l. 45. 70. l. 45.



So, if judgment be against the heir upon demurrer. *Pl. Com.* 440. *b.* *Per. ft.* 3 & 4 *W. & M.* 14.

Or, by any other means except confession and shewing the certainty of the assets. *Pl. Com.* 440. *a.*

By the *ft.* 3 & 4 *W. & M.* 14. a devisee of land, who is suable with the heir by that statute, shall be liable for a false plea by him pleaded in the same manner as the heir should have been for a false plea, or not confessing the assets descended.

But if there be judgment against the heir upon a false plea, as for his proper debt, it shall be only of a moiety of all his lands. *R. Jon.* 87.

So, in *scire facias* against an heir; for he is charged as *tertenant*. *Cro. Car.* 296. 313.

And the plaintiff shall have his election to take judgment against him, as for his proper debt of the moiety, or to take judgment of all the lands which he has by descent. *R. Jon.* 88. 2 *Rol.* 71. *l. ult.* & *l.* 10. *D. Poph.* 155.

Yet, if he takes judgment for the lands which descended, it will be error, if it does not appear to be by the plaintiff's assent. *R. 2 Rol.* 71. *l.* 20.

Tho' it is found by the jury, who find the issue, or by writ of inquiry, that he has lands by descent. *R. 2 Rol.* 71. *l.* 30.

Yet, in a *scire facias* upon a judgment or recognizance against an heir, if he pleads a false plea, the judgment shall be special against him for assets which descended. *Dy.* 81. *a. in marg.* *R. Jon.* 87. *Carth.* 93. *Vide supra.*

So, in debt against an heir upon a deed of his ancestor, who pleads *non est factum*, and it is found false, the judgment shall be only for assets which descended; for it was not false in his own knowledge. *R. Cro. Car.* 437.

So, in annuity against the heir on his ancestor's grant, who pleads *non est factum*, and it is found against him, the plaintiff may have judgment for assets which descended. *R. 2 Rol.* 71. *l.* 15.

So, by the *ft.* 29 *Car.* 2, 3. (which makes a trust in fee-simple, and also an estate *pur autre vie*, which comes to the heir as a special occupant, assets in the hand of the heir) no heir, who becomes chargeable by that act, shall, by reason of any kind of plea, confession, or *nient dedire*, be chargeable to pay out of his own estate.

So, by the *ft.* 3 & 4 *W. & M.* 14. if the defendant pleads *riens per descent* the day of the original or bill filed, the plaintiff may reply, *assets before the original*; and if it is found for the plaintiff, the jury shall inquire of the value of the lands descended; and thereupon judgment and execution shall be awarded.

(2 E 6.) *Execution.*] Execution shall be against the heir for the whole of the land descended. 3 *Co.* 12. *a.* *Pl. Com.* 441. *a.* *Semb.* *Dy.* 81. *a.* *Jon.* 87. 2 *Rol.* 71. *l.* 50.

And, if land descends to the eldest son, and other land, being of the nature of *Borough English*, descends to the youngest, the whole shall be taken in execution. *Jon.* 88.

So, if land descends as well on the part of the mother as on the part of the father, the whole shall be taken. 3 *Co.* 14. *a.* *Jon.* 88.

So, if land descends to *parceners*, the whole shall be taken.

So,

So, if land of the nature of *gavelkind* descends. *Jon.* 88.

And if execution be sued against one son or daughter only, it may be avoided by *scire facias* or *audita querela*; for all the heirs ought to be contributory. *3 Co.* 13.

If there be an action against an heir by *A.* and afterwards another action by *B.*, who has judgment first, he shall have execution prior to *A.*, tho' he obtained judgment afterwards. *1 Mod.* 253.

If there be an action against an heir, and judgment thereon, the execution shall be of the land in his hands, which descended, tho' he has paid to other creditors to the value of the land in his hands. *Kelw.* 63. *b.*

But if there be judgment against the ancestor, who afterwards aliens part, and dies, and execution be sued against the heir only, it is well; for he shall not have contribution against the alienee. *R.* *3 Co.* 12. *b.*

So, if there be judgment against an heir on *nil dicit*, the plaintiff shall not have a *capias ad satisfaciendum* against him; for it is not his proper debt. *Dy.* 81. *a.* *R. cont. Cro. El.* 692.

So, if the judgment be against him on *non sum informatus*. *Dy.* 81. *a.* *in marg.*

What lands are assets in the hands of the heir, *vide assets (A).*

(2 F 1.) In Actions by and against an Assignee.

(2 F 1.) *In an action by an assignee.*] In an action by an assignee the plaintiff must shew how assignee.

If he sues for rent upon a lease by another, he must shew a legal estate or title to it. *R. Cro. El.* 535.

But if he shews an assignment, it is sufficient; tho' he does not name himself assignee. *R. 2 Cro.* 240. *R. per ibree J. Cro. El.* 823.

So, if an assignment be by husband and wife, where they were seised to them and to the heirs of the husband, it is sufficient to declare as assignee of the husband; for the estate for life of the wife is merged. *R. Cro. Car.* 285. *Jon.* 305.

(2 F 2.) *In an action against an assignee.*] In debt for rent against the devisee of the lessee, the plaintiff must shew an entry by the assent of the executor, or *virtute ligationis*. *Cro. L.* 535.

But it is sufficient to charge the defendant as assignee of *B.*, to whom the lease is made by which he covenants to repair; tho' he be only executor, or administrator, to such assignee. *R. Carth.* 519.

As to proceedings and pleadings in account, *vide Account, (E 1, &c.)*

(2 G) Pleading in *Assumpsit*; what Pleas good.

(2 G 1.) *Non Assumpsit, &c.*

AS to a declaration in *assumpsit*, *vide Action upon the Case upon Assumpsit, (H 2, &c.)*

Pleas in *assumpsit* are, 1st. *non assumpsit*, of which *vide Action upon the Case upon Assumpsit, (H 5.)*

2d. *Non assumpsit infra sex annos*. Of which, and replications thereto, *vide Action upon the Case upon Assumpsit, (H 6, 7.)*

3d. *Another promise with a traverse of the promise in the declaration:*

P p 2

but



but this is a bad plea, for it amounts only to the general issue *non assumpsit*. R. 2 Rol. 350. *Vide ante*, (E 14.)

[Not guilty is bad on demurrer, tho' good after verdict. *Marsham v. Gibbs*, M. 9 G. 2. Str. 1022.]

(2 G 2.) Tender.

So, the defendant may plead matter in excuse or discharge: as, before a general imparlance, he may plead a tender, and always ready. *Lut.* 226. 238. *Clift.* 203.

[To a plea of tender plaintiff replied a demand and refusal before suing out the writ; rejoinder that before suing out the writ he tendered, &c. traversing that at any time after the tender and before suing out the writ the plaintiff requested him to pay, &c. The rejoinder was holden bad on demurrer. *Haldenby v. Tuke*, C. P. M. 21 G. 2 *Willes*, 632.]

[In a plea of tender defendant must say he was always ready to pay; ready from the time of the tender is not sufficient. *Ibid.*]

[A tender of bank notes is good, unless specially objected to on that account, at the time. 3 T. R. 534.]

[If A., B. and C. have a joint demand, and C. a separate demand on D. and D. offer to A. to pay him both the debts, which A. refuses, without objecting to the form of the tender, on account of his being entitled only to the joint demand, D. may plead this tender in bar of an action on the joint demand, and should state it as a tender to A., B. and C. 3 T. R. 683.]

[If the tender is one day after the day of payment in a promissory note, it is not good. *May v. Cooper*, M. 8 G. Fort. 376.]

[After an imparlance had by executor, he shall not plead tender by the testator, and that testator and executor were and are always ready to pay. *Wood v. Ridge*, M. 5 G. 2. Fort. 376.]

[After general imparlance, leave to plead tender may be in the first four days of next term. *Barnes*, 343. 354.]

[On want of time for the post, declaration delivered late, defendant may have leave to plead tender after the four days. *Barnes*, 351. 353. 357. 361, 362.]

[So, if plaintiff amends his declaration, defendant may have leave to plead tender as of last term, or that plaintiff accept his tender of the present. *Barnes*, 359.]

[Tender cannot be pleaded after rule for time. *Barnes*, 337.]

When and how this must be pleaded, *vide post*. (2 W 28.)

So, *non assumpsit* to part, and tender of the residue. *Cl. Aff.* 104. *Clift.* 202.

[Defendant cannot plead *non assumpsit* to all, and a tender as to part. *Dowgall v. Bowman*, M. 11 G. 3. 3 *Wils.* 145. 4 T. R. 194.]

To a tender after imparlance the plaintiff may plead that as an *estoppel*. *Clift.* 203.

Or, he may demur. *Lut.* 227. 239.

[If tender *ante diem exhibitionis billa* is pleaded, plaintiff shall not make up the book with the general memorandum, referring to the first day of term, which was before the tender, but with a special memorandum, according to the fact. *Smith v. Key*, M. 12 G. Str. 638.]

[If

[If tender is pleaded, the *placita* is no evidence, but an original must be produced. *Barnes*, 165.]

## (2 G 3.) Within Age.

Within age. *Lut.* 240.

When and how it must be pleaded, and replications thereto, *vide post.* (2 W 22.)—*ante*, (2 C 2.)

He cannot plead, *within age*, and traverse the promise. *R. Jon.* 146.

## (2 G 4.) Outlawry.

So, to an *indebitatus assumpsit*, where the ground of the action is forfeited by outlawry, it may be pleaded in bar, that the plaintiff is outlawed. *Co. Lit.* 128. b. 3 *Lev.* 29. *Lut.* 1512.

So, in a *quantum meruit*, tho' the demand be not reduced to a certainty. *R. 2 Vent.* 282. *Lut.* 1514.

So, in *assumpsit*, upon a bill of exchange. *R. 3 Lev.* 29.

How it shall be pleaded in *abatement*, *vide Abatement*, (E 2.)

How in bar, *vide post.* (2 W 24.)

If it be pleaded in bar, and the outlawry be reversed before the day for bringing in the record, there shall be only a *respondeas ouster*. *R. Yel.* 36. 2 *Cro.* 484.

Otherwise, if he fails to bring in the record upon the day, when there was no reversal, for then there shall be final judgment. *R. Cro. Car.* 566.

## (2 G 5.) Foreign Attachment.

So, to an *assumpsit* the defendant may plead a recovery by a *foreign attachment* on a plaint entred before the original or bill filed. *Lev. Ent.* 2.

And to an *indebitatus assumpsit* it shall be given in evidence upon *non assumpsit*. *Lut.* 995.

If the plaint was entred before the original filed. *Per Trevor*, 1 *Sal.* 291. *Per Holt*, if there was a condemnation before the original. 1 *Sal.* 280.

[The defendant must shew that plaintiff in foreign attachment swore his debt. *Hatton v. Isenonger*, M. 12 G. *Str.* 641.]

When and how it shall be pleaded, *vide attachment* (H—I).

The plaintiff may reply to it that the debt arose out of the jurisdiction. *Lev. Ent.* 10. *R. 3 Lev.* 23.

Or, may traverse the custom.

Or, demur.

## (2 G 6.) Composition.

So, the defendant may plead a composition with his creditors according to the statute. *Lut.* 266. *Clift.* 156.

And it ought to conclude, as it was a release. *Lut.* 271. for it is in the nature of a defeasance. *Per Holt*, (*Com.* 112.)

And in pleading, it is sufficient to pursue the words of the statute. *R. inter Feltham and Cudworth*, (*Com.* 112.)

And there is no need of a *profert hic in cur.* *R. Mod. Ca.* 58. (*Com.* 112.)



It is sufficient, if it be for the equal benefit of all the creditors, tho' it be not so mentioned in the composition. (*Com.* 112.)

If he shews that he was insolvent; for it shall be intended that he continued so, if the contrary does not appear. *R. Mod. Ca.* 58.

But he must shew that he was insolvent at the beginning of the sessions. *Mod. Ca.* 136.

[But, to an action brought by one of the creditors of a debtor to recover his whole demand, the debtor cannot plead an *agreement* between him and his creditors that they would accept a composition, in satisfaction of their respective debts, to be paid in a reasonable time. 2 *T. R.* 24.]

#### (2 G 7.) Statute against Usury.

So, the defendant may plead that the contract, upon which the action is founded, was usurious.

And if it appears by the declaration that the contract was usurious, tho' it is not pleaded, there shall be judgment against the plaintiff. *Lut.* 273.

But it shall not be intended usurious, if it does not expressly appear. *R. Lut.* 273.

What shall be usury or not, *vide Usury* (A—B).

How it shall be pleaded, *vide post.* (2 W 23.)

#### (2 G 8.) Statute against Gaming.

So, to an *assumpsit* the defendant may plead the *st.* 19 *Car.* 2. 7. that the money promised was won by play, in which the defendant at one meeting lost on tick above 100*l.* 1 *Lut.* 180. *Clift.* 200. 5 *Mod.* 3.

And if he lost at one meeting above 100*l.* to several persons, it is within the statute. *R.* 3 *Keb.* 671. *R. Lut.* 180.

What play or contract is illegal on this statute, *vide Justices of Peace*, (B. 42.)

How it shall be pleaded, *vide post.* (2 W 26.)

#### (2 G 9.) Accord or Arbitrament.

So, to *assumpsit* the defendant may plead, *accord* with satisfaction. *R. Dy.* 75. b.

Or, arbitrament. *Clift. Ent.* 195.

What *accord* shall be good, *vide Accord* (B).

What arbitrament, *vide Arbitrament*, (E 1. &c.)

How an *accord* shall be pleaded, *vide Accord*, (A 1.—C).

How an arbitrament shall be pleaded, *vide Accord*, (D 1, 2.)

#### (2 G 10.) Payment.

So, the defendant may plead payment of money *juncta assumption.* 2 *Bro. Ent.* 6. *R. Sal.* 516.

But this seems to amount to the general issue. *R. Cont. Sal.* 516.

Payment after the last continuance. *Clift.* 202.

*Non assumpsit* to one promise, payment to the other. *Bro. V. M.* 99. 102.

Payment of so much in satisfaction. *Bro. V. M.* 93. 109.

[If

[If a man is indebted on several accounts to the same person, and pays money to him, it shall be on that account which he pleases to declare it to be; but if he gives no direction, the creditor may apply it to which account he pleases. *Goddard v. Cox*, T. 16 G. 2. Str. 1194.]

But a note or bill given in satisfaction, if it be not under seal, is not good. 5 Mod. 136.

[A stated account cannot be pleaded in bar to an action on simple contract. *Roades v. Barnes*, M. 30 G. 2. 1 B. M. 9.]

(2 G 11.) *Insimul computaverunt.*

So, to an *assumpsit*, the defendant may plead that, since the promise made, he and the plaintiff *insimul computaverunt, et super comput. ill. ipse inventus fuit* in arrear, so much, which he has paid. *Bro. V. M.* 94. 100. *Vide Action on the Case upon Assumpsit* (G).

Or, he may tender the arrears found on the account in court. 2 Mod. Int. 144.

But an account without payment or release is no plea to an *indebitatus assumpsit*. *R.* 3 Lev. 238. for a *chose in action* cannot discharge a matter executed.

So, *insimul comput.* and payment amount to the general issue.

[On account stated between merchant and merchant, the balance carries interest from the time it is liquidated. *Blaney v. Hendrick*, P. 11 G. 3. 3 Wils. 205.]

(2 G 12.) Bond for the Money.

So, to an *assumpsit* the defendant may plead a bond given by him for the money demanded. *Cl. Aff.* 117. *Clift.* 199. For the bond determines the contract. *Cro. Car.* 415. 2 *Cro.* 33. 234. *Vide post.* (2 W 46.)

Or, that all the counts are for the same sum, and he has paid part, and given a bond for the residue. *Ray.* 449. 2 *Jon.* 158.

So, he may give it evidence upon *non assumpsit*. *Per Holt*, 5 An.

And if it be pleaded, it is bad; for it amounts to the general issue, *R. Cro. El.* 201. *Semb.* 5 Mod. 314. *Vide ante*, (E. 14.)

(2 G 13.) Discharge from the Promise.

So, the defendant may plead that the plaintiff, before the breach, discharged him from the promise. *Clift.* 199.

When a promise may be discharged or not, *vide Action on the Case upon Assumpsit* (G).

(2 G 14.) A Release.

So, he may plead a release after the promise. *Cl. Aff.* 258.

A release to such a day *absque hoc quod assumpsit post.* *Bro. V. M.* 98.

But a release upon performance of the promise in part *quoad hoc* does not discharge the promise for the residue. *R.* 2 Rol. 413. l. 20. *Vide post.* (2 W 30.)

(2 G 15.) Performance.

So, to an *assumpsit* the defendant may plead a special performance.



If the defendant pleads payment, he must shew in certain what sum he paid. *R. Mar. pl. 120. Vide Dan. 77. Vide ante, (E 5.)*

But a sum given in satisfaction after the day of payment is no good plea. *R. 4 Mod. 250.*

But if the defendant pleads a special performance: as, payment, &c. upon an *indebitatus assumpsit*, it is bad; for this amounts to the general issue only; yet he may plead it, for it admits a promise. *R.*

*1 Sal. 394.*

So, if he pleads that by agreement with the plaintiff he paid to *A.*

*1 Mod. 7.*

That he performed all on his part to be performed. *R. 1 Sal. 394.*

Or, another promise, and traverses the *assumpsit modo et forma*. *R.*

*2 Rol. 350.*

(2 G 16.) Discharge upon Statute for Insolvent Debtors. *Vide Imprisonment, (M 1.)*

So, the defendant may plead in discharge of an execution against his body, &c. a discharge according to the statute for the relief of insolvent debtors. *Sal. 521. Lev. Ent. 65.*

And if the plaintiff demurs to it, he shall have judgment, but no execution against his body; for the demurrer confesses the discharge. *R. 2 Jon. 165.*

So, the plaintiff may take his judgment immediately. *Clift. 156.*

But he shall not be discharged, if the defendant was indebted above the sum of 500*l.* by the *st. 30 Car. 2.* at the time of his discharge; tho' he was not in execution for it 29 *May*, 30 *Car. 2.* *R. 2 Jon. 208.*

So, it is no plea if it does not shew all things done which entitle the justices to jurisdiction. *R. Sal. 521. 3 Lev. 151. Per Holt, Skin. 362.*

[In pleading a judgment of a court of limited jurisdiction it is necessary to state those facts that give the court a jurisdiction, and having stated those, the party may allege generally that the court gave such a judgment. *Ladbroke v. James, C. P. H. 13 Geo. 2. Willes, 199.*]

[The insolvent act 10 *Geo. 2.* gave the court of quarter sessions power to discharge certain persons who had surrendered before a certain time; and it was holden that in pleading a discharge by the court of sessions it was necessary to allege that the party was in prison or had surrendered himself before that time. *Ibid.*]

[Saying that "he was duly discharged by the court of quarter session from his imprisonment aforesaid," is not alone sufficient. *Ibid.*]

[If *A.* indebted to *B.* by simple contract, becomes a fugitive; insolvent act passes; *A.* returns, and five months after is arrested for this debt, lies five months in prison, and then gives bond for the debt, and afterwards surrenders, and is discharged by the insolvent act, he shall not plead it against the bond; for he ought to have surrendered in reasonable time before he was arrested, or when arrested, have brought *hab. cor.* and been surrendered. *R. on demurrer. Knight v. Preston, P. 7 G. 3. 2 Wilf. 332.*]

[A pro-

[A promise to waive the benefit of an act for insolvent debtors, and pay the debt on request, will revive a debt barred by that act; but the request must be made before the action brought. 2 Bl. 724.]

(2 G 17.) Statutes of Set-off.

[It is enacted by the *stat. 2 Geo. 2. c. 22. s. 13.* "that where there are mutual debts between the plaintiff and defendant, or if either party sue or be sued as executor or administrator, where there are mutual debts between the testator or intestate and either party, one debt may be set against the other, and such matter may be given in evidence upon the general issue, or pleaded in bar, as the nature of the case may require, so as at the time of his pleading the general issue, where any such debt of the plaintiff, his testator or intestate, is intended to be insisted on in evidence, notice shall be given of the particular sum or debt so intended to be insisted on, and upon what account it became due, or otherwise such matter shall not be allowed in evidence upon such general issue."]

[It is enacted by *stat. 5 Geo. 2. c. 30. s. 28.* (an act to prevent the committing of frauds by bankrupts,) "that where it shall appear to the commissioners, or the major part of them, that there hath been mutual credit given by the bankrupt and any other person, or mutual debts between the bankrupt and any other person, at any time before such person became bankrupt, the said commissioners, or the major part of them, or the assignees of such bankrupt's estate, shall state the account between them, and one debt may be set against another; and what shall appear to be due on either side on the balance of such account, and on setting such debts against one another, and no more, shall be claimed or paid on either side respectively."]

[And debts deemed in law of a different nature may be set against each other, "unless in cases where either of the said debts shall accrue by reason of a penalty contained in any bond or specialty; and in all cases where either the debt for which the action hath been or shall be brought, or the debt intended to be set against the same hath accrued, or shall accrue, by reason of any such penalty, the debt intended to be set off shall be pleaded in bar, in which plea shall be shewn how much is truly and justly due on either side; and in case the plaintiff shall recover in any such action or suit, judgment shall be entered for no more than shall appear to be truly and justly due to the plaintiff, after one debt being set against the other as aforesaid." *Stat. 8 Geo. 2. c. 24. s. 5.*]

[Debts to be set off must be such as an *indebitatus assumpsit* will lie for; an unliquidated demand, or uncertain damages, cannot be set off. *Howlet v. Strickland, B. R. E. 14 Geo. 3. Cowp. 56.*]

[The statutes of set-off extend to assignees under a commission of bankruptcy. *Ridout v. Brough, B. R. T. 14 Geo. 3. Cowp. 133.*]

[The statute of limitations may be replied to a plea of set-off. *Remington v. Stevens, B. R. T. 21 Geo. 2. 2 Str. 1271.*]

[A broker under a *del credur* commission may set off under the general issue, a loss upon a policy happening before a bankruptcy, to an action by the assignees of the bankrupt, for premiums upon various policies underwritten by him, and for which he had debited the broker; but such a loss cannot be proved under notice of set-off. *Grove v. Dubois,*



*v. Dubois, B. R. H. 26 Geo. 3. 1 T. R. 112. Bize v. Dickason, B. R. T. 26 Geo. 3. 1 T. R. 285.]*

[If two persons agree to perform certain work in a limited time, or to pay a stipulated weekly sum for such time afterwards as it should remain unfinished, and a bond is prepared in the name of both, but is executed by one only, with condition for the due performance of the work, or the payment of the weekly sum, and the work is not finished in the time: such weekly payments are not by way of penalty, but in the nature of liquidated damages, and may be set off by the obligee in an action brought against him for work and labour by the obligor who executed. *Fletcher v. Dyche, B. R. T. 27 Geo. 3. 2 T. R. 32.*]

[Mutual credit may be constituted tho' the parties do not mean particularly to trust each other; as, if a bill of exchange accepted by A. get into the hands of B., and B. buy goods of A., there is mutual credit between A. and B., tho' A. is ignorant that the bill is in B.'s hands. *Hankey v. Smith, B. R. E. 29 G. 3. 3 T. R. 507.*]

[A plea of set-off, that the plaintiff was indebted to the defendant at the time of the plea pleaded, is bad; it should state that he was indebted at the commencement of the action. *Evans v. Proffer, B. R. E. 29 Geo. 3. 3 T. R. 186. Reynolds v. Burling, B. R. M. 25 Geo. 3. Dougl. 112. n. 47. contra.*]

[It is no objection to a plea of set-off that the defendant has brought an action against the plaintiff for the same sum in which the plaintiff has paid the amount of the demand into court. *Ibid.*]

[In an action for a creditor's share under an order of commissioners of bankrupt for a dividend, the assignees cannot set off a debt due from the plaintiff. *Brown v. Bullen, B. R. E. 20 Geo. 3. Dougl. 407.*]

[Where the defendant lent his acceptance to the bankrupts on a bill which did not become due till after the act of bankruptcy, and was then outstanding in the hands of third persons, yet the defendant having paid the amount after the commission issued, and before the action brought by the assignees, is entitled to set off the same. *Smith v. Hodson, B. R. H. 31 Geo. 3. 4 T. R. 211.*]

[A debt due to a defendant as a surviving partner, may be set off against a demand on him in his own right. *Slipper v. Stidstone, B. R. H. 34 Geo. 3. 5 T. R. 493. French v. Andrade, B. R. H. 36 Geo. 3. 6 T. R. 582.*]

[The court will permit defendants to set off a judgment, recovered by him against the plaintiff, against a judgment obtained by the plaintiff against him, notwithstanding the plaintiff may also have a separate demand on one of the defendants. *Glaister v. Hewer, B. R. M. 39 Geo. 3. 8 T. R. 69.*]

[Under the *stat. 8 Geo. 2.* no debt on bond can be set off, unless it be on a bond for the securing the payment of money. *Hutchinson v. Sturges, C. P. T. 14 & 15 Geo. 2. Willes, 261.*]

[A bail-bond cannot be set off. *Ibid.*]

[Nor, can such a bond (given to an officer of the palace court) be set off under the *stat. 2 Geo. 2.* to an action brought against that officer on simple contract. *Ibid.*]

[But a bail-bond assigned over by the sheriff to the party may be set off to an action brought by that party; *Semb.* tho' in such case the

the penalty of the bond will be considered as the debt. *C. P. T. 14 & 15 Geo. 2. Willes, 261.*

[*A.* brings an action against *B.*, the expences of defending which are borne by *C.* and *D.*, but *A.* is nonsuited; afterwards *C.* brings an action against *A.* in which *D.* is interested as well as *C.*, and *C.* is nonsuited; the costs of the one nonsuit may be set against those of the other. *O'Connor v. Murphy, C. P. T. 31 Geo. 3. 1 H. Bl. 657.*]

[If *A.* recover against *C.* and *C.* recover against *A.* and *B.*, the court will permit *C.* on motion to set off the damages which he has recovered against those obtained by *A.*, on his undertaking that the bill of *A.*'s attorney in the first action shall be satisfied; he having a lien on the judgment for his costs. *Mitchell v. Oldfield, B. R. H. 31 Geo. 3. 4 T. R. 123.*]

[And this does not defend on the statutes of set-off, but on the general jurisdiction of the court over the suitors in it; it is an equitable part of their jurisdiction, and has been frequently exercised. By *Ld. Kenyon C. J. Ibid.*]

## (2 H) Pleading in an Action for a Deceit.

**A**S to the original and declaration in an action for deceit, or in an action upon the case in the nature of deceit, *vide Action upon the Case for Deceit, (F 1, &c.)*

To this action the defendant generally shall plead *not guilty*. *Pal. 393.*

And he may plead *not guilty* to an action for deceit in levying a fine in *C. B.* of land in *ancient demesne*, whereby it becomes frankfee, tho' matter of record is mixt with matter of fact. *R. Tr. 10 An. in C. B.*

## (2 I) Pleading in Trover.

**A**S to a declaration in trover, *vide Action upon the Case upon Trover, (G 1, &c.)*

The defendant can plead nothing but *not guilty*, or a release. *Vide ibidem.*

*Not guilty infra sex annos. Lut. 99.*

## (2 K) Pleading in Conspiracy.

(2 K) *In conspiracy.* **A**S to the original and declaration in conspiracy, or action upon the case in the nature of a conspiracy, *vide Action upon the Case for Conspiracy, (C 1, &c.)*

To this action the defendant shall generally plead *not guilty*.

Antiently it was usual for the defendants to plead a justification specially, shewing the grounds of the prosecution, *3 Bul. 284. 2 Cro. 193.*

But it is not so safe, because it is *tantamount* to the general issue. *R.* that such special matter may be pleaded, for it is not safe to send it to *Lay Gens.* *20 H. 7. 11. b. R. 2 Cro. 131.*



## (2 L) Pleading in an Action for Defamation.

## (2 L 1.) Declaration.

AS to declaration in *scandalum magnatum*, vide *Action on the Case for Defamation*, (B 3.)

For slander of title, vide *Action on the Case for Defamation*, (C 1, &c.)

As to a declaration for slander against a common person, vide *Action upon the Case for Defamation*, (G 1, &c.)

## (2 L 2.) Plea.

(2 L 2.) *Not guilty*.] To an action for defamation the defendant shall plead *not guilty*. *Lut.* 1291.

Or, may make a special justification.

The defendant shall plead *not guilty*, if he did not speak the words in the declaration.

Or, spoke them in a course of justice, or in a manner not malicious. *2 Cro.* 91. *Poph.* 69.

[On not guilty pleaded, the truth of the words shall not be allowed to be given in evidence, in mitigation of damages; it shall be pleaded, that plaintiff may be prepared to defend himself. *This was resolved on at a meeting of all the judges. Per Lee C. J. Underwood v. Parks, M.* 17 G. 2. *Str.* 1200.]

[Where the words amount to treason or felony, defendant cannot on general issue prove the truth in mitigation. *Barnes*, 195. *Pr. Reg.* 383. (*Com.* 551.) *Willes, Rep.* 20. S. C.]

So, the defendant may plead the statute of limitations.

*Within age. Cont.* if he was seventeen. *Noy*, 129.

So, he may plead that the plaintiff did not take the oath mentioned in the declaration. *Semb. Cro. El.* 169.

(2 L 3.) *In justification. When allowed*.] But if the defendant can justify the truth of the words, he shall not plead *not guilty*, but must plead a special justification: but this admits the words, and aids uncertainty in alleging them. *Jon.* 307.

[And there may be an implied justification of a libel or of slander from the occasion, (as if read in a judicial proceeding,) as well as on account of the subject. *1 T. R.* 110.]

So, if he can confess the words, and by special matter shew them not actionable, he shall not be put to the general issue. *4 Co.* 14. a. *Poph.* 67.

And therefore, if the words were spoken in another sense, the defendant may plead it specially. *R.* 4 *Cro.* 14. a.

So, if spoken in a court of justice as counsel. *R.* 2 *Cro.* 90.

The defendant may justify words in *scandalum magnatum*, as well as in an action by a common person. *R.* 4 *Co.* 13, 14. *Kelw.* 26. *R.* *Poph.* 66.

But it is no justification for the speaking, that there was a common fame that the plaintiff was guilty. *Dan.* 163.

That

That he was a bankrupt, without averment that he continued so. *R. 2 Cro. 579.*

(2 L 4.) *Replication to it.*] To the justification, the plaintiff by replication shall say generally *de injuriâ suâ propriâ*, &c. 1 *Sand. 244.*

Or, he may say, that after the crime of which he was accused, and before speaking, he was pardoned. *Dan. 163. R. Mod. 863. 872.*

(2 L 5.) *How justification shall be pleaded.*] The justification is not good, if the defendant does not confess the speaking of the words alleged; as, if the declaration is for saying *you stole my cloth and half a yard of velvet*; justification, that the plaintiff being a taylor, had velvet delivered him to make a coat, which he made too little, *ratione cujus* he said, *you stole part of my velvet*, is not good; for it does not confess any words; tho' it traverses the words alleged. *R. Cro. El. 239.*

So, if the declaration alleges an accusation of returning on a commission the examination of divers not sworn, it is no justification that he returned one. *R. Cro. El. 623.*

If the declaration be for saying, *you are a thief, and stole 20 l.*, it is no justification that he stole a hen. *R. 2 Cro. 676.*

If the justification be upon a presentment at a leet, he must shew the matter to be within the jurisdiction. *R. Cro. El. 492.*

And that the plaintiff knew the presentment false. *R. Cro. El. 492.*

So, the justification is not good, if the words with the circumstances by which he justifies are actionable. *R. 1 Brownl. 5.*

If the defendant says that the plaintiff was found guilty of perjury by verdict, &c. if he does not shew judgment thereon. *R. 1 Brownl. 11.*

[A justification of libellous words generally, in the words of the libel, where the libel is general, is not sufficient; therefore, where the libel consisted in printing that the plaintiff was a swindler, the justification must state the particular instances of fraud by which the defendant means to support it. 1 *T. R. 748.*]

(2 L 6.) *What shall be a good justification.*] If the words accuse of felony, the defendant in justification may say *quod furatus fuit*, &c. 1 *Sand. 243, 4.*

If of perjury, that the defendant was perjured in his answer in *Chancery*. *Gliff. 103.*

Or, when he was a witness at *nisi prius* or sessions of the peace.

Or, when examined upon interrogatories in *Chancery*.

That he falsely swore a debt upon a foreign attachment. *R. Bendl. pl. 216. 1 And. 12.*

That being sheriff, he sold the office of under-sheriff, contrary to his oath. *Bro. R. 97.*

That being upon a jury in a leet, the plaintiff revealed secrets contrary to his oath. *Bro. V. M. 119.*

So, if there is a general pardon, a justification for words, which accuse



accuse of treason, will be good, if the plaintiff does not plead it; for he may be within the exceptions. *R. Ray. 23.*

So, if the defendant justifies, and a verdict be thereon found for the plaintiff, he shall not have judgment, if the words are not actionable. *R. 2 Lev. 51.*

(2 L 7.) *What not.*] But the defendant to an action for defamation cannot plead that the plaintiff *non fuit damnificatus modo et forma.* *R. Dy. 26. b.*

So, it is no plea that the plaintiff was not of good fame *prout. Dan. 172.*

That there was a common fame that the plaintiff was guilty.

[It is no justification to plead that such a one told the slander to the defendant. *Davis v. Lewis, B. R. M. 37 Geo. 3. 7 T. R. 17. Ld. Northampton's Case, 12 Rep. 133.*]

[But if the person repeating the slander at the same time mention the name of the person from whom he heard it; that may be pleaded in justification to an action brought against the former. *Ibid.*]

#### (2 M) Pleading in an Action for a Disturbance.

**A**S to the declaration and pleas in an action on the case for disturbance, *vide Action on the Case for a Disturbance, (B 1, 2.)*

#### (2 N) Pleading in an Action for a Nuisance.

**A**S to the declaration in an action on the case for a nuisance, and pleas thereto, *vide Action on the Case for a Nuisance, (E 1, 2.)*

As to proceedings in a *quod permittat*, *vide Action on the Case for a Nuisance, (D—E, &c.)*

#### (2 O) Pleading in an Action for a Mifeasance.

**T**HE declaration in an action for mifeasance in an officer must shew, that the defendant was an officer, that it was his duty to do, and that he acted contrary to his duty.

As, if it be for a false return of a writ for an election to parliament, he must shew that such writ issued and was delivered to the defendant, being sheriff, who proceeded to the election *secundum exigent. brevis*, and that the plaintiff *fuit debito modo elect.*, but the defendant returned another, elected. *P. 2 An. Hale v. Owen. (Com. 132. 1 Ld. Raym. 904.)*

But, if the declaration shews the mifeasance, it is sufficient, tho' it omits several circumstances not material: as, if the action be for tearing the seal from a deed, whereby an annuity or rent was granted, tho' it does not say that it was the seal of the grantor, or what seal, or that thereby he lost his annuity, or the deed was void, or whether it was an annuity or rent charge. *R. 2 Cro. 255.]*

[In an action on the case for maliciously holding to bail; the plaintiff in his declaration must shew that there is an end to that suit in which he was held to bail. By *Buller J. Morgan v. Hughes, B. R. H. 28 Geo. 3. 2 T. R. 232.*]

To

To an action upon the case for a misfeasance the defendant shall plead *not guilty*. *Cro. El.* 569.  
Or, *not guilty infra fess annos*. *Lut.* 99.

(2 P) Pleading in an Action for Negligence.

(2 P 1.) In his Office, &c.

**I**N an action against a sheriff, &c. for an escape, the plaintiff must shew a judgment against him who escaped. *R. 1 Lev.* 191.

And ought to say directly that he recovered, and not *quod cum recuperasset*. *Semb. 1 Sid.* 306.

If an escape be out of the counter upon a plaint before one sheriff of London, the action shall be against the two sheriffs. *R. Carth.* 145.

But, in an action for an escape, the plaintiff need not shew how the debt in the original action became due. *Lut.* 110. *Vide ante*, (E 18.)

Nor the original, and all the proceedings thereon; for it is sufficient to begin *quod cum recuperasset*, &c. *R. Cro. El.* 877.

Nor shew the original, &c. tho' the escape was of one outlawed by *mesne* process; for it is sufficient to say, *quod cum implacitasset*, &c. *Lut.* 111.

Nor shew that he did not find bail, tho' the precept in the counter be *nisi interim inveniat manucaptos*; for it will come from the other side, if he found them. *R. Sho.* 162.

Nor say that the debt was not satisfied; for it shall not be supposed. *R. 1 Rol.* 47.

To this the defendant shall generally plead, *not guilty*.

But if the action be for not returning a writ, &c. the defendant may plead *quod pertinuit ad alium*.

So, in an action for an escape, the defendant may plead *non permit ire ad largum*. 5 *Co.* 89. a. 10 *Ed.* 4: 10. b.

Or, *nul tiel record*. *R. Hob.* 209.

So, *quod non arrestavit*. *Asb. Ent.* 14.

*Quod recenter infecutus fuit*. 3 *Co.* 52. *Vide Ent.* 195. 198.

[And a voluntary return of a prisoner, after an escape, before action brought, is equal to a retaking on a fresh pursuit. 2 *T. R.* 126.]

And by the *stat. 8 & 9 W.* 3. 27. it shall not be allowed in evidence, without plea.

By the same statute, plea of fresh suit shall not be allowed without an affidavit that the escape was without consent.

That he was rescued after an arrest upon *mesne* process. *Lut.* 130. *R.* 3 *Lev.* 46. *R.* 2 *Lev.* 144. *R.* 2 *Cro.* 419. *R. contr. Cro. El.* 868. *R. acc.* 16 *Ed.* 4. 3. *Vide infra*.

A *rescous* may be pleaded, without saying that he returned the *rescous*. *R.* 3 *Lev.* 46. 2 *Lev.* 144.

[Under a count for a voluntary escape, the plaintiff may give evidence of a negligent escape. 2 *T. R.* 126.]

If an action be for a voluntary escape, he may take by protestation, that it was not voluntary, and plead *recent. infecut*. *R. 1 Vent.* 217.

There is no need to traverse that the escape was voluntary. *R. Latch.* 201. [2 *T. R.* 126.]



But the defendant cannot say that the party afterwards appeared at the return of the writ. *Lut.* 72, 73.

So, the defendant cannot plead a *rescous* to an escape upon a judicial process. *R.* 3 *Lev.* 46. *R.* *Mo.* 852.

Nor, upon *mesne* process. *Mo.* 852. *Vide supra.*

Tho' the arrest be upon a *latitat*, whereon the cause of action does not appear. *Mo.* 852.

But he shall not plead, in an action for not keeping a ferry where he ought, that he erected a bridge there. *Semb.* 1 *Sal.* 12. *Vide post.* (2 S 2.)

(2 P 2.) In keeping a Dog, &c.

A declaration for a neglect in keeping his dog, horse, cattle, &c. must say that the defendant was *sciens* of the mischievous quality. *Vide Action on the Case for Negligence*, (A 5.)

So, if *sciens*, or *scienter* is omitted, it will be bad after verdict. *R.* *Sal.* 662.

But, *quod habuit suam ad mordendum animalia consuet.* will be well after verdict; for it shall be intended to have been proved that they were animals of which the defendant had notice, and the biting of which was a damage and loss to the plaintiff. *R.* *Sal.* 662.

To such action the defendant shall plead *not guilty*.

Or, that the dog made an assault upon his dog.

So, to every action on the case for misfeasance or non-feasance, the defendant shall plead *not guilty*.

But in action on the case for non-feasance, it was resolved, that the defendant shall not plead *not guilty*, tho' in an action for misfeasance he may; for *not guilty* to non-feasance are two negatives, which do not make an issue. *Cro. El.* 569.

But, it is no plea that he made the thing more beneficial for the plaintiff; for this being a voluntary act, it does not excuse him for the neglect of his duty: as, in an action upon the case for not keeping a ferry, it is no plea, that he erected a bridge, which was more commodious. *R.* *Sho.* 257.

(2 P 3.) In keeping Fire.

A declaration in an action, founded on the custom of the realm, for not taking care of his fire, must shew the custom of the realm, and the damage by the defendant's neglect. *Asb. Ent.* 23. 56. *Vide Action upon the Case*, (B 2, 3.)—*For Negligence*, (A 6.)

And therefore, if it enlarges to foreign matter, it is bad. *Lut.* 90.

But, it need not say, *time whereof*, &c. for *secundum legem et consuetudinem regni*, is sufficient. *R.* 2 *H.* 4. 18. b. *Vide Action on the Case for Negligence*, (A 6.)

And it is sufficient, if it says, *ne dampnum alicui eveniat*, tho' it is not, *alicui vicino*. 2 *H.* 4. 18. *R.* 3 *Lev.* 359.

So, if it says, *ignem suam*, tho' he has no property in the fire. 2 *H.* 4. 18. a.

To this action the defendant may plead *not guilty*.

So, he may plead *quod ignotus combussit messuagium per quod*, and traverse the neglect in keeping his fire. 1 *Bro. Ent.* 29.

By the *st.* 6 *An.* 31. if an action be brought against any, in whose house

house or chamber any fire accidentally began, or for any thing done by virtue of that act, the defendant may plead the general issue, and give in evidence the said act; and if the plaintiff be nonsuit, discontinue, or have a verdict against him, he shall pay treble costs.

(2 Q) Pleading in an Action against a common Innkeeper.

**A**S to the declaration against a common innkeeper for the negligent keeping of the goods of his guest, *vide Action upon the Case for Negligence*, (B 1.)

To this action the defendant shall plead, *not guilty*.

Tho' he has matter of excuse: as, that his inn was full, &c.  
1 *And*. 29.

(2 R) Pleading in an Action against a common Carrier.

**A**S to the declaration in an action against a common carrier and pleas thereto, *vide Action on the Case for Negligence*, (C 2, 3.)

(2 S) Proceeding in Actions upon several Statutes.

**W**HEN an action lies upon a statute or not, *vide Action upon Statute* (A 1.—B).

How it shall be sued by *qui tam*, &c. or the party grieved, *vide Action upon Statute* (E—F).

When the statute shall be recited or not, and how, *vide Action upon Statute* (G—H—I).

(2 S 1.) Upon the Statute of *Winton* 13 Ed. 1. of *Hue and Cry*.

If an action be commenced upon the statute of hue and cry, 13 Ed. 1. the plaintiff must take out his original. *Vide Hundred*, (C 1, &c.)

And the suit in B. R., as well as in C. B., must be commenced by original; for the inhabitants of a hundred cannot be in the custody of the marshal. R. 3 *Keb*. 126. *Vide* 2 *Sand*. 375. 4 *Mod*. 296.

And the original usually recites the statute. *Th. Br*. 141. 1 *Bro. Ept*. 99, 2 *Sand*. 374. 4 *Mod*. 296.

The original shall be tested forty days (in *Leonard* it is by mistake said, *half a year*) after the robbery, otherwise it is error. R. 2 *Leo*. 12. *Vide post*. (2 S 4.)

[Because the hundred is not liable, if the robber be taken *within* 40 days after the robbery was committed. *Doug*. 704.]

And within a year after the robbery. R. 1 *Brotonl*. 156.

[And the day on which the robbery was committed is to be included in the year. *Doug*. 465.]

But, if the day of the robbery be mistaken, it may be amended. R. 1 *Brotonl*. 156.

If several are robbed together, they cannot join in an action against the hundred, except where they are joint owners of the money stolen. R. *Dy*. 379. q. 2 *Leo*. 12.

[It is amendable, not being a penal action. *Merrick v. Offulston*, H. 11 G. 2. B. R. H. 409. *Andr*. 115.]



(2 S 2.) *Declaration must be against the inhabitants of the hundred generally.*] The declaration must be against the inhabitants of the hundred generally.

For, if it is against any by name, and all are not named, it is bad. *R. 2 Keb. 126. Adm. cont. Bend. pl. 157.*

Declaration need not recite the original at large. *Per Rule, 1654. Mills, 26.*

Declaration need not recite more of the statute than is pertinent to the action. *R. 2 Vent. 215. Vide Action upon Statute (I).*

And therefore may omit the part of the act concerning the burning of houses. *2 Vent. 215.*

(2 S 3.) *Reciting the statute.*] And if it recites the sense, tho' not the exact words of the statute, it is sufficient. *Vide Action upon Statute (I).*

As, if it is, *quod respond. pro. malefactoribus*, where the statute says *pro corporibus malefactorum*. *R. 2 Vent. 215.*

(2 S 4.) *Must shew the time of the robbery.*] The declaration must shew the time when the robbery was committed, whereby it may appear that the action was commenced after forty days since the robbery. *R. 2 Lev. 12.*

And the forty days for taking the thieves are limited by the statute of *Winton*, (for the 28 *Ed. 3. 11.* is only a confirmation thereof,) and therefore they who say that half a year was allowed by the statute of *Winton*, are mistaken. *R. 3 Lev. 320.*

(2 S 5.) *And that it was within the hundred, &c.*] So, the declaration must shew the robbery to be within the hundred, and upon the highway.

But tho' the parish be mistaken, if it be within the hundred, it is sufficient. *R. 2 Leo. 175. Ow. 7.*

And if the parish be not alleged within the hundred, it is good after a verdict. *R. 3 Mod. 258.*

So, if it does not appear that the robbery was in the highway, it shall be aided after verdict. *R. 3 Mod. 258. Sho. 60. R. 1 Mod. 221. Carth. 71. Vide Hundred, (C 2—4.)*

So, if it does not appear that the robbery was by day-light. *R. 3 Mod. 258. Carth. 71.*

(2 S 6.) *Must allege oath before a justice of peace.*] So, the declaration must allege that he made oath before a justice of peace, pursuant to the *st. 27 El. 13.* that he did not know the robbers. *Cont.* for the declaration need not shew it. *Sal. 614. Vide Hundred, (C 4.)*

[It is not necessary to aver that the justice was such at the time. *Merrick v. Offulston, H. 11 G. 2. B. R. H. 409. And. 115.*]

If the robbery was by four, oath, that he did not know them, is not sufficient, without saying *nec eorum aliquem*. *Per three J. Noy, 21, Dub. 3 Lev. 328. 12 Co. 62.*

(2 S 7.) *And notice.*] So, the declaration must allege that the plaintiff gave notice of the robbery.

[It is not necessary to aver that the high-constable was the only one,

one, nor that he was such at the time. *Merrick v. Offulston*, H. 11 G. 2. B. R. H. 409. *Andr.* 115.]

(2 S 8.) *And property of the goods.*] So, the declaration must allege that the plaintiff has the property of the goods stolen.

If a servant be robbed of his master's money, he may declare *de pecun. ipsius querent. propr.* R. 4 Mod. 303. R. 2 Leo. 82.

And if the plaintiff declares *de pecun. in custodia ipsius querent.* without saying *de pecun. querent. propr.* it is bad. R. 2 Sand. 379.

But where the plaintiff declares that he was robbed *de bonis ipsius querent. propriis*, and of other goods in *custodia querent.* On demurrer to the whole declaration, the plaintiff shall have judgment for so much as is well alleged, and shall be barred only for the residue. R. 2 Sand. 379. *Vide ante*, (C 32.)

(2 S 9.) *And particulars of them.*] So, the plaintiff must name the goods stolen in his declaration particularly; for it is not sufficient to say, *quod diversa bona ceperunt.* R. 2 Sand. 379. *Vide ante*, (C 21.)

But he need not in the writ, if he particularise them in his declaration. 2 Sand. 379.

And as much certainty as in *trover*, &c. is sufficient. 2 Sand. 263.

(2 S 10.) *Must conclude contra formam statuti.*] The declaration must conclude *contra formam statuti*, for *contra formam statutorum* is bad, the action being founded upon the *st. Wint.* 13 Ed. 1. only, and not on the *st. 27 El.* R. *Yel.* 116. *Eg.* 1 Vent. 235. *Vide Indictment*, (G. 5, 6.)

But *contra formam statuti*, without more, is sufficient; for it shall be intended the *st. of Winton.* R. *Yel.* 116. *Noy*, 125. 2 Cro. 187. *Merrick v. Offulston*, H. 11 G. 2. B. R. H. 409. *Andr.* 115.

(2 S 11.) *Plea.*] To an action against an hundred the defendants may suffer judgment by confession, or *non sum informatus.*

Or, the defendants may plead, *not guilty.* *Vide Ent.* 211. 1 And. 158.

So, they may plead, that the plaintiff did not make *hue and cry* to give notice of the robbery. *Co. Ent.* 350. a. *Bond. pl.* 157.

But *Semb. cont.* for the plaintiff need not make *hue and cry*, but by the *st. 27 El.* 13. he ought to give notice to the next *vill*, or hamlet, and this shall be proved on *not guilty.* *Vide Hundred*, (C 24.)

So, they may plead that they took one of the robbers on fresh suit. 1 Vent. 118. *Vide Hundred*, (C 4.)

But it is no plea for the hundred, that they made fresh suit, if they did not take any of the robbers. R. *Dy.* 370. a.

(2 S 12.) *Venire facias.*] If the defendants plead, after issue, a *venire facias* shall be awarded to the next hundred. *Thef. Br.* 144.

(2 S 13.) *Judgment.*] As to judgment against the hundred, *vide Hundred*, (C 5.)

If there be judgment for the hundred, the inhabitants of the hundred



dred may sue for costs by debt or *scire facias* on the judgment; for, tho' no corporation, they may have an action *quoad hoc*. *R. F. g. 296.*

Or, if the plaintiff be in execution for the costs, and escapes, they may have an action against the sheriff for the escape. *Ibid.*

[If the record is said to be taken before the *secondary* to the chief clerk, it is well; and the court will take notice without averment, that he was *then* officer. *Merrick v. Offulston, M. 11 G. 2. B. R. H. 409. Andr. 115.*]

(2 S 14.) Upon the *St. 2* (or 2 & 3) *Ed. 6. 13.* for Tithes.

(2 S 14.) *By whom it lies.*] Action of debt lies on the *st. 2* (or 2 & 3) *Ed. 6. 13.* for the treble value for not setting out his predial tithes. 2 *Inst. 650. 612. R. Cro. El. 608. 613. 621. R. Mo. 710.*

But it must be by the party alone, and not by *qui tam*, &c. *R. Mo. 911. Cro. El. 621. Semb. Sav. 63.*

And may be by the rector, or by the farmer of the rectory, *R. 2 Cro. 70. Mo. 915.*

And may be by an executor for not setting out tithes in his testator's time.

So, it lies by the husband alone, seised in right of his wife, for tithes arising after his marriage. *Cont. Noy, 136.*

Or, husband and wife may join. *R. Noy, 136. Adm. Mo. 912.*

So, it lies by a farmer of two parts of a rectory by one title, and of the third part by another title; for he declares as farmer, and need not mention the title. *R. Yel. 63. Mo. 915. 2 Cro. 68. 1 Brownl. 86. Noy, 3.*

So, by two farmers of the same rectory. *2 Cro. 70. Mo. 915.*

But two, who claim by several titles, cannot join in debt upon this statute. *R. Yel. 63. 1 Brownl. 86.*

As, if one claim two parts, and the other the third part of the same rectory. *R. Yel. 63.*

[If *A.* execute a lease of tithes to *B.* on a day subsequent to their severance, but previous to their being carried away by the land-holder, *B.* cannot maintain an action on this statute, as the right to the tithe vested in *A.* immediately on a severance. *Wyburd v. Tuck, C. P. T. 39 Geo. 3. 1 Bos. & Pull. Rep. 458.*]

[Evidence that the parishioners have treated with the proprietor for a composition, is not alone sufficient to establish his possession of the tithes in an action on this statute. *Ibid.*]

[*Quere.* Whether, if one only of two joint-tenants execute an assignment of a lease of tythes, the person claiming under that lease can support an action for not setting them out? *Ibid.*]

(2 S 15.) *Against whom.*] Debt lies on the *st. 2* (or 2 & 3) *Ed. 6. 13.* against two joint-tenants, who occupy together. *R. Hut. 121.*

Or, against one joint-tenant, or tenant in common, only, if he occupies the whole. *Ibid.*

But it does not lie against several tenants for their several tithes. *R. Yel. 63.*

(2 S 16.) *Declaration.*] The plaintiff in his declaration need not recite the statute. *Per Rul. 1654, Mills, 27. Per Holt, Sbo. 337.*

And if it be recited to be made at a parliament, 4 *Nov. 2 Ed. 6.*  
when

when the parliament began 1 *Ed.* 6. and so was prorogued till 4 *Nov.* 2 *Ed.* 6. yet it shall be allowed, for there are several precedents so. *R. Yel.* 127. *Vid. Dy.* 171. a.

And if it be recited *agreavit cum rector. firmar. aut aul. proprietar.* where the statute says, *other owner, proprietor, &c.* so owner is omitted, it is not material. *R. 2 Cro.* 362.

The plaintiff, in his declaration, need not shew any title; for it is sufficient to say *quod cum sit rector, &c.* or *firmar. et proprietar. decimarum, &c.* *R. 2 Bul.* 66. 2 *Cro.* 318. *R. 2 Cro.* 362. 437. *R. 2 Bul.* 228. *D. Yel.* 63. 1 *Brown.* 86.

And, if he shews a grant to himself, he need not say, it was by deed, tho' tithes cannot be granted without deed. *R. 2 Bul.* 228. 1 *Rol.* 13.

So, if he claims by lease under the king's patentee, he need not shew the patent.

So, it is sufficient that the plaintiff alleges himself *proprietar.* without saying *conjunctim*, or in common.

So, if he says that he is *proprietar. decimarum et 60 atrar. in D.* without saying which in certain. *R. H. 7 Car. Rot.* 587. in *B. R.*

So, it is sufficient, if he says that he is rector of *A.* and *ratione inde* ought to have tithes out of the parish of *B.* which is another parish. *R. Hard.* 173.

The plaintiff in his declaration usually alleges that the plaintiff is *proprietar. &c.* that the defendant occupied lands within the parish, and sowed them, and reaped and carried away his grain, without setting out the tithes or agreement with the rector, &c. for them.

So, if he claims as rector, &c. he must allege the tithes taken to belong to the rectory. *R. Jon.* 322.

But the non-payment of the treble value is the *gist* of the action, and the possession, and the whole declaration precedent is but inducement; and therefore, if it be alleged as recital, the declaration is good. *R. 2 Cro.* 362.

So, the declaration is sufficient; tho' it does not shew that the defendants occupy jointly or in common.

Tho' it does not shew the kinds of grain sown. *R. 2 Cro.* 438.

Nor, by whom it was sown. *R. 2 Cro.* 362.

Or, if it alleges the time of the severance before the sowing.

Or, more than a year after; for it is possible. *R. 2 Cro.* 362.

So, if it does not allege the time of severance, but says, that 30 *Sept. sic inde possessionat. messuit*; for it shall be intended that he severed the same day on which the possession is alleged. *Ibid.*

So, if the day of severance be coupled with the removal of the grain. *Ibid.*

Or, if the term was expired before the day alleged of the removal. *R. 2 Cro.* 324.

So, if the quantity of the land sown, and the quantity severed, vary: as, if he says *quas quidem 30 acr.* for 40, the word *thirty* shall be rejected as surplusage. 1 *Sid.* 135.

So, if the declaration does not say that the defendant did not agree with the plaintiff, it will be good after verdict, tho' not upon a demurrer. *R. Carth.* 304.

So, it is sufficient that the declaration demands the single value; for it shall be trebled by the jury or court. 2 *Rol.* 54, 55.



And if it adds the treble value, and it is mistaken, it will be good. 2 Rol. 55.

The plaintiff must allege in his declaration what brings the party within the statute, and therefore he must allege him to be the subject of the king that now is.

If he recites the statute, and says, that he is *subditus dicti domini regis*, it is bad; for this refers to *Ed. 6. Per three J. 2 Cro. 325. Vide infra.*

He must allege a *venue*, where the tithes are alleged to be carried away without severance; for this is the *gift* of the action. R. Vel. 127.

So, it is sufficient if he alleges the value of the tithes to be 11 l. & sic actio accrevit ad habendum pro triplici valore 32 l. The miscasting is no prejudice. R. 2 Cro. 499. *Vide ante*, (C 84.)

So, if he alleges that the defendant is occupier, it is sufficient, tho' he does not say that he is a subject; for it implies as much. R. Hard. 173. *Vide supra.*

So, if there are two plaintiffs, and they allege that the defendant did not agree with them, it is sufficient, without saying *vel eorum altero*, for it is implied. R. 2 Cro. 70.

[A declaration, stating that tithes were within forty years next before the statute paid, &c. was ordered to be amended, and the word *payable* to be inserted in it. *Mansfield v. Clarke, C. P. M. 9 Geo. 3. 5 T. R. 264. n. a.*

(2 S 17.) *Plea.*] To debt upon the *st. 2* (or 2 & 3) *Ed. 6. 13.* the defendant may plead, *nil debet.* R. Hob. 218. Cro. El. 608.

Or may plead, *not guilty.* R. Mo. 914. 302. R. Cro. El. 621.

[*Not guilty*, pleaded to an action of debt on a penal statute, is not such a nullity as warrants judgment to be signed for want of a plea. *Coppen v. Carter, B. R. M. 27 Geo. 3. 1 T. R. 462.*]

[Whether *not guilty* may not be pleaded to an action of debt on a penal statute? *Quære. Ibid.*]

So, an agreement with the plaintiff for his tithes for three years, tho' it be not by deed; for it will be good between the parties, and shall be a bar by the statute, tho' it does not pass the right of the tithes. R. Ray. 14.

But a plea, that after the tithes were set out the owner of the soil took them *damage feasant*, is not good; if it does not shew *quamdiu* they remained on the land. *Latch, 8.*

(2 S 18.) Action upon the *stat. 1 R. 3. 3.* for Seizure of a Felon's Goods before Conviction.

If action be upon the *st. 1 R. 3. 3.* for taking the goods of one accused of felony before conviction, the plaintiff must recite the statute, and shew the breach. *Lut. 132.*

(2 S 19.) Upon the *stat. 1 & 2 Ph. & M. 12.* for *sl.* for driving a Distress three Miles, &c.

If action be upon the *st. 1 & 2 Ph. & M. 12.* for driving a distress out of the hundred, &c. above three miles, the defendant may plead, *not guilty.* Co. Ent. 44. b.

That the taking was by *capias in withernam*. *Co. Ent. 44. a.*

(2 S 20.) Upon the *stat. 8 H. 6. 9.* for a forcible Entry.

If action be upon the *st. 8 H. 6. 9.* for a forcible entry, or detainer, the plaintiff in his declaration must recite the statute. *Lut. 1548. Co. Ent. 44. b. 315. b. Vide Action upon Statute (G).*

To this action the defendant may plead, *not guilty. Cl. Aff. 34.*

*Non est ingressus contra formam statuti. Co. Ent. 46. a.*

*Non expulit nec discessit querentem.*

(2 S 21) Upon the *Stat. 23 H. 6. 8.* for being Under-sheriff two Years together.

If an action be upon the *st. 23 H. 6. 8.* for using the office of under-sheriff two years together, the plaintiff must recite the statute and the offence. *Lut. 193. Lev. Ent. 135.*

He need not aver that the sheriff had no estate of freehold in the office. *Semb. Lut. 197.*

(2 S 22.) Upon the *Stat. 21 H. 8. 13.* against a Spiritual Person.

(2 S 22.) *For taking a Farm.]* If an action be upon the *st. 21 H. 8. 13.* against a spiritual person for taking a farm, the plaintiff must recite the statute. *Lut. 135. Cont. Bro. Action sur Statute 4. Vide Action upon Statute (G).*

To this the defendant may plead *not guilty.*

That, not having glebe, he took it for sustentation of his family. *Lut. 136.*

*Quod non tenuit ad firmam contra formam statuti. Sav. 32.*

And upon the last plea, he may give in evidence that it was for the sustentation of his family. *Per two J. Baldwin. cont. Bro. Action sur Statute 3. Sav. 32.*

(2 S 23.) *For non-residence.]* If an action be upon the *st. 21 H. 8. 13.* for non-residence, it is usual to recite the statute. *Rob. Ent. 414. Lut. 138.*

(2 S 24.) Upon the *Stat. 33 H. 8. 9.* for using unlawful Games.

If an action is brought upon the *st. 33 H. 8. 9.* for using unlawful games, the plaintiff may recite the statute and shew a breach. *Lut. 133.*

To this action the defendant may plead *quod non custodivit domum Inforum, &c. Lut. 134.*

(2 S 25.) Upon the *Stat. 13 R. 2 & 2 H. 4. 11.* for suing in the Admiralty for a Matter not *super altum Mare.*

If an action be upon the *st. 13 R. 2. 5. 15 R. 2. 3. & 2 H. 4. 11.* for suing in the admiralty for a thing not done *super altum mare*, it must be by *qui tam, &c. Dy. 159. b. Vide Action upon Statute, (B 1. &c.)*

The plaintiff in his declaration must surmise the effect of the libel, and suggest that the matter arose *infra corpus com.* and not, *super altum mare. Dy. 159. b.*



And in actions upon these statutes, the party shall recover double damages, and the king 10*l.* *Dy.* 159. *b.*

And the costs as well as the damages shall be doubled. *Dy.* 159. *b.*  
*Vide Costs, (C. 1. &c.)*

(2 S 26.) Upon the *Stat.* 5 *El.* 14. for Forgery.

If an action be upon the *st.* 5 *El.* 14. for forgery, he must recite the statute and the offence. *Lut.* 191.

(2 S 27.) Upon the *Stat.* 8 *El.* 2. for suing in another's Name, without his Consent.

If an action be upon the *st.* 8 *El.* 2. for suing in another's name without his consent, the plaintiff must recite the statute, and shew the offence. *Lut.* 166.

And it well lies, tho' there be no conviction before, for the proof may be in the same action. *R.* 2 *Cro.* 188.

But an attorney is out of the statute. *Semb. Lut.* 169.

So, it does not lie for a suit in *C. B.* for it is not mentioned in the statute. *R. Lut.* 169.

(2 S 28.) Upon the *Stat.* 25 *Car.* 2. 2. for not taking the Test.

If an action or information be upon the *st.* 25 *Car.* 2. 2. for not taking the test, the plaintiff must expressly allege that the defendant was admitted to the office at such a time, and that he did not take the oaths, &c. at such a time; for it is not sufficient to say, that he was an officer, and never took the oaths. *Lut.* 162.

So, he must demand the penalty by express words, *per quod actio accrevit ad habendum, &c.* *Dub. Lut.* 163.

Must shew a conviction prior to an action or information for the 500*l.* penalty. *Semb. Lut.* 163. it was not shewn *Clift.* 123. but it was in *Sir Edward Hale's Case, Clift.* 133, 4.

So, he must expressly aver that the defendant exercised the office after the time limited for taking the oaths. *Lut.* 163.

So, he must recite the oath tendred conformable to the statute. *R. Ray.* 374, 5.

And the same law shall be in an information for not taking the association. *Clift. Ent.* 392, 393.

To this action, or information, the defendant may plead that he took the oaths pursuant to the statute. *Lut.* 161.

If the defendant pleads that he took the oaths, he must conclude *prout patet per recordum.* *Semb. Lut.* 163.

He must shew that he was admitted to the office when he took them. *Lut.* 163.

So, if a man neglects taking the oaths, &c. after admission to an office, he will be an officer from the time of his admission till three months expire.

And after neglect he may maintain an action against a stranger for the profits of the office received during that time. *R. Lut.* 910.

(2 S 29.) Upon the *Stat.* 2 *W. & M.* 5. for *Rescous* of a Distress.

If an action be for *rescous* of a distress upon the *st.* 2 *W. & M.* 5.  
the

the plaintiff must shew the demise, distress for rent arrear, and *rescous*. *Lut.* 213.

He must shew the whole substance of the lease. *Semb. Mod. Ca.* 215.

And if he says that he was seised in fee and leased, he must prove a seisin in fee. *R. Mod. Ca.* 215.

But he need not say that notice was given; for it is nothing to the defendant, tho' necessary to the owner. *R. Lut.* 214.

Nor, that the corn distrained was threshed, or unthreshed. *Ibid.*

He need not shew a thing collateral to the lease; as, that he gave a quarter's warning. *Per Holt, Mod. Ca.* 215.

(2 S 30.) Upon the *Stat. 4 & 5 W. & M. 8.* for apprehending Highwaymen.

If an action is brought upon the *st. 4 & 5 W. & M. 8.* against the sheriff for non-payment of the allowance for apprehending highwaymen, &c. the plaintiff must recite the statute and every thing that entitles him to the allowance within the statute. *Clift.* 120.

## (2 T) Pleading in Account.

**A**S to process, declaration, pleas and other proceedings in account, *vide Account*; (E 1, &c.)

In account there are two judgments; the first judgment is *quod defendant computet*.

And upon such judgment a *capias ad computandum* lies. 1 *Brownl.* 24. *Br. Jud.* 17.

If *non est inventus* be returned thereon, an *exigent* goes. *Ibid.*

But if he be taken on the *capias*, he shall be bailed. 1 *Brownl.* 24. tho' *ex rigore* he ought to account in prison. *Vide Account*, (E 18.) — *Bail*, (G 2.)

As to the writ, declaration, pleas, judgment, &c. in annuity, *vide Annuity* (D—E—F—G—H).

As to the writ, count, pleas and other proceedings in appeal, *vide Appeal*, (G 1, &c.)

As to the plaint and other proceedings in assize, *vide Assize*, (B 8, &c.)

As to the pleadings in attaint, *vide Attaint*, (C 1, &c.)

As to proceedings in *audita querela*, *vide Audita Querela*, (E 1, &c.)

## (2 V) Pleading in Covenant.

(2 V 1.) Process.

**A** Writ of covenant shall be sued in *B. R.* or *C. B.*

Or, covenant may be sued by plaint in the county or hundred. *F. N. B.* 145. *E. Reg.* 166.

Or, by *justices*. *Reg.* 167.

If it be sued by plaint in the county, it may be removed into *C. B.* by *recordare*. *F. N. B.* 145. *E.*

So, in the hundred, it may be removed by *accedas ad curiam*. *F. N. B.* 145. *E.*

If it be sued by *justices*, it may be removed by *pone*. *Reg.* 166, 167.

The



The process in covenant in *C. B.* by the common law was summons. And now, by the *stat. 23 H. 8. 14.* like process as in debt; and therefore an outlawry.

(2 V 2.) Declaration.

The declaration in covenant shall be laid in the county where the covenant was made. *F. N. B. 146. E. Vide Aſſon, (N 6.)*

The declaration ought to be founded upon a deed: for covenant does not lie without deed, except by the custom of London. *Vide Covenant, (A 1.)*

And therefore, if the declaration be, *quod cum per script. articuli, &c. convenit*, without saying, *ſigillat.*, it is bad. *R. Cro. El. 571. Vide poſt. (2 W 9.—2 W 14.)*

So, if the declaration be by an assignee of a reversion, he must shew an assignment by deed. *R. 3 Lev. 155. Vide poſt. (2 W 14.)*

And tho' he shews an attornment by the lessee, it is not supplied. *R. 3 Lev. 155.*

But *per scriptum suum factum apud, &c.* is sufficient; for this imports that it was sealed and executed, otherwise it cannot be *factum suum*. *Semb. Cro. El. 571.*

[*Contra, per scriptum suum factum apud W. concessit, &c.* is not sufficient, for *factum* here does not signify a deed, but is an adjective. Nor is this helped by *oyer*, tho' it appears to be sealed. *Per totam curiam. Moore v. Jones, M. 2 G. 2. Str. 814. Ld. Raym. 1536.*]

So, *per indenturam cujus alteram partem ſigillo* of the defendant, omitting *ſigillat.*, will be aided by plea or verdict. *R. 1 Sal. 141.*

So, in covenant by an assignee, he need not shew the deed of assignment, where the thing may be assigned without deed, tho' the covenant ought to be by deed. *R. Cro. El. 373. 436.*

If a man covenants with *A.* who was agent for *B.* to pay, &c. *B.* shall not have covenant. *Dub. 2 Mod. Ca. 116.*

[In an action of covenant by husband of tenant in fee, he must declare on a seisin "in fee in himself and his wife in right of his wife." If he state that he is seised "in his demesne as of freehold in right of his wife," it will be bad on special demurrer. *Polyblank v. Hawkins, B. R. H. 20 Geo. 3. Dougl. 329.*]

If a covenant be with several, and it appears by the deed, or by the count, that their interest is joint, all must join in the declaration. *R. Skin. 401. Vide Obligation (F).*

So, when it appears that their interest is joint, they must join; tho' the defendant covenants with them *et eorum quolibet*. *R. 5 Co. 19. a. 3-Leo. 161. R. 1 Sand. 155. Sho. 8.*

Or, covenants with them *conjunctim et divisim*. *D. Mo. 849.*

Or, several covenant with several *quolibet per se cum altero et alteris eorum respective*. *R. 1 Sand. 155.*

So, if the interest and covenant of the covenantors be joint, the action must be against all.

So, on a demise by *A.* and *B.*, covenant must be against both upon a covenant in law, if it assigns the breach, that a stranger was seised. *R. 1 Sal. 137. Carth. 98.*

Otherwise, if the breach be of a covenant in law by *tert* of one of the lessors only. *R. Carth. 98.*

[Where th; covenant is joint and several, in an action against one only,

only, the breach may be assigned in the neglect of both. *Lilly v. Hedges*, T. 9 G. Str. 553.]

But if the interest of the covenantees be several, and the covenant be with them *et eorum quolibet*, every one may sue severally in respect of his several interest. R. 5 Co. 19. a. Mo. 849. R. cont. 2 Lev. 47.

So, if the covenant be mutual between them, *et eorum quemlibet*. R. 2 Lev. 57.

So, if the interest is several, each must sue severally; tho' it is said, that it was agreed between the parties, and there are several on the covenanting part. R. 3 Mod. 263.

[If one named in the indenture does not execute, he must be excluded by an averment; or they may join in the action. *Vernon v. Jeffreys*, M. 14 G. 2. Str. 1146.]

So, if several *conveniunt separatim* to do such a thing, tho' they join in the covenant, yet by the word *separatim* they may be sued severally; for it is the several contract of each. R. 5 Co. 23. a. Cro. El. 408. (470.) 546.

And if the seal of one of the covenantors is broken off, the deed shall be void only as to him; for it is, as it were, the several deed of each of them. 5 Co. 23. a. Vide *Fait*, (F 2.)

So, if several *conveniunt, pro se et quolibet eorum*. Per three J. Holt cont. 1 Sal. 393.

So, if several *conveniunt*, covenant lies against one for a several breach by him. 1 Sal. 138.

If A. and B. covenant to collect the rents of C. and D., and that they and each of them will pay a moiety to each of them, A. alone shall have covenant against C. alone, and assign breach, that he or D. did not pay him a moiety. R. 2 Mod. Ca. 166.

A declaration in covenant must recite the deed in which the covenant is contained; as, if it be in an indenture of feoffment.

Or, in an indenture of bargain and sale. Lut. 284.

Or, in an indenture of covenant to stand seised. Lut. 287.

In an indenture of demise. Lut. 298. 308.

So, he must shew the original deed, and not a counterpart. R. Noy, 53. Vide ante, (O 3.)

But, it is sufficient to say, *quod cum testat. exist.* by such an indenture, without a direct affirmation, that by such indenture *conven.* R. Cro. El. 195. R. 2 Cro. 383. R. 2 Cro. 537. for this in covenant is only inducement. R. Cro. Car. 188. Ad. 2 Leo. 74. 2 Jon. 229. Vide ante, (E 3.)

Or, *per quoddam script. per quod testat. exist.* R. 1 Sid. 375.

So, it is sufficient to recite the deed according to the construction in law; tho' different from the words. R. 2 Rol. 249. l. 20.

[And that is the safest way, as it may prevent objections arising from variance. Vide *Doug.* 667.]

So, it is sufficient to recite so much of the deed as contains the covenant. R. 1 Lev. 88. Per Rule, 1654. Mills, 27.

[And it is not only sufficient, but if the declaration contain more than is sufficient to maintain the plaintiff's action, the court will refer it to the master to strike it out with costs, and will animadvert on the drawer of the declaration. *Comp.* 665. 727. *Doug.* 667.]

Tho' it is a condition or proviso which goes in defeasance; for this



this will come from the other side. R. 1 Lev. 88. [*Vide Doug.* 272, 684. 1 T. R. 638.]

So, it is sufficient to shew an assignment to the plaintiff, tho' he does not name himself assignee. R. 2 Cro. 240.

So, a recital in the words of the deed does not prejudice, tho' they are uncertain, &c.; as, that he demised *messuagium sive tenementum*. R. Cro. Car. 188.

So, in covenant by the husband alone, *testat. exist. quod* husband and wife demised is well: Sal. 515.

So, a mistake in the recital of an immaterial thing is no prejudice.

[The plaintiff need not set out a title, when he declares on his own demise. *Aleberry v. Walby*, M. 6 G. Str. 229.]

So, it is sufficient to say that he demised by indenture, in which the defendant covenanted, without shewing how he was entitled to make a demise. R. Cart. 32.

So, if he says *in placito convention. frac.*, it is as well as *de placito quod teneat convention*. R. 2 Jon. 229. Hard. 178.

So, if it be said that the plaintiff covenanted with the defendant, where it should have been, the defendant with the plaintiff, it will be aided after verdict. R. 1 Sid. 49.

Or, *quod prædict.* Thomas Chapman, where the surname is mistaken; for *prædict.* Thomas is sufficient. R. Cro. El. 697.

A declaration in covenant ought to assign a good breach. *Vide ante*, (C 45, &c.)

The breach ought to be co-extensive with the import and effect of the covenant. *Vide ante*, (C 47.)

If it assigns for breach disturbance, &c. by a stranger, it must shew that it was lawful, and how. *Vide ante*, (C 49.)

If the covenant be in the disjunctive, the breach ought to be that he has not performed the one or the other. *Vide ante*, (C 45.)

The breach must be assigned to have been before the action brought. 1 Sid. 307. *Vide Action* (E).

In covenant several breaches may be assigned. 2 Sand. 380. *Winch. Ent.* 147. 1 Sal. 138.

So, by the *st.* 8 & 9 W. 3. 11. in debt on bond or penal sum for performance of covenants in an indenture, &c. plaintiff may assign as many breaches as he pleases: but, before, it was double. Dy. 295. b.

And if he assigns two breaches, he ought to say that he does it *secundum formam statuti*. Per C. B. P. 7 Geo. Acc. per Cur. *ibid.* M. 10 Geo. *Walker v. Priestley*, (Com. 376.)

[This statute is compulsory on the plaintiff; and he cannot enter up judgment for the whole penalty on a judgment by default, as he might have done at common-law. *Roles v. Roswell*, B. R. H. 34 Geo. 3. 5 T. R. 538. *Hardy v. Bern*, 5 T. R. 636.]

[After *oyer* of the condition, and *non est factum* pleaded to debt on bond, on which issue is joined and notice of trial given, the plaintiff may enter a suggestion on the roll, and assign breaches pursuant to the statute; but it is irregular to deliver such second issue without a summons and judge's order. *Ethersey v. Jackson*, B. R. E. 39 Geo. 3. 8 T. R. 255. *Vide Infra*, (2 V 17.)]

[The court will order satisfaction to be entred on the record in an action on a bond of indemnity, on the defendant's paying the penalty of

of the bond, and the costs of the action. *Wilde v. Clarkson, B. R. E. 35 Geo. 3. 6 T. R. 303.*

But, it is sufficient, tho' it is not a direct averment, *et in facto dicit*, &c. but only *licet ipse perform. omnia ex parte sua*, and the defendant entred, &c. *R. 2 Cro. 383. Vide ante, (C 77.)*

It is sufficient, if the breach be assigned in the words of the covenant. *Vide ante, (C 45.)*

Or, in words equivalent to the sense and intent of the covenant. *Vide ante, (C 46.)*

And, if the plaintiff demands more than by the covenant appears to be due, it is not bad. *R. 2 Lev. 57.*

So, if he demands less without shewing the residue to be satisfied, it is not bad upon a general demurrer. *R. 2 Lev. 57. Vide ante, (C 84.)—Post. (2 W 7.)*

Otherwise, upon a special demurrer. *Semb. 2 Lev. 57.*

If the plaintiff does not conclude his breach, *et sic infregit conventionem*, it is not bad. *R. upon a special demurrer. 2 Jon. 229.*

Or, says *infregit conventionem*, where he assigns breaches upon several covenants. *R. 2 Mod. 311.*

So, he ought not to repeat the covenant in the conclusion. *Per Rule, 1654. Mills, 27.*

In debt upon bond for performance of covenants, the breach shall be assigned in the replication. *Vide ante, (F 14.)*

Where the covenant is to be performed upon a condition or consideration, or other thing previous, the declaration must aver performance. *Vide ante, (C 51, &c.)*

But in covenant nothing can be alleged or averred, which varies the case, as it appears upon the deed. *R. 1 Sal. 197.*

[Since the statute of *Anne, c. 16. s. 9.* attornment need not be averred in a declaration of covenant for rent by an assignee. *Vide Doug. 283.*]

### (2 V 3.) Demurrer to the Declaration.

If the declaration does not shew sufficient cause for the plaintiff to maintain his action, the defendant may demur to the declaration; as, if the plaintiff is not entitled to covenant against the defendant. *2 Sand. 164.*

[As, if the action be brought against the assignee of a lease assigned after covenant broken by the lessee. *1 Bl. 351.*]

[If on *oyer* it appears that two others besides the plaintiffs are named in the deed, tho' they did not seal, defendant may take advantage of it by demurrer. *Vernon v. Jeffereys, M. 14 G. 2. Str. 1146.*]

If the covenant does not extend to the breach assigned. *Co. Ent. 115.*

So, if several breaches are assigned, he may demur to one, and plead to the others. *1 Sand. 108.*

And default of a good breach is bad upon a general demurrer. *Win. Ent. 120.*

So, if the breach is not well assigned, he may demur specially; for it will be aided upon a general demurrer. *Vide ante, (C 47, 48.)*

If the declaration recites the indenture according to a construction which



which the words do not import, the defendant may demand *oyer* of the deed, and then demur. 2 Sand. 366.

So, if it recites it materially variant in any respect, he may demur specially for such cause. *Win. Ent.* 166.

If debt be upon a bond for performance of covenants, and the defendant shews the indenture, and pleads that there were no covenants, the plaintiff may demand *oyer*, and then demur.

So, if the defendant shews only part of the indenture, and pleads performance, the plaintiff may demand *quod indentura irratuletur*, and then demur; for, by shewing part only, he deprives the plaintiff of the opportunity of assigning a breach in the other part. R. 3 Lev. 50.

But if several breaches are assigned, some good and some bad, and the defendant demurs generally to the whole declaration, the plaintiff shall have judgment for the part which is good. 2 Sand. 380. R. 2 Cro. 557. *Vide ante*, (Q 3.)

(2 V 4.) Plea.

(2 V 4.) *When it shall be after oyer.*—[Advantage cannot be taken of any covenant omitted in plaintiff's declaration, on an action of covenant, without craving *oyer*. *Ball v. Squarry*, M. 4 G. 2. Fort. 354.]

To an action of covenant the defendant may plead after or before *oyer* of the deed; but to debt upon a bond for performance of covenants the defendant cannot plead without *oyer* of the bond. *Bro. Oyer*, 16. 25. *Vide ante*, (P 1, 2.)

And after *oyer* of the bond and condition the defendant ought to set out the deed mentioned in the condition under the seal of the plaintiff. 1 Sid. 50. 97. 1 Vent. 37. R. 1 Sid. 425.

And if he does not, it will be bad on a special demurrer. 1 Sid. 50. 425. 1 Sand. 9.

And if the defendant has not the deed, the court will, upon motion, order the deed or a copy to be delivered to him by the plaintiff. 1 Sid. 50. And this of favour. 1 Sand. 9.

(2 V 5.) *What pleas are bad.* Non infregit conventionem.] To covenant the defendant cannot plead *non infregit conventionem*; for it is too general, and two negatives, viz. *et sic non tenuit conventionem, et non infregit*, &c. do not make good issue. R. 1 Lev. 183. Semb. 1 Leo. 114. R. 3 Lev. 19. [2 Bl. 1312. *Hodgson v. East India Company*, B. R. T. 39 Geo. 3. 8 T. R. 278.]

But it shall be aided after verdict. R. 1 Lev. 183. 1 Sid. 289.

[So, where one party covenants to do one thing, the other party doing another, defendant cannot plead want of performance on the part of the plaintiff. 2 Bl. 1312.]

[So, where there are mutual and independent covenants, it is no plea, to allege a breach by the plaintiff of the covenants to be performed by him. *Corup.* 56. *Doug.* 690. 3 Wils. 387. 2 Bl. 1312.]

(2 V 6.) *Nil debet*, &c.] So, to covenant the defendant cannot plead *nil debet*, tho' the action be founded upon an indenture of demise,

mise, and breach assigned for non-payment of rent. *R. upon general demurrer, 3 Lev. 170.*

So, to debt on bond for performance of covenants, he cannot plead *no covenants*; for then the bond is single. *R. 1 Lev. 3. R. Cro. El. 756.*

Nor, can plead that there is no such indenture; for he is estopped. *R. 1 Rol. 408.*

(2 V 7.) *What good.* Non est factum.] But to covenant, the defendant may plead in discharge or performance.

As, he may plead to a deed, *non est factum.*

[And, on this plea, the defendant, lessee in possession, shall not contravert the title of the plaintiff, his lessor, to demise. *2 Bl. 1152.*]

*Within age. R. Cro. Car. 179.*

If the heir be sued upon the father's covenant, he must plead *riens per descent.* *Lut. 290. Vide ante, (2 E 3.)*

(2 V 8.) *Accord.*] So, he may plead accord with satisfaction made after the breach. *Co. Ent. 117. a. [1 T. R. 141.] Vide Accord, (A 1.)*

But accord is no plea in covenant for the payment of money. *Vide Accord, (A 2.)*

[To covenant for non-payment of rent, it is a bad plea that defendant before rent due, with assent of lessor, assigned to *A.* who, with assent of lessor, entred and paid rent to lessor. *Joddrell v. Cowell, M. 10 G. 2. B. R. H. 343.*]

Nor, in an executory covenant, if it is made before the breach. *Vide Accord, (A 2.)*

(2 V 9.) *Arbitrament.*] So, the defendant may plead in bar, an arbitrament made after the covenant broken.

[To covenant in a deed, (made for the performance of several matters,) the defendant cannot plead that in the deed there is a covenant, that in case any difference should arise between the parties respecting any part of the agreement, it should be settled by three arbitrators to be chosen, &c. and that he offered to refer the matter in dispute, &c. but that the plaintiff refused, &c.; such a plea being holden bad on demurrer. *Thompson v. Charnock, B. R. H. 39 Geo. 3. 8 T. R. 139.*]

How an arbitrament shall be pleaded, *vide Accord, (D 1.)*

(2 V 10.) *Outlawry.*] So, the defendant may plead outlawry in bar, where the breach is for a thing forfeited by outlawry; as, for non-payment of rent. *Lut. 1513.*

But where the breach is for not repairing, he cannot; for the damages are uncertain. *R. Lut. 1513.*

(2 V 11.) *Release.*] So, the defendant may plead a release of all actions, covenants, or demands. *Vide post. (2 W 30.)*

So, a release of covenants or agreements in the indenture, to a bond for performance of covenants. *3 Leo. 69.*

So, if a covenant be with *B.* his executors and assigns, in an action



tion by an assignee, the defendant may plead a release by *B.* *R. Cro. Car.* 503. *2 Rol.* 411. *l.* 35.

Tho' the release by *B.* be made after a breach in the time of the assignee. *R. Cro. Car.* 503.

But a release by *B.* after an action brought by the assignee, is no plea; for then an interest in the covenant is vested in him. *R. Cro. Car.* 503. *2 Rol.* 411. *l.* 30.

So, a release of actions to the covenantor before breach is no plea. *D. Al.* 39.

So, a release of all covenants after breach is no discharge of the bond for performance of covenants, for it was forfeited before. *R. 3 Leo.* 69. *Dy.* 57. *a.*

So, where a covenant is joint and several, a release of the action to one shall not be a bar as to the other. *Dub. Sal.* 574. [*1 Ld. Raym.* 420. 690.]

[A discharge in nature of a release, without deed, in satisfaction of all demands, cannot be pleaded in covenant; for covenant by deed must be discharged by deed. *Rogers v. Payne*, *P.* 8 *G.* 3. *2 Will.* 376.]

[*2 V* 12.) *Defeasance.*] So, the defendant may plead in bar a defeasance of the covenant. *Vide post.* (*2 W* 35.)

As, a subsequent covenant, which discharges this. *Vide Defeasance.*

Or, a covenant that he will not sue the defendant upon a former covenant. *P.* 4 *An. in C. B. inter Fitzgerald and Cragg*, (*Com.* 139.) *Adm. Sal.* 574. *Semh, cont. Sal.* 575.

And in all cases, where the defeasance is absolute and perpetual, it amounts to a release, and shall be a good bar. *R. Sho.* 46.

But on a covenant by charter-party, the defendant shall not plead a breach of covenant on the other part in bar; for one may be less damage than the other. *R. 3 Lev.* 41.

So, if several covenant, and the covenantee makes a collateral covenant with one that he shall not be sued, this cannot be pleaded in bar; for it does not amount to a discharge of the prior covenant; for it will not be to the benefit of all, but only of one. *R. T.* 13 *W.* 3. *B. R. Tracy v. Kynaston*, *Sal.* 575. (*1 Ld. Raym.* 688.) *Fitzgerald v. Cragg*, (*Com.* 139.)

So, a covenant that he will not sue for such a time. *R. Sal.* 573.

So, if a covenant be to give licence for seven years for payment, it is no bar. *R. Sho.* 46.

So, sequestration of the parsonage in covenant for rent upon a lease by indenture is no bar. *R. Dal.* 44.

So, if *A.* covenants to pay 300 *l.* per ann. to *B.* *quandiu* he and his wife live separate, and by a subsequent deed *B.* covenants to indemnify *A.* from the payment of 300 *l.* *quandiu* he and his wife cohabit, this is no bar to the action upon the first deed; but *A.* must have his remedy by covenant upon the collateral indenture, if he is sued on the first. *R. 2 Vent.* 218.

[*2 V* 13.) *Covenants performed.*] The defendant may plead performance generally, or a special performance. *Vide post.* (*2 W* 33.)

In covenant, or in debt upon a bond for performance of covenants, if all the covenants are in the affirmative, the defendant may plead covenants performed generally. *Co. Lit.* 303. b. *R. Crs. El.* 749. 1 *Lev.* 303. 2 *Sand.* 411. *Vide ante*, (E 26.)

So, if some of the covenants are negative, but they are void in law, the defendant shall plead performance generally; for the court will take notice that the negatives are contrary to law. *R. Mo.* 856.

So, tho' to affirmative covenants negative words of the same import are added. 1 *Sid.* 87.

So, in covenant to discharge all arrears of rent, it is a good plea that he left money in the plaintiff's hands to discharge it. *R. 4 Mod.* 249.

If several breaches are assigned, he may plead to each. 1 *Sal.* 138.

But generally, where some of the covenants are negative, the defendant must plead to them specially. *Vide ante*, (E 25.)

So, if the covenant requires an act to be done by a stranger. *Ibid.*

Or, an act upon record. *Ibid.*

So, if a covenant be in the disjunctive, the defendant must shew what part he has performed. *Ibid.*

So, where the agreement is to do an act upon request, and the request is alleged, it is no plea to say, *quod paratus fuit facere*. *R. 3 Mod.* 295.

Yet, upon a general demurrer it shall be aided; if the defendant pleads generally, where there are any negative covenants. *Vide ante*, (E 26.)

If, in covenant or debt upon a bond for performance of covenants, the defendant pleads performance to the affirmative matter, alleged for breach, or to be done by the condition, it is not sufficient without shewing how, and in what particular manner he has performed it. *Vide ante*, (E 25.)

As, if the covenant be, *that he make appear to B.*, it is not sufficient to say, *that he made appear to B.* without saying how. *R. 2 Lev.* 125.

*That he will pay a moiety of a sum to be received*, it is not sufficient to say, that he has paid a moiety, without shewing how much he received. 1 *Sid.* 334.

*That he will pay as long as letters patent stand in force*, it is not sufficient to say, they are not in force, without shewing how become void. *R. Sho.* 290.

So, it is not sufficient to say, that he *paratus fuit*, or *obtulit* to perform, when he takes upon himself to perform at his peril. *R. 1 Lev.* 191. *Vide ante*, (C 61.—C 75.)

But, if the condition, &c. comprehends multiplicity of matter, to avoid prolixity, performance generally has been allowed, and the other party shall be put to shew a particular breach. *Vide ante*, (E 26.)

As, if the condition be to pay a moiety of all sums which he shall from time to time receive. *R. 1 Sid.* 334.

So, if the covenant be in the negative, it is sufficient to plead generally in the negative; as, if the condition or covenant be, to indemnify,



nify, &c. the defendant may plead generally, *quod non fuit damnificatus*. *Vide ante*, (E 25.)

So, if to affirmative words the defendant pleads in the negative *non damnificatus*, &c. *R. 2 Co. 4. 2 Cro. 363, 4. Mar. pl. 200.*

So, if the condition be to free and indemnify from the charges of a suit. *R. 5 Mod. 244.*

But, where the covenant or condition is to indemnify from a certain and a particular thing, it is not sufficient to say, *non damnificatus* generally, but he must shew how he indemnified. *Semb. 5 Mod. 244.*

[Performance pleaded otherwise than in the terms of the covenant, is bad even on a general demurrer. *Scudamore v. Stratton*, C. P. T. 39 Geo. 3. 1 Bos. & Pull. 455.]

(2 V 14.) *Pleas to a breach for non-payment of rent.*] In covenant, if the breach be for non-payment of rent, the defendant may plead *riens arrear*. *R. cont. 1 Brownl. 19. (Cowp. 588.) Acc. 2 Brownl. 273.*

That the plaintiff *nil habuit in tenementis*. 3 Lev. 193. *Vide post.* (2 W 48.)

[The defendant may plead *nil habuit in tenementis* to an action of covenant brought by the committee of a lunatic on a lease made by him as committee in his own name; for the committee of a lunatic cannot grant such a lease. 2 Wils. 130.]

[*Nil habet in tenementis* cannot be pleaded, if the demise is by indenture. *Palmer v. Ekins*, M. 2 G. 2. Str. 817. Ld. Raym. 1550.]

[That another was seised in fee before the demise amounts to *nil habet*, &c. *Ibid.*]

*Solvit ad diem.* 2 Brownl. 273.

But, if breach be assigned upon a covenant in a lease for non-payment of a sum in gross, *nil habet in tenementis* is no plea. *R. 2 Vent. 99.*

[To covenant for rent, the defendant may plead, that before the rent became due, he assigned all the estate, title, interest, and term for years which he then had to come in the premises. *Doug. 461. n.*]

[And to this it will not be a good replication, that the assignee never took actual possession, without adding that the assignment was fraudulent or by way of mortgage, &c. *Ibid.*]

[In covenant for rent against the defendant as assignee of all the original lessee's interest, &c. by virtue whereof he became and still is possessed; if the defendant plead, that all, &c. did not come to him by assignment, and that he did not become possessed, &c. it is good evidence to support the plea, that the assignment was by way of mortgage, with a clause of redemption, and that the defendant has never taken actual possession; and this, altho' the mortgage be forfeited. *Doug. 455.*]

[But, evidence of an *under-lease* will not support such a plea. *Id.* 183.]

[Nor, evidence of an assignment of all the original lessee's estate in part of the demised premises. *Ibid.* in the notes.]

So,

So, *levy by distress*, is no plea in covenant for non-payment of rent; for this admits the rent not paid at the day. *R. 2 Brownl. 273. Vide post. (2 W 47.)*

[It is no plea that all the estate and fortune of the lessee was transferred to trustees under an act of parliament, tho' a public one, if there were no words of discharge. *Andr. 40. 1 T. R. 93.*]

[In covenant for rent against an assignee, an assignment to a *some covert* before the rent accrued, is a good plea. *Barnfather v. Jordan, B. R. M. 21 Geo. 3. Dougl. 452.*]

[That the house was burnt down, and not rebuilt by the lessor who was obliged to do it, is no plea. *Monk v. Cooper, P. 13 G. Str. 763. Ld. Raym. 1477. Vide 1 T. R. 310. Ambler, 619. (Com. 626.) Bullock v. Dommitt, B. R. E. 36 Geo. 3. 6 T. R. 650.*]

[Neither can the defendant set off any uncertain damages which he may be entitled to recover against the landlord on any of the covenants in the lease. *Wrigall v. Waters, B. R. M. 36 Geo. 3. 6 T. R. 488.*]

[Whether bankruptcy be a plea to an action of covenant for rent? *Quere, 1 T. R. 86.*]

[If, to covenant for not repairing certain premises demised, the defendant plead that the plaintiff before the cause of action accrued, *entred and pulled down the premises and expelled him*; the plaintiff may reply that *he did not expel, &c. modo et forma, &c.* *Hodgskin v. Queenborough, C. P. M. 12 Geo. 2. Willes, 129.*]

[The lessee covenanted to put a house in repair before the first of June "5000 slates being found, allowed, and delivered by the lessor towards the repair," and afterwards to keep it in repair during the term: the lessor assigned a breach for not keeping in repair after the first of June, and it was holden no plea to say that the lessor had not *after making the lease* found, allowed, and delivered the slates, &c. *Mucklestone v. Thomas, C. P. E. 12 Geo. 2. Willes, 146.*]

[But to an action of covenant for not repairing several premises, the defendant cannot plead an expulsion by the plaintiff from part. *Ibid.*]

(2 V 15.) *For not making assurance.*] In covenant for further assurance, if the breach be, that counsel devised a note for a fine, which the defendant was required to acknowledge and refused, the defendant may plead *non requisivit*. *Lut. 286.*

[Covenant to levy a fine of certain lands in the township of *A.* in the parish of *B.*, on the request and at the costs of the grantee; breach assigned that the grantor refused to acknowledge a fine (tendered to him) of lands in the parish of *B.*; plea that the note of the fine tendered comprised other lands in *B.* than those contained in the covenant, of which the grantor was seized; and it was holden a good plea. *Danby v. Grigg, C. P. E. 12 Geo. 2. Willes, 150. 7 Mod. 292. S. C.*]

(2 V 16.) *For not repairing.*] In covenant, if the breach be for default of repairing, the defendant may plead *quod reparavit*.

That the plaintiff was to deliver timber, which upon request he did not deliver. *Lut. 316.*

Otherwise, if the breach be assigned in a thing which does not require timber. *Ibid.*



If he pleads *quod reparavit* generally, and issue thereon, after a verdict for the defendant, it shall be well. *R. 2 Mod. 176.*

But he cannot plead that he rebuilt. *R. 2 Leo 189.*

[The bankruptcy of the lessee is no bar to an action of covenant brought against him. *Anviol v. Mills, B. R. M. 31 Geo. 3. 4 T. R. 94.*]

[A plea of bankruptcy given by the *stat. 5 Geo. 2. c. 30. s. 7.* must state that the *cause of action* accrued before the bankruptcy; stating that an *indenture*, on which the action is founded, *was executed* prior to the bankruptcy, is insufficient. *Charlton v. King, B. R. H. 31 G. 3. 4 T. R. 156.*]

If the breach be, that the tenements were not of such yearly value, the defendant may plead that they were. *Lut. 289.*

If the breach be, that a stranger had title, the defendant shall plead that he had not. *Lut. 322.*

[In covenant for quiet enjoyment, a plea that for the first half year of plaintiff's lease the plaintiff might have enjoyed, &c. but that for non-payment of the rent for 21 days after that half year, the defendant had a right to re-enter according to a proviso in the lease, and that he did re-enter, &c. was holden bad on special demurrer. *Ludwill v. Newman, B. R. M. 36 Geo. 3. 6 T. R. 458.*]

But if the breach be, that he did not lease, and the defendant says, *non habuit unde dimittere potuit*, replication, *quod habuit unde*, &c. is not good. *R. 2 Bul. 41.*

[To covenant as heir, and breach assigned for want of repairs, on a lease for years, it is a good plea that the lessor was only tenant for life, with a traverse that the reversion was not in him and his heirs. *2 Wilf. 143.*]

Yet, it shall be aided by a verdict, *quod habuit terras unde dimittere potuit.* *2 Bul. 41.*

[On a covenant to build a bridge in a substantial manner, and to keep it in repair for a certain time, the party is bound to rebuild the bridge, tho' broken down by an extraordinary flood. *Brecknock Company v. Pritchard, B. R. T. 36 Geo. 3. 6 T. R. 750.*]

#### (2 V 17.) Judgment.

If covenant be on the word *dimisi*, &c. the plaintiff shall not have judgment for damages, but for the term. *R. 2 Leo. 104.*

If the defendant has judgment against him upon *nil dicit*, confession, or demurrer, a writ of inquiry shall be awarded to inquire of the damages. *1 Sand. 47.*

And by the *st. 8 & 9 W. 3. 11.* the plaintiff may suggest on the roll as many breaches as he shall think fit; on which shall issue a writ to summon a jury before the justices of *nisi prius* for that county, to try each, and what damage the plaintiff sustained by it, which writ the said justices shall return to the court from whence it issued.

In covenant if there be an issue for part, and a demurrer for part, the jury who try the issue shall also find conditional damages upon the demurrer. *1 Sand. 109.*

If the issue goes to the whole, the jury shall find damages, and there shall be judgment thereon.

[Where the precise sum is not the essence of the agreement, the quantum

quantum of damages may be assessed by the jury; where the precise sum is fixed by the parties, the jury are confined to it. *Lowe v. Peers*, P. 8 G. 3. 4 B. M. 2225.]

And by the *st.* 8 & 9 W. 3. 11. the jury, besides damages and costs as usual, shall assess damages for such of the said breaches as the plaintiff shall prove broken, on which the like judgment shall be entered as formerly.

But if the plaintiff assigns several breaches, and the defendant does not rejoin, the plaintiff may sign judgment if he pleases, without a writ of inquiry awarded returnable before the justices of *nisi prius*; for he has his election to proceed upon the statute, or by the common law, and this, as well where the judgment is for want of a rejoinder, as by *nil dicit* or confession, &c. R. M. 10 G. in C. B. *Walker v. Priestly*, (Com. 376.)

[Where there is judgment for the plaintiff on demurrer in an action of debt for the penalty for non-performance of covenants in articles of agreement, the plaintiff may enter up his judgment for the penalty in like manner as before the statute; but then the judgment is to stand only as a security for the damages sustained, and the plaintiff is not to assign the breaches till after the judgment is given, and if he should take out execution for the whole penalty, then is the time to complain. *Goodwin v. Crowle*, B. R. M. 16 Geo. 3. Corp. 357.]

[If breach is assigned for non-payment of rent, and for not repairing, on payment of what is due for rent, proceedings as to that shall stay. *Anon.* T. 17 G. 2. Wilf. 75.]

#### (2 V 18.) Execution.

After the judgment in covenant there shall be the same execution as in debt.

But by the *st.* 8 & 9 W. 3. 11. if after judgment, and before execution, the defendant pays into court, for the plaintiff's use, the damages assessed by the jury and costs, a *cessat executio* shall be entered on record.

So, by the said *st.* 8 & 9 W. 3. 11. if the plaintiff be satisfied, by execution executed, his damages, costs, and the charge of the execution, the defendant's body, land and goods, shall be forthwith discharged, and the discharge shall be entered on record.

But by the same statute, such judgment shall remain as a collateral security to the plaintiff against any further breach of covenant, in which case the plaintiff, &c. may have a *scire facias* on the same judgment against the defendant, his heir, *terre-tenant*, executor or administrator, suggesting other breaches, &c. upon which shall be the like proceedings *ut supra* to try issues, discharge execution, &c. *Et sic toties quoties.*

So, before where there was a judgment in covenant upon a breach of covenant, a perpetual *scire facias* might have been sued upon a new breach, without suing covenant *de novo*. R. Cro. El. 3.

And covenant could not be sued afterwards upon a new breach of the same covenant. *Per Manw.* 3 Leo. 51.

[After judgment for the plaintiff on demurrer, in debt on bond conditioned to pay an annuity, the defendant cannot take out execu-



tion for the arrears due, but must assign breaches on the record under this statute. *Walcot v. Goulding, B. R. H. 39 Geo. 3. 8 T. R. 126.*]

## (2 W) Pleading in Debt.

(2 W 1.) Where it shall be brought.

**D**EBT lies, where a man is indebted to another by judgment, specialty, contract, &c.

If a debt be under 40*s.* it shall be sued for by plaint in the county.

Or, by *justicies* in the county. *Reg. 139. a. F. N. B. 119. I.*

The *justicies* requires the sheriff *quod justic.* the defendant that he render to the plaintiff what he owes to him, &c. *Reg. 139. a.*

And the word *justicies* is repeated in the writ to each debtor. *Reg. 139.*

And, by the *justicies*, the county-court may hold plea in debt above 40*s.* *2 Inst. 312.*

If it be sued in the county, the plaintiff may remove it by *pone* into C. B. without any cause, and the defendant with cause. *F. N. B. 119. K.*

Or, by *recordare*, if it be sued in the court of a city, borough, &c. *F. N. B. 119. K.*

If the debt be above 40*s.* it ought regularly to be sued in C. B. by original. *Reg. 139. b.*

And upon pretence of privilege by bill in B. R. *4 Inst. 71.*

[But, by the modern practice, debt may be sued in B. R. by original. *B. R. H. 317.*]

## (2 W 2.) What Process.

(2 W 2.) *Summons.*] Process in debt by the common law was only a summons. *3 Co. 12. a.*

By the *st. 23 Ed. 3, 17.* like process was given in debt as in account, which by the *st. W. 2. 17.* was a *capias*, and so to outlawry. *3 Co. 12. 1 Brownl. 50.*

The original or summons in debt is by a *præcipe quod reddat.* *Reg. 139. b.*

And it shall be in the *debet* and *detinet* for money, but for chattels, or by or against an executor, it shall be in the *detinet tantum.* *F. N. B. 119. M. Vide ante, (2 D 1.)*

The original ought to name the parties by their proper names, and give an addition to the defendant. *1 An. 39. Vide Abatement, (E 18, &c.—F 17, &c.—F 22, &c.)*

It ought to be without rasure, or false *Latin*, and agreeable to the form of the register. *Vide Abatement, (H 1.)*

And if there be a defect in the writ, *teste*, or return, it may be pleaded in abatement, or assigned for error. *Vide Abatement, (H 1, &c.)*

The original may be returnable two or three terms after the *teste.* *Dy. 175. a.*

The sheriff returns upon the original, *pledg. de prof. et quod sum.* *Rit. 257.*

Or, *nihil habet per quod sum. potest*; or, if the defendant be a clerk, *no lay fee per quod, &c. Ibid.*

The

The summons ought to be fifteen days before the day of the return. *Kit. 257.*

(2 W 3.) *Capias.*] If the defendant does not appear upon the return of the original, a *capias* issues. *Reg. Jud. 1. b. Off. Br. 22.*

If he does not appear, nor is taken upon the *capias*, an *alias capias*, and afterwards a *pluries capias* issues. *Reg. Jud. 1. b. Off. Br. 23.*

And, if the sheriff returns upon the *capias* that the defendant *latitat in al. com.*, a *testatum capias* to the sheriff of such county. *Off. Br. 23.*

By the common law a *capias* does not lie, except in actions supposed to be done *vi et armis.* 3 Co. 12. a.

Or, for the king's debt. 3 Co. 12. b.

By the *st. of Marl. 23.* and *W. 2. 11.* it was given in account, and by the *st. 25 Ed. 3. 17.* in debt. 3 Co. 12. a.

The *capias* ought to be tested at the return of the original, the *alias* at the return of the *capias*, and the *pluries* at the return of the *alias.* *Comp. Att. 7.*

It ought to be returnable in the next term after the *teste.* *D. Cro. El. (467.)*

The *capias* ought to be conformable to the original, and the *alias* and *pluries* to the *capias.*

And therefore, if the original is *A. de B.* and *capias* is *A. nuper de B.* it is error. *R. 2 Cro. 576.*

If the original be *Launcelot*, and the *capias*, *Lancelot.* *Semb. Cro. El. 50.*

If the one be *A. B. alderman*, the other *armiger.* *R. Tel. 120.*

(2 W 4.) *Exigent.*] If the defendant is not taken, or does not appear upon the return of the *pluries capias*, an *exigi facias* issues. *Reg. Jud. 2. a.*

By the *st. 31 El. 3.* in all personal actions, a writ of proclamation shall be made out upon every *exigent* of the same *teste* and return, and delivered to the sheriff of the county where the defendant then dwells, who shall thereon make three proclamations, the first at the county court, the second at quarter sessions, and the third a month before the *quinto exact.*, at the church door where the defendant dwells, &c. and all outlawries otherwise had shall be void.—So, by the *st. 6 H. 8. 4.*

The *exigent* shall be conformable to the original and *capias.*

And therefore, if it be a *testatum capias*, an *exigent* does not lie thereon in the last county, without an original *capias* there. *Dy. 295. b.*

The *exigent* shall have such return, as that five county-courts may intervene between the *teste* and return. *Comp. Att. 13.*

And if there are not five county-courts before the return, an *exigent de novo allocat. 4 com.* issues. *Reg. Jud. 21. b. 61. b. Kit. 264. a.*

So, if another person of the same name with the defendant appears upon the *exigent*, the plaintiff may have an *exigent de novo* against the defendant. *Off. Br. 80.*

But the *exigent allocat. com.* must be executed at the next county



after the fourth; for, if by any accident the fifth county intervenes, it will be error. *Pl. Com.* 371. b.

So, proclamation must appear to be made at the county-court held *pro com.*, for *in com.* is not sufficient. *R. 1 Vent.* 108. *R. 3 Mod.* 89.

[Return of proclamation, "that they were made as by the writ commanded," good. *Semb. Barnes*, 322.]

If there are several, it must be said, *quod nec eorum aliquis comperuit*. *R. 3 Mod.* 90.

If the defendant appears upon the *exigent*, the sheriff may return a *reddidit se*. *Kit.* 264. a.

So, if one of the defendants appears, he may return so for him, and proceed against the others. *Kit.* 264.

So, if one defendant dies. *Kit.* 264. b.

If the defendant appears upon the *exigent*, he may have a *superfedeas* to the sheriff.

[*Superfedeas* to the *exigent* should be delivered to sheriff before return. *Barnes*, 319.]

[Whilst the writ remains in sheriff's hands, tho' after the return, a *superfedeas* may be allowed on costs. *Barnes*, 323.]

[If defendant becomes a prisoner after the *teste*, and before the return of *exigent* on *ca. sa.* proceedings shall be staid. *Barnes*, 321.]

If the sheriff proceeds after *superfedeas* to outlawry, it will be error. *Yel.* 57. *R. Mo.* 73.

So, it will be error, if the outlawry be pronounced on the same day the *exigent* bears *teste*. *R. 2 Cro.* 660.

If there be no return to the *exigent*. *R. Dal.* 68. 1 *And.* 36.

Or, the name of the sheriff be not added to it. *Dub. Dal.* 68. *Leb.* 139. *Semb. Hob.* 70.

But it is no error in an outlawry, after judgment, if there be no proclamation in the county where the defendant inhabits. *R. 2 Cro.* 577.

So, an outlawry shall not be reversed for default of proclamation in the county where the defendant dwelt, till issue taken thereon and tried. *R. 1 And.* 36. [*Vide Utlagary.*]

(2 W 5.) *Outlawry upon it.*] If the defendant upon the *exigent* being *quinto exact.* makes default, there shall be judgment *quod utlaget*. *Kit.* 263. b. [*Vide infra, Utlagary, (C 1.)*]

And the outlawry shall be by judgment of the coroners. *R. 2 Rol.* 805. l. 35. *R. 2 Cro.* 521.

[If there are several defendants, the judgment shall be *quod utlagentur.*]

If defendant be a woman, it shall not say *quod utlaget.*, but *quod waiveat.*, otherwise it is error. *R. 2 Cro.* 358. *Vide Utlagary (A).*

But a return of the coroners, that he was outlawed upon a *certiorari* to them, does not conclude; for it does not belong to them. *Dy.* 223. a.

So, in every case, where the entry varies from the legal form, it will be error: as, if it does not appear that the county-court was held *pro com.* *R. 3 Mod.* 89. *R. 2 Rol.* 802. l. 30.

Or, if it be *in hustingis*, without saying, that it was *in hustingis de communibus placitis*. *Cro. El.* 50. 2 *Rol.* 803. l. 10.

So, if the *quinto exact.*, &c. be entred the day of the *teste* of the *exigent* *R. 2 Cro.* 660. Or,

Or, there are only fourteen days between the two counties upon the return of the *exigent*. R. 2 Rol. 802. l. 42.

If there are several defendants, and the entry is *non comparuerunt*, without saying, *nec eorum aliquis*. R. 2 Cro. 358. 2 Rol. 490. 2 Rol. 802. l. 25. Cro. El. 50. 3 Mod. 90.

If the year is not mentioned to the *quarto exact.*, tho' it be to the *tertio* and *quinto*, by which it may appear to be the same year. R. 2 Rol. 803. l. 25.

If it be *ad comitat. tent. primo M. anno regni domini nostri Jacobi*, omitting *regis*. R. 2 Rol. 802. l. 45.

Or, *domini regis*, omitting the king's name. R. 2 Rol. 802. l. 50.

Or; omitting *regni Anglia*. R. 2 Rol. 803. l. 5.

If the outlawry be *per judicium coronatorum*, without naming the coroners, except in London. R. 2 Rol. 802 l. 37.

But, in London naming the coroners is not usual. R. 2 Rol. 802. l. 45.

So, *quinto exact. ad Fest. S. Pauli, 1653*, without saying *A. D.*, is no error. R. Hard. 6.

So, in London fourteen days between two *hustings* will be well; for the *hustings* may be held every week. 2 Leo. 14.

(2 W 6.) *Capias utlagatum*.] After outlawry returned, the plaintiff shall have a *capias utlagatum* against the defendant. *Vide. Utlagary, (D 5.)*

[*Capias, alias, & pluries*, may issue all together in order to an outlawry. And no affidavit for bail is required, nor any date to the writs. *Barnes, 322.*]

Or, special against him, his goods, and lands.

And thereon an inquisition shall be taken and returned.

Yet, by the *st. 4 & 5 W. & M. 18.* a defendant taken upon a *capias utlagatum* shall be discharged on his attorney's signing an appearance, or, if special bail required, on bond, &c.

[If *capias utlagatum* recites a special original, specially expressing the cause of action, the sheriff must take special bail, tho' the *capias utlagatum* is not marked for bail. *Cracraft v. Gledowe, P. 4 G. 3. 3 B. M. 1482.*]

[Process of outlawry is not within 12 G. 1. c. 29. *Ibid.*]

[Defendant cannot reverse outlawry, without giving such bail as the law requires. *Ibid.*]

If the defendant be taken upon a *capias utlagatum*, the plaintiff cannot declare against him; for the process is determined. *Dy. Cro. El. 706; 7.*

But he may have a new action of debt against him. *D. Cro. El. 707. 5 Co. 88. a.*

Or, may reverse the outlawry for error. 1 Bro. Ent. 215, 216.

By the *st. 31 El. 3.* none shall be admitted to reverse an outlawry for want of proclamation unless he put in bail to answer the plaintiff on the same cause of action, and to answer the condemnation also, if the plaintiff begin suit before the end of two terms next.

[If the case originally required special bail, and defendant stands out to an outlawry, he cannot come in and appear to the outlawry, without putting in special bail, and the filacer shall not issue a *superseas* till then. *Campbell v. Daley, T. 6 G. 3. 3 B. M. 1920.*]

So,



So, if the reversal be for other defect, when the debt and damages amount to upwards of 10*l.* *Com. Att.* 16.

So, if the reversal be of an outlawry in ejectment, &c. 2 *Rol.* 490.

If the plaintiff proceeds to an outlawry, when the defendant was in prison upon the *capias*, he shall reverse it at his own charge. 2 *Vent.* 46.

Or, if the plaintiff knew that he was in prison in another action at his suit. *Sal.* 495.

Or, if the defendant appears publicly, it shall be so in *B. R.* otherwise in *C. B.* *Sal.* 495.

After outlawry reversed, the defendant ought to appear and accept a declaration within two terms next. *Vide ante*, (C 4.)

If the outlawry was in *London*, &c. the plaintiff may afterwards declare in another county. *R. Lev.* 245.

If the plaintiff does not declare within two terms after notice of the reversal of the outlawry, the defendant shall have costs to be taxed by the prothonotary. *Per Rule, T. 33 Car. 2. Mills*, 81.

After outlawry reversed, the plaintiff may declare upon the first or upon a new original, for by the outlawry the first was determined. *Joy.* 442.

[Yet they may, on extraordinary grounds either for or against him, but are not bound to do it. *Per Mansfield C. J., cateris non assentient. ut videtur.* 4 *Bur.* 2527.]

[Nor, will the court bail him by their discretionary power without consent of prosecutor, tho' a writ of error is allowed. *Ibid.*]

[For such custody is *in execution*; not for security only, but in part of punishment, and will be considered in the final judgment; and if the outlawry is reversed defendant must continue in custody on the conviction. *Ibid.*]

[Arrest on *cap. utlagat.* is bad on Sunday. *Barnes*, 319.]

[On plaintiff's death, and no administration, prisoner on *cap. utlagat.* shall be discharged. *Barnes*, 366.]

[Prisoner on *capias utlagatum* discharged by insolvent act, cannot be taken on a new *cap. utlagat.* *Barnes*, 378.]

#### (2 W 7.) Declaration in Debt.

(2 W 7.) *Must shew the certainty of the debt demanded.* A declaration in debt is founded upon a specialty, or judgment, or contract.

In all actions for debt, the declaration must shew the certain sum demanded: and therefore, if the contract is contingent, or depends upon divers particulars, the declaration shall demand a sum certain. *Vide ante*, (C 21.)

[If the declaration be upon several bonds or contracts, what is due upon both shall be demanded in one entire sum. *Yel.* 81. 3 *Leo.* 119.]

If it be for arrears of an annuity granted for years, it must be for such a sum, without saying *de annuali redditu*. *R. Yel.* 208. 1 *Bul.* 151.

Declaration, *quod pro diversis debitis et mercimon. concessit solvere*, is not good. *R. 2 Rol.* 332.

If the contract be for foreign coin, the safest way is to declare *quod reddat* 20*l.* certain, or whatever other sum, and then shew the contract for so much foreign coin, which atting. *ad* 20*l. monet. Angl.* *R. 2 Cro.* 88. *Yel.* 80. *Mo.* 775. And

And this in debt by bill as well as by original. *R. 2 Cro. 88.*

If a man binds himself in a bond to pay so much *Flemish*, &c. the plaintiff may declare, *quod reddat* so much as it amounts to in *English* coin. *R. Yel. 81. 135. 2 Cro. 617. Jon. 69.*

If a man is bound to pay 67*l.* at *H.*, and debt is brought for 56*l.* the value of the coin there, without more, if the defendant demands *oyer* of the bill, and then demurs, there shall be judgment for the defendant. *R. 2 Bul. 154.*

And where the contract is for foreign coin, the plaintiff has his election to demand such coin, or as much as it amounts to in *Sterling*. *R. 1 Leo. 41.*

If there be a sale of goods for two jewels, two diamonds, &c. in certain, the declaration may demand the jewels, &c. *1 And. 118.*

Yet, if debt be for so much *monet. Flandr. ad valor.* so much *monet. Angl.*, it is well. *R. Cro. El. 536. Mo. 704.*

But then the jury ought to inquire of the value, or a writ of inquiry must issue before judgment. *Cro. El. 536. 2 Cro. 617. [Vide supra Pleader (Z).]*

So, if the contract be for 20*l.* to be paid in goods, without saying what in certain, it must demand the 20*l.* not the goods. *R. 1 And. 118.*

If the contract be for 100 guineas, he may declare for so much as they are valued for. *Dub. Skin. 573.*

If debt be for a certain sum, and the particular contracts, whereon the plaintiff declares, amount to more, it is bad; for he has judgment for more than he demands. *R. Yel. 5. Vide post. (2 W 14.)—ante, (C 84.)*

So, if he declares for so much due, and demands a less sum without shewing that the residue is discharged. *Vide ante, (C 84.)*

So, if he declares upon several contracts, and shews part satisfied, but does not say on which contract, and he cannot recover upon all the contracts, he shall recover for no part. *R. Cro. El. 583.*

So, if the debt be founded upon record or specialty, and he demands a less sum than was due by the specialty, without shewing the residue satisfied: as, if 80 shillings are demanded upon a judgment in an inferior court, where the judgment was for 80 shillings and four pence. *R. 3 Mod. 41.*

[On a certificate of the commissioners of army-debts for 105*l.* 18*s.* 7*d.* farthing, the demand (which it was necessary by the statute to make) had been made for 105*l.* 18*s.* 6*d.* farthing, and plaintiff was nonsuited. *Palliser v. Ord, P. 1724, Bunb. 166.*]

But debt for 50*l.*, and a declaration upon a bill to pay 50*l.* viz. ten pounds at five several days, and ten pounds *nomine pæna*, is well; for it is a several bill as to the *nomine pæna*. *R. Cro. El. 771.*

So, in debt upon several bonds, if he shews part satisfied, it is sufficient, tho' he does not say upon which bond. *R. 3 Bul. 244. 1 Rol. 423.*

So, it is sufficient, if he declares for a debt of 50*l.* tho' part be satisfied before action. *1 Vent. 135.*

So, in debt upon a statute, &c. if the declaration be *quod cum*, &c. it is well. *R. Sho. 337.*

[In debt for goods sold and delivered, the plaintiff declared that the defendant at *Westminster* in the county of *Middlesex*, in a certain sum



sum for goods sold and delivered, without alleging an express contract, and place where such contract was made; on special demurrer for these causes, the court held the contract and venue well laid. *Emery v. Fell*, B. R. T. 27 Geo. 3. 2 T. R. 28.]

(2 W 8.) *When in the debet et detinet.*] So, a declaration in debt, generally, shall be in the *debet et detinet*.

Tho' it be against husband and wife for the debt of the wife *dum sola*. R. 3 Leo. 206.

Tho' debt be for guineas or foreign coin of so much value *Englisb*. R. Lut. 488.

But where debt is brought for goods and chattels it may be in the *detinet* only.

As, in debt *quod reddat dolium ferri*. Yel. 71.

*Quod reddat* so many *quarteria frumenti*. 2 Cro. 88. 4 Leo. 46. 11 H. 7. 5. b.

So, if it be for foreign coin. *Mo.* 704. Yel. 81. R. Latch, 84. R. 2 Cro. 617. R. Latch, 5. Jon. 69.

Or, for guineas in *specie*. 4 Mod. 410. Lut. 488.

So, in debt by or against an executor. *Vide ante*, (2 D 1.—2 D 2.)

But upon an original in debt the plaintiff cannot declare in annuity. R. Yel. 208.

And therefore, if the declaration is *quod reddat 50l. de annuali reddit.*, and shews the grant of an annuity, it is bad. Yel. 208.

So, a declaration in B. R. *de placito debiti quod reddat ei 20l.* without saying, *quas ei debet et injuste detinet*, is bad. R. Mod. Ca. 306.

[So, the assignees of a bankrupt are allowed to sue both in the *debet* and *detinet*, because the whole property of the bankrupt is vested in them by law. By Buller J. *Winter v. Kretchman*, B. R. T. 27 Geo. 3. 2 T. R. 45.]

(2 W 9.) *Declaration upon a bond, &c.*] If the plaintiff declares upon a bond, or other specialty, he must shew the certainty of the bond, &c.

And therefore, if he says *per scriptum concessit*, without saying *per scriptum suum obligatorium*, it is bad. *Semb.* Cro. Car. 209.

Or, *per scriptum manu sua signat*. *Semb.* 3 Lev. 234.

But, *per scriptum suum obligatorium* is sufficient, without saying *sigillis figillat.*, for *scriptum obligatorium* implies it. R. Cro. El. 737. R. 2 Cro. 420.

And if he omits *per scriptum obligatorium*, after plea upon *oyer quod solvit*, &c. it shall be aided. R. Cro. Car. 209.

So, after plea of privilege, and a demurrer thereto. Lut. 1667.

So, *per scriptum obligatorium* is sufficient, without mention of the date, or seal, or delivery. R. Mod. Ca. 306.

So, *per scriptum obligatorium cujus dat. est eisdem die et anno*, tho' it has another or void date, for *cujus dat.* shall be construed of the delivery, otherwise if it was *gerentem* such a date; for then the true date shall be set out. R. Sal. 463.

If the bond upon *oyer* appears to be, *I A. stand bound in 16 pounds, and is to be paid to B.'s executors*, it is good, without saying to whom bound. R. 3 Leo. 21.

If the whole substance of the bond, &c. be in the declaration, it is  
not

not necessary to mention words, underwritten, or indorsed. *R. 2 Brownl. 98.*

The plaintiff may declare upon several bonds in the same declaration. *Vide Action (G).*

So, he may declare upon a bill for payment of money on a day with a *nomine pœna* for non-payment, and afterwards declare for the *nomine pœna*. *R. Cro. El. 771.*

So, he may declare upon a penal bill, tho' it be not formally expressed. *R. 2 Vent. 106.*

If the declaration is insufficient, or upon *oyer* appears not sufficient, the defendant may demur. *Vide ante, (Q 3.)*

(2 W 10.) Upon a statute, recognizance, &c.] When it lies, *vide Dett, (A 3.)*

If the plaintiff declares upon a statute, recognizance, &c. he must shew the certainty of the statute or recognizance. *Asb. Ent. 223. Raft. 189. a.*

And therefore, if he declares *quod A. coram Ch. J. concessit se teneri, &c. et si defecerit, concessit per idem scriptum quod curreret super se pœna in stat. stat.*, without saying *per scriptum suum obligatorium*, or *secundum formam statuti*, it is bad. *R. per three J. Cro. Car. 363.*

So, if the declaration does not shew the statute to have such seals as the act directs, it will be bad. *Mo. 811.*

But, if the jury find that *A. recogn. se debere, &c.* without saying, *per scriptum obligatorium*, or *secundum formam statuti*, it is sufficient. *R. 4 Co. 65. b.*

So, if the statute be recited, as inducement to the action, it is sufficient tho' it is not said that it was *sub sigillo*. *R. Mo. 811.*

[On a recognizance against bail, must shew at whose suit defendant became bail, and for what sum the suit was brought. *Park v. Yerbury, M. 24 G. 2. 1 Wilf. 284.*]

[If it do not appear on the record that there is a condition to the recognizance, on which an action is brought, the court will not intend that there is any condition. *Crosse v. Porter, C. P. M. 17 Geo. 2. Willes' Rep. 18. Barnes, 339. S. C.*]

(2 W 11.) Upon a contract.] When it lies, *vide Dett, (A 8.)*

So, if the plaintiff declares upon a contract, he ought to shew the certain contract, where the contract is express; as, upon a *mutuatus* or account. *Bro. V. M. 162.*

Upon a sale or other agreement executory. 1 *Bro. Ent. 160. 165.*

For a salary upon a retainer. 1 *Bro. Ent. 176. Bro. V. M. 166, 7.*

For fees. 1 *Bro. Ent. 172. Vide Attorney, (B 18.)*

Upon a submission to an award without specialty. 2 *Sand. 127. Vide Arbitrament, (I 1, 2, 3.)*

So, if the contract is only implied by the law, the plaintiff by his declaration ought to shew the foundation of the contract.

As, in debt for an escape, the plaintiff shall shew the judgment, execution, and commitment thereon. 2 *Sand. 98. 2 Bro. Ent. 59. 3 Lev. 390. Vide Action on the Case for Negligence, (A 2.)—Vide ante, (2 P 1.)*

For a penalty of a by-law, must shew a power to make by-law made, and breach. 2 *Vent. 243. 1 Bro. Ent. 170.*

[The first count in a declaration in debt for a penalty under a by-law



law set forth the charter, empowering the company to make by-laws, the by-law made, and the breach of it; the second count, omitting the above particulars, stated the penalty as being forfeited, "under and by virtue of a certain by-law of the company before that time duly made," &c. and this count was on special demurrer holden bad. *Company of Felt-makers v. Davis*, C. P. M. 38 Geo. 3. 1 Bos. & Pull. Rep. 98.]

For, a fine of a copyhold, a custom for the fine, and admission to copyhold. *Clift*. 244. *Lut*. 597. *Vide Copyhold*, (H 6.)

For a fine or amercement, in a court leet, the plaintiff must shew a power to hold the leet, the offence, and the fine or amercement for it. *Lev. Ent*. 62. 1 *Bro. Ent*. 152. 154. 168.

(2 W 12.) *Upon a judgment.*] If the plaintiff declares upon a judgment, he must shew the certainty of the judgment. *Vide ante*, (E 18.)

As, if the declaration be in C. B. upon a judgment in B. R., he must shew the term and parties, and thing recovered. 2 *Mod. Int*. 224, 5. *Lut*. 600.

So, if it be upon a judgment in the same court. 2 *Mod. Ent*. 223, 4.

And if it be upon a judgment in C. B. he must also shew before what judges.

So, if it be upon a judgment in an inferior court. 2 *Mod. Int*. 228. *Carth*. 86.

So, the plaintiff must aver that the judgment stands in full force. *Semb. Lut*. 600.

But in debt upon a judgment, the plaintiff need not shew all the proceedings at large. *Semb. Cro. El*. 817.

Tho' it be upon a judgment in an inferior court. 2 *Mod. Int*. 229. *R. Sho*. 71. *Carth*. 86. *Vide ante*, (E 18.)

[On a judgment of nonsuit in an inferior court, it is not necessary to set forth that the plaint in the court below was levied for a cause of action arising within its jurisdiction; nor is it necessary to set out the plaint and subsequent proceedings; it is enough if the nonsuit is laid to be given and recorded at a court held within its jurisdiction. *Murray v. Wilson*, H. 25 G. 2. 1 *Wilf*. 316.]

It is not necessary to shew (except in the case of an executor or administrator) more than the judgment. *Per Rule*, 1654. *Mills*, 27.

Nor, in a declaration against an executor or administrator upon a judgment, more than the declaration and the judgment upon it. *Ibid*.

It is not necessary to say *prout patet per recordum*. *Sal*. 565.

So, if the plaintiff does not shew who were the judges of the court, it will be aided after verdict. *R. Carth*. 86.

[An action of debt will lie on a foreign judgment, and the plaintiff need not shew the ground of the judgment. *Walker v. Witter*, B. R. M. 19 Geo. 3. *Dougl*. 1. *Massin v. Massareene*, B. R. M. 32 G. 3. 4 T. R. 493.]

[The defendant however may go into the consideration of it. *Ibid*.]

(2 W 13.) *Pleas*. Nul tiel record, nil debet, &c.] To debt upon judgment

judgment in any court of record, if there was no such recovery, or the record is mistaken, the defendant may plead *nul tiel record*. 3 *Mod.* 41. *Vide post.* (2 W 36, &c.)

Tho' the judgment was in the same, or in an inferior court. *Bro. V. M.* 244. *Clift.* 148.

So, in every case where the record is denied, the defendant shall say *nul tiel record*.

And *nul tiel record* without more, is a complete issue if the record is in the same court. *Mod. Ca.* 40.

But where the record itself is shewn to the court in pleading, the defendant cannot say *nul tiel record*; for, by the *profert in curia*, it appears to the court that there is such a record: as, if letters patent are pleaded, the defendant may say *non concessit*, but not *nul tiel record*. *Co. Lit.* 260. a. *Hard.* 158.

If the defendant pleads *nul tiel record*, he shall conclude to the action. *Clift.* 148.

And to this plea the plaintiff ought to reply that there is such a record. *Lut.* 945.

And the replication shall conclude, *prout patet per recordum*. *Lut.* 945. *Vide ante*, (E 29.)

If the record is in the same court, the replication shall pray *quod videat. per cur.*, and a day shall be given for the inspection. *Lut.* 945. *R. Sal.* 566. *Carth.* 517.

Or, the plaintiff may demand *oyer*. *Per Holt, Carth.* 517.

If it be in another court, day is given to produce it, as in *B. R.* *Bro. R.* 107. *Sal.* 566.

[On *nul tiel record* pleaded, *B. R.* will not make an order for the proper officer of *C. B.* to attend with the record, there must be a *certiorari*. *Hewson v. Brown*, T. 33 & 34 G. 2. 2 *B. M.* 1034.]

In *C. B.* *Cl. Aff.* 79.

If it be in a county *palatine*, there shall be a writ to the *chamberlain* to certify, &c. *Clift.* 148.

So, if it be in an inferior court, there shall be a writ to the proper officer to certify, &c. *Bro. V. M.* 244.

If the officer refuses to certify, there shall be a rule to do it *upon pain*, and if he does not, an attachment. *Pal.* 562.

At the day given for the record, there shall be judgment for or against the defendant, if he shews or fails of the record. *Town. Jud.* 72, 73.

But an immaterial variance is no failure. 3 *Leo.* 243. *Hob.* 209. *Vide Record* (D).

To debt upon a judgment in a court not of record, the defendant may wage his law, or plead *nil debet*. *Vide post.* (2 W 17.—2 W 44.—2 W 45.)

So, by the *st.* 4 & 5 *Ann.* 16. to debt upon any judgment he may plead payment in bar of the action.

[If there is judgment for 388 l. c.s. 1 d. and debt is brought on it for 388 l. omitting the penny, it is variance, and cannot be cured by a *remittit* of the penny, for that must be before judgment. *Coy v. Hymas*, M. 16 G. 2. *Str.* 1171.]

(2 W 14.) *Upon a demise.*] If the plaintiff declares upon a demise, he must shew the certainty of the lands demised.

And



And therefore, if he alleges a demise made to B., but does not say where the land lies, it is bad. R. 2 Cro. 682.

[Debt will lie for use and occupation generally, without setting forth the particulars of the demise. *Wilkins v. Wingate*, B. R. M. 35 Geo. 3. 6 T. R. 62.]

If the plaintiff be an assignee, he must shew a good assignment: as, an assignment by deed. *Vide ante*, (2 V 2.)

And *per scriptum*, without saying *sigillat.* or *fact.*, is not sufficient. 1 Leo. 310. *Vide ante*, (2 W 9.)

But default of attornment shall be aided after verdict. R. Ray. 487.

So, if he says that he is yet seised of the reversion where the term is determined. R. 2 Cro. 118.

So, it is sufficient to allege the lands demised, as general and certain as they are in the lease. R. 2 Cro. 124.

Tho' no *vill* appears where the land lies, but only the county. 2 Cro. 125.

So, it is sufficient to say that the plaintiff demised, without shewing what estate he had. Sal. 562.

So, the plaintiff must shew that the defendant entred and was possessed by virtue of the demise. *Semb. Cro. El.* 262.

And this is necessary where the debt is for rent upon a lease at will; for the defendant is charged in respect of his occupation. R. 1 Sal. 209.

If he shews that he was possessed *a festo Michaelis usque ad festum M.* when he demands rent for one year, it is bad; for it wants one day of a year. *Per Yel.* 74.

But *virtute cujus intravit* is sufficient, without shewing the time of the entry. R. *Latch*, 196.

And if the lease commenced at a future day, it shall be intended that he entred after the day. R. 2 Cro. 549.

So, upon a lease for years no entry or occupation need be alleged. 1 Sal. 209.

So, if a lease begins from *Michaelmas*, and the entry is 29th September, which is the day before the commencement, it will be well after *nil debet*, and a verdict for the plaintiff. R. *Cro. El.* 169.

[If a tenant from year to year hold for four or five years, either he or his landlord, at the expiration of that time, may declare on the demise as having been made for such a number of years. *Salk.* 414. cited 1 T. R. 380.]

If the declaration alleges a demise *per nomen*, &c. it ought to say that it was by writing. R. 3 Leo. 9.

So, the plaintiff must shew expressly what rent is reserved; for *secundum ratum* 20 l. is not sufficient. R. 1 Sal. 262.

So, the plaintiff must shew when the rent was in arrear. *Semb.* 2 Cro. 668.

But it is sufficient, if the plaintiff says the rent was in arrear at such a day, without saying that it then became due; for it shall be intended upon a general demurrer. R. 1 Sal. 139.

And if it be reserved at two feasts, it is not sufficient to say that it was in arrear for a year, without shewing at what feast the year expired. R. 3 Mod. 70. *Semb. Sho.* 9. R. *Cro. El.* 702.

Yet, if the declaration shews that he had possession only one year, it will be aided. R. 3 Mod. 70. If

If it be reserved at two feasts, or ten days after, it is not sufficient so say that it was in arrear for 10 days, but he must say after 10 days. *R. Cro. El.* 262.

If the grantee of a reversion be plaintiff, he need not allege notice or attornment in the declaration; for if he has paid, it will be a good plea; if not, the action is a demand. *R. 2 Cro.* 193.

But the rent must be computed according to the day mentioned in the *reddendum*, not according to the *habendum*: as, if a demise be to commence from the 24th *December*, rendering rent at *Michaelmas*, *St. Thomas*, &c. the declaration must say that the rent was due 21st *December*, viz. *St. Thomas*, not the 24th of *December*. *R. 1 Sal.* 141.

Yet, *reddendum* quarterly shall be computed according to the *habendum*. *Ibid.*

But if debt be for a sum more or less than the rent in demand, it is bad, except where it shews the residue discharged. *Vide ante*, (C 84.—2 W 7.)

As, if debt be for 100*l.* and the plaintiff declares upon a lease, rendering 74*l.* and demands for a year and a half, it is bad, if he does not shew that the 11*l.* above the 100*l.* is satisfied. *Semb.* 2 *Lev.* 4.

So, if debt be for 15*s.*, and he declares upon a lease rendering 30*s.* and demands rent for a year, it is bad, if he does not say how the 15*s.* are discharged. *R. Cro. Car.* 137.

Yet, in debt for so much rent, upon *nil debet*, if it appears that the rent ought to be apportioned for part, the plaintiff shall recover for the residue. *Per Popb.* 3 Co. 24. a. *Acc.* 1 Sid. 6. 2 *Inst.* 504.

So, in debt for a quarter's rent due at the end of the term, it is sufficient without shewing the residue satisfied. *R. 2 Vent.* 129.

So, if by his own shewing the plaintiff demands more than is due, after a verdict upon *nil debet* he may remit the surplus. 1 *Vent.* 49.

#### (2 W 15.) Judgment by Confession, &c.

After a declaration in debt the defendant may demur.

Or, demand *oyer* of the deed on which he may demur, if upon *oyer* no cause of action appears.

Or, to avoid more trouble, the defendant may give judgment by his confession.

Or, by *nil dicit*. *Bro. Vad. M.* 216.

Or, to avoid damages against him in writ of deceit, the attorney may plead *non sum informatus*. *F. N. B.* 98. I.

But the prothonotary shall not sign judgment by confession, *nil dicit*, or *non sum informatus*, if it be not brought to him after *Easter*, before the first day of *Trinity* term, or within 20 days after the end of every other term, except where the warrant of attorney is dated after the term, and then before the *essoign-day* of the next term. *Per Rule*, Tr. 29 *Car.* 2. *Mills*, 75.

#### (2 W 16.) Pleas in Debt.

(2 W 16.) Upon a bond what are good or not.] To debt what pleas the defendant may plead in abatement, *vide Abatement*.

In bar to debt upon a bond the defendant shall plead in avoidance or discharge of the action.



(2 W 17.) *Nil debet.*] As, the defendant may plead the general issue *nil debet* to debt upon contract, not upon bond.

And this plea is good in all cases where nothing is due at the time of the action.

So, *nil debet* is a plea in debt for an escape; for the commitment is only inducement. *Sal.* 565.

In debt against an executor or administrator upon a *devastavit* after judgment against him, tho' mixt with record. 1 *Sand.* 219. *R. Carth.* 2.

In debt upon a specialty to pay so much as *A.* owes; for it is no sum certain, but must be ascertained by averment. *R. Skin.* 17.

In debt for the arrears of a rent-charge devised for life; for the will is no specialty. *Hard.* 332.

In debt upon a tally. *Hard.* 332, 333.

Tho' the debt is barred by the statute of limitations; for he need not plead *nil debet infra sex annos*, but *nil debet* generally. *Per Holt C. J.* (*Vide* 1 *Ld. Raym.* 153.)

Or, a release be given; for then he owes nothing. 1 *Sal.* 394.

And this plea ought to conclude to the country. *R.* 1 *Sand.* 283.

And the plaintiff ought to join in issue without replication. *Co. Lit.* 126. a.

But where the defendant has matter for his excuse or discharge, he cannot plead *nil debet*.

So, it is no plea to a penalty in an indenture to perform covenants. *R.* 2 *Mod. Ca.* 106. 323. 382.

[Where matter of fact is the foundation of the action, and a specialty only inducement to it; as, in debt for rent on an indenture, there *nil debet* is a good plea: but where the specialty is the foundation, and the fact is but inducement; as, in debt for non-performance of a covenant to accept and pay for stock, there *nil debet* is no plea. *Warren v. Consett*, *T.* 13 *G. Ld. Raym.* 1500. *Str.* 778.]

So, *nil debet* is no plea to a debt by bond, single bill, or other specialty, with <sup>o</sup>t an acquittance. *R.* 5 *Co.* 43. a. *Cro. El.* 455. 157. *Mo.* 692. *R.* 9 *Ed.* 4. 53. a. [2 *Wils.* 10.]

[*Nil debet* is no plea to a bail-bond. *Mills v. Bond*, *M.* 7 *G. Fort.* 363. *Mayhew v. Mayhew*, *P.* 4 *G. Fort.* 367.]

Nor, to an annuity granted by deed. *Hard.* 333.

Nor, payment without an acquittance, and if found for the defendant he shall not have judgment. 2 *Cro.* 377.

If found for the plaintiff it shall be aided by the *st.* 32 *H.* 8. *Vide Amendment*, (K 1.)

[If *nil debet* is pleaded in a *qui tam* action, defendant cannot give in evidence, a record of recovery against him for the same forfeiture by another person. *Bredon v. Harman*, *P.* 12 *G. Str.* 701.]

[A set-off may be pleaded to debt on a bond, conditioned for the payment of an annuity or growing sum. *Collins v. Collins*, *T.* 32 & 33 *G. 2.* 2 *B. M.* 820.]

[In an action on a bond the defendant must set forth in his plea the sum really due on the bond before he is entitled to set off any cross demand on statute 8 *Geo.* 2. c. 24. s. 5. and such averment is traversable. *Symmons v. Knox*, *B. R. H.* 29 *Geo.* 3. 3 *T. R.* 65.]

[Tho' laid under a *viz.* the averment being material. *Grimwood v. Barrit*, *B. R. M.* 36 *Geo.* 3. 6 *T. R.* 460.]

[Where

[Where a bond was given to one in trust for another, in an action brought by the trustee on the bond, the court permitted the defendant to set off a debt due from the *cestuy que trust*, in the same manner as if the action had been brought by him. *Bottomley v. Brooke*, C. P. M. 22 Geo. 3. cited 1 T. R. 623.]

[The whole penalty of a bond cannot be set off. (And *Qu.* Whether under a penalty of a bond for performance of articles, which sounds only in damages, the sum really due for damage sustained can be set off?) *Nedriffe v. Hogan*, T. 33 & 34 G. 2. 2 B. M. 1024.]

[*Nil debet* on bond may be good after verdict, tho' bad on general demurrer. *Anon. M.* 27 G. 2. 2 Wils. 10.]

(2 W 18.) *Non est factum.*] So, to debt upon bond, &c. the defendant may say *non est factum.* Cl. Ass. 72.

And this plea is good in all cases where the bond or specialty was not executed.

Or, if it was executed, but was void *ab initio*; as, for default of capacity; if the obligor was a monk, *feme-covert*, &c. he may plead a special *non est factum.*

And it ought to conclude to the country. R. 1 Sal. 274.

[On *non est factum* pleaded to debt upon articles, defendant may give lunacy in evidence, and plaintiff will be nonsuited. *Yates v. Boen*, M. 12 G. 2. Str. 1104.]

But if the plaintiff pleads over to the special matter, it will be well. 1 Sal. 274.

[If a bond is void *ab initio*, the facts which make it so may by law be averred and specially pleaded; e. g. that the bond was given to indemnify against a note given to suppress evidence on an indictment for perjury. *Collins v. Blantern*, P. 7 G. 3. 2 Wils. 341. 347.]

[Such plea shall conclude that the supposed bond is void in law, *et hoc*, &c. and therefore prays judgment, and this may be pleaded with *non est factum.* *Ibid.*]

A special *non est factum* puts the proof upon the defendant, which, upon *non est factum* generally, will be upon the plaintiff. *Mod. Ca.* 218.

So, if it was executed, but became absolutely void before the time of the action; as, if it be erased, altered, or cancelled. R. 5 Co. 119. b. *Dub. Dy.* 112. a. 1 Bro. Ent. 198, 199. *Cont. Sav.* 71.

So, if two are bound, and the seal of one is broken off, for this avoids the whole deed; tho' they are bound jointly and severally. *Dy.* 59. a. in marg.—But it shall conclude *actio non*, &c. *Dal.* 33.—*Not his deed.* *Dal.* 105.

So, if it was executed to the use of one who refused it, or if her husband refused. 5 Co. 119. b. *Dy.* 167. b.

Or, was delivered as an *escrow*, to be his deed upon conditions, which are not performed. 2 Rol. 683. l. 5. 2 Bro. Ent. 82. *Ray.* 197. *Mod. Ca.* 217.—and shall conclude *actio non*, &c. *Dal.* 33. *Dy.* 167. b.

But it is no plea where the deed is only voidable; as, for infancy, *dures* or *per minas.* R. 5 Co. 119. a.



So, if it is void by act of parliament; as, by the statute of usury, &c. R. 5 Co. 119. a.

Or, becomes void after action brought by accident; as, if the seal is destroyed by rats or other accident after plea. R. Dy. 59. R. Dal. 33.

So, it is no plea where the deed is inrolled upon record. 1 Rol. 862. l. 12.

Nor, to a recognizance or statute. Hard. 367.

So, a stranger to the deed cannot plead a special *non est factum*; but shall say *nothing passed by the deed*. 1 Rol. 188.

If the plea says *quod factum predictum* was altered, *et sic non est factum*, it will be repugnant and bad. R. Cro. El. 800.

So, it is no plea where it was a joint bond, and the plaintiff declares upon a bond by one alone. R. 5 Co. 119. a. Sav. 92.

Where the bond was delivered to the party himself upon a condition not performed. R. 9 Co. 137. a.

Or, if the delivery to a stranger be not as an *escrow*. Dy. 167. b. Co. Ent. 145. b.

If an indenture be executed by one party only, and the other party does not execute. R. Cro. El. 212.

If the delivery, after conditions performed, is to be *ut scriptum suum*, not *ut factum*. Per two J. Morton cont. Ray. 197.

If the issue upon *non est factum* is found for the defendants, the deed may be kept in court. 1 Sal. 215.

But shall not be cancelled, nor kept upon a collateral issue. Ibid.

(2 W 19.) Per *dures*.] So, to debt upon bond the defendant may plead *per duces*. Cl. Aff. 77. Brq. R. 200.

So, to debt for arrears of an account. R. 1 Leo. 13.

And it will be *dures*, if a man is forced to give a bond, &c. by a wrongful imprisonment. 2 Inst. 482.

As, when he was under an arrest without legal process.

Or, by the process, warrant, &c. of him who had no jurisdiction.

So, if a man arrested by a legal process be forced by tortious usage in prison. 2 Inst. 482.

But, without plea of *dures*, the bond, &c. shall not be avoided; for it is not void, but only voidable. Ibid.

Replication.] To this the plaintiff may reply, that the defendant was *ad largum*, and not *per duces*. Cl. Aff. 77. Bro. R. 200.

But a man shall not plead *dures* to a deed acknowledged by him to be inrolled upon record. 1 Rol. 862. l. 15.

So, it is no plea for a surety for B. that the bond was obtained by *dures* of B. R. 2 Cro. 187.

(2 W 20.) Per *minas*.] So, *per minas*. Cl. Aff. 72.

And menace of life, member, mayhem, or imprisonment, is sufficient to avoid a deed. 2 Inst. 483.

But menace of battery it not sufficient to avoid a deed. Ibid.

Nor, menace of burning his houses. Ibid.

Or, taking or destroying his goods; for he may recover damages for them. Ibid.

Replica-

*Replication.*] To this the plaintiff may reply, that it was voluntary, and not *per minas*. *Cl. Aff.* 72.

(2 W 21.) *Coverture.*] So, to debt by a *feme-covert*, as sole, the defendant may plead in bar, that *A.* and she are married, *8bo.* 50.

So, in debt or action upon the case, by a man against a woman. *R. Ray.* 395.

But in debt by husband and wife, he cannot plead *ne unques accouple*, &c. for the trial would be altered, *R. Sal.* 437.

(2 W 22.) *Within age.*] So, to debt upon bond, the defendant may plead that he was within age. *Cl. Aff.* 76. *Asb. Ent.* 273.

So, to debt on simple contract, if it was not for necessities. *Vide Enfant*, (B 5.)

And it shall not be intended for necessities, if it be not alleged; and therefore if the defendant pleads within age, and the plaintiff demurs, there shall be judgment for the defendant. *R.* 2 *Cro.* 560.

*Replication.*—[In replying to a plea of infancy, the plaintiff must shew enough in the replication to maintain every part of the declaration. 1 *T. R.* 40.]

To this plea the plaintiff may reply that the defendant *fuit plena etatis et non infra*. *Cl. Aff.* 76.

He may reply to part *full age*, to the residue *for necessities*; tho' all the same day. *R.* 1 *Sal.* 223.

To *within age* pleaded to debt upon contract, the plaintiff may say, that the defendant was indebted to him for necessary apparel, physic, victuals, &c. *Cro. El.* 583.

[To plea of infancy, to *assumpsit* on a farrier's bill, plaintiff must reply generally, necessities for the infant, not necessities for his horse. *Glowes v. Brooke*, *M.* 12 G. 2. *Str.* 1101. *Andr.* 277.]

And if there is a bill for the debt, that he was indebted for necessities, and the bill given for security of payment. *Asb. Ent.* 273.

And it is sufficient to rejoin, that it was not for necessities generally, without saying that the money, or any part thereof, was not for necessities. *R. Lut.* 241. *Carth.* 110.

[The plaintiff may reply to a plea of infancy, that the defendant, after he attained 21, confirmed his promise; and if the defendant rejoin that he did not, the plaintiff need only to rejoin that he did, and the defendant must shew that he was under age at the time. 1 *T. R.* 648.]

(2 W 23.) *Statute of Usury.*] That the bond was given upon an usurious contract. *Co. Ent.* 168. b. 2 *Vent.* 80. *Clift.* 185.

And it may be pleaded, without reciting the statute. *Bro. V. M.* 255.

But the defendant, by his plea, must shew the usurious agreement specially, and how much more than legal interest was given. *R.* 3 *Mod.* 35.

So, he must expressly aver that the agreement was for giving day of payment, &c. *R. Jon.* 410.

*Quod corrupte agreatum fuit.* *Cro. Car.* 501.



*Replication.*] To this the plaintiff may reply *quod non corrupte agreeatum fuit*.

*Quod licite bargainizavit*, with a traverse of the corrupt agreement. *Cl. Ass.* 324.

That it was for a lawful debt with a traverse, &c. *Clift.* 185.

[So, on a note, plaintiff may reply that the note was given for a just debt; *absque hoc* that it was agreed *moda et forma* as defendant pleads. *Cooke v. Ratcliffe*, T. 9 G. 2. B. R. H. 287.]

That it was a mistake of the scrivener, with such traverse. 2 *Vent.* 82. *R. Cro. Car.* 501.

So, if the defendant avers the manner of the agreement, the plaintiff may traverse the averment. *Semb. Hard.* 418.

[To debt on bond dated 20th *July*, conditioned for repayment of the principal sum, with interest, at 5 *l. per cent.* from 24th *June* preceding, defendant pleaded that there was a corrupt agreement between plaintiff and defendant; that the former should lend the principal sum on 20th *July*, to be repaid with interest from 24th *June* preceding, which exceeds legal interest, and that the bond was given in pursuance thereof: plaintiff in his replication traversed the corrupt agreement, and defendant demurred. Judgment was given for the plaintiff, because the demurrer admitted the non-existence of any corrupt agreement. *Grimwood v. Barrit*, B. R. M. 36 Geo. 3. 6 T. R. 460.]

(2 W 24.) *Outlawry, &c.*] *That the plaintiff was outlawed.* Bro. V. M. 460. R. Ow. 22. *Vide ante*, (2 G 4.)—*Abatement*, (E 2.)

So, tho' the plaintiff was outlawed after the action brought. 1 *Sal.* 178.

So, *that the plaintiff was attaint of felony, &c.* Bro. V. M. 252. *Lut.* 610. *Vide Abatement*, (E 3.)

[And if a pardon be replied, it must be averred to be *sub pede sigilli*. *Bull v. Tilt*, C. P. H. 38 Geo. 3. 1 *Bos. & Pull. Rep.* 199.]

*That the plaintiff's testator was felo de se*, and the defendant has paid to the king's grantee. *Clift.* 190.

So, it is sufficient to say, *debito modo utlagat. fuit*, without shewing how. *Dub.* 2 *Vent.* 282.

But to say, *et sciend. est quod A. utlagat. fuit*, is not good. R. 1 *Sid.* 173.

And it is not necessary to produce it *sub pede sigilli*, when the plea is in bar. *Lut.* 1514.

And it is not necessary to say, *after the last continuance*, that he was outlawed since the declaration. 5 *Mod.* 11.

But in an action against an executor or administrator, outlawry of the testator or intestate is no bar; for he may have assets not forfeited. *Semb. Cro. El.* 575. *R. Cro. El.* 851. *Hut.* 53.

(2 W 25.) *The st.* 23 H. 6. c. 9. *that it was to a sheriff, &c. colore officii.*] To a bond given to a sheriff *colore officio*, or for ease and favour, the defendant may plead the *st.* 23 H. 6. c. 9. 1 *Sand.* 157. *Dy.* 119. b.

[*Quare.* Whether this is not a private statute, and therefore must be set out? But if set forth, in a plea to an action on a sheriff's bond, a misrecital is fatal. *Boyce v. Whitaker*, B. R. H. 19 Geo. 3. *Dougl.* 94.]

[This]

[This statute is a public act, and the court will take notice of it, though it be not pleaded. *Samuel v. Evans*, B. R. T. 28 Geo. 3. 2 T. R. 569.]

[And if it appear in a declaration, by the assignee of the sheriff on such bond, that the bond is void by the provisions of that statute, the court, on motion, will arrest the judgment against the defendant on a plea of *non est factum*. *Ibid.*]

So, to a bond given to the marshal of B. R. warden of the Fleet, &c. 1 Lev. 254. 1 Sand. 162. 1 Sid. 383. R. Cro. El. 66.

But the statute is no plea, except as against the sheriff, his bailiffs, or ministers; as, gaolers, &c. Cro. Car. 309.

It is no plea against a serjeant of the marshes in Wales; for he is not an officer within the statute. *Semb.* Cro. Car. 309.

Nor, against the serjeant at mace of the house of commons. R. 1 Lev. 209. Ray. 62. R. Hard. 464. Dub. 1 Sid. 384.

Nor, to a bond to an officer of an inferior court, upon an arrest out of his jurisdiction. R. Cro. Car. 309.

And therefore, if a bail-bond be not conformable to the statute in the condition, it will be void: as, if it does not say in certain before what justices, or in what court, the defendant is to appear. Dy. 364. a. in marg.

So, if it does not say in what suit: as, if it says in *placito debiti*, where the writ is in *placito transgressionis ac etiam billæ* for 40 l. debt. *Semb.* 1 Vent. 233. But afterwards R. cont. for it is sufficient that the condition shews the time and place of appearance, and in what suit. 2 Jon. 138. Mod. Ca. 122. Vide Ray. 220. 2 Lev. 35.

[Under an original writ in a plea of *trespass on the case*, on promises, the sheriff took a bail-bond, conditioned for the defendant's appearance, &c. in a plea of *trespass*; and it was holden good. *Owen v. Nail*, B. R. T. 36 Geo. 3. 6 T. R. 702.]

So, if he takes only one bond for three defendants, who are sued severally. Mod. Ca. 122.

So, if the day of appearance be after the term, or impossible. *Semb.* 3 Lev. 74. Aff. *Mills v. Bond*, M. 7 G. Fort. 363.

So, if the bond be without any condition. 10 Co. 100. a.

Or, taken of him who is not bailable. 10 Co. 100. b.

If the bond be to the sheriff not by the name of his office. 2 Jon. 138.

Or, to the sheriff in *com. predict.* for *predict.* R. Pal. 378.

Or, to another by the name of sheriff, and not to the sheriff. 10 Co. 100. b.

But, if the county be named, and it be to the sheriff, without saying *de com. predict.* it will be good. R. 2 Lev. 123.

[To take advantage of a bail-bond's not being made to the officer by the name of his office, *oyer* of the bond must be prayed. *Darby v. Hammond*, P. 8 G. 2. Fort. 371.]

So, if the bond was to A., without saying *tunc vicecom.* it is bad, tho' the declaration be *ad respond. A. nuper vicecom.* R. Cro. El. 800.

If the bond be to appear, and also to pay chamber-rent. R. Ray. 222. 1 Vent. 237.

Or, also to indemnify the sheriff. 10 Co. 100. b. R. Dal. 76.

So, if the bond adds, *appear, and there receive farther as they shall award.* Dy. 364. a. in marg.



So, if the bond has no condition, or, which is the same, an impossible one; for then the bond is single. *Semb. 3 Lev. 74, 75.*

So, if it be to appear *coram majestate sua*, without saying *coram domino rege*. *R. 2 Lev. 177.*

*Ad respond. billa* for 100 l. without saying at whose suit. *2 Lev. 177.*

If it be to pay for a debt. *10 Co. 100. b.*

So, the statute is no plea, if the bond was taken without legal process; for he ought to plead *dures*. *2 Jon. 76. Semb. Cro. El. 646.*

But a bond, that the defendant appear personally, is good, tho' the statute says, *no sberiff shall take obligation but by name of his office, on condition that the prisoner shall appear at the day and place as the writ shall require.* *Dy. 364. in marg. R. 2 Leo. 78. 10 Co. 101. Sav. 81. Cro. El. 776.*

[A bail-bond is good, though made two days after the return of the writ; for defendant has four days to put in bail. *Belgardine v. Preston, P. 8 G. Fort. 365.*]

[If the bail-bond is for more than the sum in the writ, it is not void; it is only a misdemeanor in the officer. *Jenyns v. Gooftrey, H. 3 G. 2. Fort. 366. Rusb v. Rusb, P. 6 G. 2. C. B. Fort. 370.*]

[Bail-bond is good, though the indorsement of the writ is different from the *ac etiam*. *Fromanteel v. Williams, H. 3 G. 2. Fort. 367.*]

So, that the defendant appear, &c. and *then and there answer*, &c. for it is tantamount to *ad respondendum* as the writ speaks. *R. Dy. 364. a. Dub. 2 Leo. 78. Acc. 10 Co. 101.*

That he appear before *justic. nostris de B.* without saying *apud Westm.* is sufficient. *R. 2 Vent. 238.*

Or, *coram rege in cancellar.* tho' it says, *apud Westm.* instead of *ubicunque*. *Semb. 2 Vent. 238. Cont. 1 Vent. 234.*

Or, *coram just. de B. R. apud Westm.* without saying, *ad placita coram nobis*, &c. *R. 2 Jon. 46. 2 Lev. 180.*

In the *Star-chamber*, without saying *coram rege et concilio*, &c. *Per Twissd. 2 Jon. 46.*

[On a special original returnable *coram dom. rege, ubicunque tunc fuerit in Anglia*, a bail-bond without the *ubicunque*, &c. is good; for there are no set forms of words for these bonds; and if in substance they ase to appear according to the design of the writ, it is sufficient. *Shuttleworth v. Pilkington, T. 14 G. 2. Str. 1155.*]

That he appear *ad respondendum de placito debiti* generally, where the writ is for 350 l. *R. 2 Cro. 286.*

Or, *ad respondendum*, without saying *in quo placito*, if the writ is recited in the condition. *R. 2 Lev. 123.*

[If the process is in trover, and the condition of the bail-bond to answer to a plea of trespass, yet it is good: the *ad respond.* is surplusage. *Davenport v. Parker, M. 4 G. 2. C. B. Fort. 368.*]

So, a bond to save harmless from past escapes, is not void, otherwise from future escapes. *Mod. Ca. 225.*

So, a bond to the party, and not to the sheriff, to pay or give security for such a sum, or render himself to prison, is not within the statute. *R. 2 Mod. 305.*

So, a bond that he will be a true prisoner, is not within the statute, if he traverses the case and favour. *R. 1 Sid. 383. Per Holt, Sal. 438. Semb. cont. 10 Co. 100. b.*

Or,

Or, by a person, not in his custody, for payment of money levied upon a *fiery facias* into court at the return. *R. 10 Co. 99. b.*

Or, for the due execution of a *fiery facias*. *R. 10 Co. 100. a.*

Or, for payment of money to the king upon an extent. *10 Co. 100. a.*

So, the bond is not void, tho' the bail be insufficient. *R. Cro. El. 808. 852. 862. Mo. 636. Vide Bail, (K. 5.)*

So, the bond is not void, if given by a person not in his custody. or who need not appear. *R. Mo. 452. D. 4 Mod. 187.*

Yet a bond taken by him who is no minister within the *st. 23 H. 8. 10.* in a case not bailable, is void by the common law. *R. Hard. 464.*

Or, if the bond be for profit to himself. *Sal. 438.*

Or, to let to bail a man not bailable. *10 Co. 100. b.*

Or, for his fees, before execution done. *R. Hw. 52.*

[An agreement in writing to put in good bail for a person arrested on mesne process at the return of the writ, or surrender the body, or pay debt or costs, made by a third person with the bailiff of the sheriff, in consideration of his discharging the party arrested, is void by this statute. *Rogers v. Reeves, B. R. M. 27 Geo. 3. 1 T. R. 418.*]

[The undertaking of an attorney for the appearance of a defendant, is not within the statute, because it is given to the plaintiff in the action, and not to the sheriff. *Ibid. Vide Bail, (K. 5.)*]

[A bail-bond may be assigned by the sheriff after he is out of his office. *Hange v. Manning, T. 8 G. Fort. 365.*]

[If the assignment is said to be *sigillat. & attestat.* it is well, though not said to be under hand and seal. *Watkins v. Harris, H. 3 G. 2. Fort. 367.*]

[If to a bail-bond given to the prison-keeper of the marshal's court, the statute be pleaded, and that *A.* sued forth of the palace, it is bad; it should be, sued forth of the court of the palace. *Derby v. Rose, H. 8 G. 2. Fort. 370.*

[Bail-bond on an attachment (except out of *Chancery* for want of appearance or answer) is void. *Barnes, 64.*]

*Replication.*] To this plea the plaintiff may say, that it was for security of his prisoner, and traverse that it was for ease and favour. *R. 1 Sand. 162. 1 Lev. 254. 1 Sid. 383.*

And if issue be thereon, little evidence will be sufficient. *R. 1 Sid. 383.*

(2 W. 26.) *The st. 16 Car. 2. against Gaming.*] So, to a bond the defendant may plead, that it was given for money won at play contrary to the *st. 16 Car. 2. Clift. 187. 5 Mod. 3. Lut. 485. Vide ante, (2 G. 8.)*

[The defendant must shew at what game the money was lost. *Colborne v. Stockdale, H. 8 G. Str. 493.*]

He must shew the statute.

That he lost upon tick at the same time above 100*l.*

That the bond was given for the same sum.

But the statute is not pleadable, where debt is brought for a wager when he was at play. *R. 5 Mod. 6. Lut. 487.*

[It



[It is no plea to a bond that it was given for the repayment of the moiety of a sum paid by the obligee, (with whom the obligor was jointly concerned,) for compounding differences for not delivering stock, &c. and not performing contracts, &c. which are prohibited by *stat. 7 G. 2. c. 8. Faikney v. Reynous, P. 7 G. 3. 4 B. M. 2069.*]

(2 W 27.) *The st. 5 Ed. 6. against sale of offices.*] That it was given upon the sale of an office within the *st. 5 Ed. 6. F. g. 45.*

[It is not sufficient in the plea to state generally that the case is within the statute, but facts must be set forth to shew that it is so. *Huggins v. Bambridge, C. P. H. 14 Geo. 2. Willes, 241.*]

But it is no plea to debt upon a bond, that it was given for composition of felony; for it is a bare fact, which is no plea in bar of a specialty. *Semb. F. g. 74.*

(2 W 28.) *Tender.*] So, to debt upon bond the defendant may plead a tender, and always ready, 2 *Mod. Int. 234. Bro. V. M. 213. Vide Condition, (G 6, &c.)*

If issue be upon the tender, there must be an actual offer.

But where the goods are cumbersome, the bringing of them to a place where the party may well receive them, and the offer of them there is sufficient. *R. Sho. 149, 150.*

This plea does not go in bar of the action, but of damages. *R. 1 Vent. 322. 2 Lev. 209. R. upon a single bill, Carth. 133.*

But if tender be upon a bond with a penalty, it must be in bar to the action. *R. Carth. 133.*

And it cannot be pleaded after an imparlance. *Dub. Dyer, 300. Semb. 36 H. 6. 13. 2 Cro. 627. 5 Ed. 4. 141. R. Lut. 226. 239. Adm. good to a bond, tho' in no other case. 2 Mod. 62.*

If the declaration has several counts, it must be pleaded to a count in certain. *R. Lut. 239.*

Must shew the day of the tender. 1 *Sid. 10.*

And if it be at a day after the time limited by the condition, *abinde* always ready, is bad. *R. M. 9 W. 3. B. R. Giles v. Hart. (Vide 1 Ld. Ray. 254. Sal. 622.)*

Or, at a day after the time of request alleged in the declaration. *R. Lut. 227.*

Must allege always ready after the tender, for *still* ready is not sufficient. *Dub. Dy. 300. b. Acc. 2 Cro. 627.*

There must be a *profer* of the money in court. *R. 2 Rol. 524. D. 9 H. 6. 65. Bro. tous temps prest. 3. 5, 6. R. Lut. 283. 368.*

But, where it appears that the thing to be delivered is so ponderous that it cannot be brought into court, it is not necessary. *Co. Lit. 2c7. a. 2 Rol. 524. E. 9 H. 6. 65. Ash. Ent. 276.*

So, when a forfeiture is to be saved, a tender is necessary. *R. 1 Vent. 322. 3 Keb. 800. 810. 828. Ray. 419. R. 3 Lev. 103.*

Otherwise, it is not necessary. *R. Ray. 419. cont. in rent. 1 Vent. 322. 2 Lev. 209.*

The tender alleged must be legal: and therefore it is not sufficient to say *paratus fuit solvere*, without saying *et obtulit*. *R. Sal. 584.*

A tender of corn, &c. must be with an *uncore prest*. *R. Dy. 25. a.*

So, if by bond money is to be paid within two months after the death of the obligee, if he pleads that within two months there was  
no

no executor or administrator, he must say *uncore prist*. *R. Raym.* 416.

[In pleading a tender of a sum according to a defeasance, (which is in a different instrument from the original deed,) it is not necessary either to plead that the party has always been and still is ready to pay, or to bring the money into court; it is sufficient to plead that on the day he tendred, &c. *Trevett v. Angus*, *C. P. T. 11* & *12 Geo. 2. Willes*, 107. (*Com. 568.*)]

[*Aliter* if the defeasance be in the same deed. *Ibid.*]

It is sufficient to allege, that no one was ready to receive, in the words of the condition. And therefore if the condition was *to pay to B.*, if it is said *prædict. B. non fuit paratus ad recipiendum*, it is sufficient, without saying *nec aliquis alius*. *R. Yel. 38. 2 Cro. 14.*

So, surplusage does not prejudice; as, if he says, no one ready *ad exigendum et recipiendum*, tho' a demand was not requisite. *R. Yel. 38. 2 Cro. 14.*

So, if a bond be to pay a legacy, which was payable upon request, it is sufficient to say *touts temps*, &c. for the bond does not alter the nature of the legacy. *R. 1 Leo. 17.*

But, where damages are to be recovered, and not the debt, a tender may be pleaded without *uncore prist*: as, in covenant to pay to *A.* or his order, a tender to *B.* who has an order, and refusal, is a good plea, without saying *uncore prist*. *R. Sho. 130.*

So, in *replevin*, if the defendant avows for a rent-charge, the plaintiff may plead a tender, without a *proffert in-cur*. *R. Sal. 584.*

And tho' the plaintiff accepts the money brought into court, the plea will be bad. *Ibid.*

But where a tender is pleaded, and the money brought into court, and the plaintiff accepts it, he cannot afterwards proceed for damages. *Per Holt, B. R. H. 13 W. 3. Horne v. Leaven*, (*Vide 1 Ld. Ray. 639. Sal. 583.*) *T. 1 An. Brecon v. Souter*, (*Vide 2 Ld. Ray. 774.*) *R. 2 Cro. 126.*

[If defendant bring money into court on a plea of tender, plaintiff may take it out, tho' he reply that the tender was not made before action brought. *Le Grew v. Cooke*, *C. P. M. 39 Geo. 3. 1 Bos. & Pull. 332.*]

So, now by the *st. 4 & 5 An. 16.* at any time pending the action on a bond with a penalty, if the defendant brings into court all principal and interest due, and all costs expended in law or equity, on such bond, the court may discharge the defendant from said bond. *Vide ante*, (*C 10.*)

But, such proffer cannot be made before bail to the action. *Mod. Ca. 11.*

(*2 W 29.*) *Solvit ad diem.*] So, to debt upon bond the defendant may plead *solvit ad diem*; for before breach it is well without an acquittance. *Sal. 508.*

So, payment of part with an acquittance *puis darrein continuance*; for this goes in bar. *R. Sal. 519.*

And now, by the *st. 4 & 5 Ann. 16.* if he has paid before the action brought, tho' it was not strictly at the day, he may plead it.

If the condition be that he pay at *D.*, he must plead *quod solvit at D.*, and



and the omission is not supplied by *secundum formam conditionis predictæ* upon a special demurrer. *R. 3 Lev. 245.*

[*A.* gave *B.* a bond to secure an annuity, and before any payment became due *A.* lent *B.* a sum of money; on which it was agreed that *B.* should retain the payments of the annuity as they became due, till that sum was discharged: then *B.* became bankrupt; and the agreement to retain was held a good plea to an action on the bond by *B.*'s assignees for the payments accruing after the bankruptcy, being equivalent to a plea of *solvit ad diem*. 3 *T. R.* 599.]

If it be, that he pay within six months, he ought to plead payment within the time. *R. Cro. El. 823.*

If the condition be to deliver 20 *l.* or ten cows, at the obligee's election, he must plead tender of one and the other. *R. 1 Leo. 68.*

If the condition be that he pay upon assurance of an estate, he must shew when the estate was conveyed; for payment at such a day is not sufficient, for it does not appear that it was paid upon the assurance. *R. 2 Mod. 33.*

So, it will be a good plea that he paid before action, viz. such a day, which is before the day; for the words after the viz. shall be rejected. *R. 2 Mod. Ca. 345.*

But, it is no plea *quod fuit itinerans ad solvendum ad diem*, and he was imprisoned by *covin* of the obligee. *R. Cro. El. 672.*

That it was not demanded, tho' payable upon demand; for the suit is a demand. *R. 2 Cro. 242, 3.*

*Quod solvit pendente lite*, without a specialty for his discharge. *R. Cro. El. 157. 884.*

Or, after the day, without an acquittance for it. *R. 5 Co. 43. a. Cro. El. (455.) Mo. 692.*

Or, that the plaintiff agreed to give a longer day for payment. *R. Cro. El. 697.*

[In debt on bond from defendant's testator and *A.*, jointly and severally, if defendant pleads that testator in his life-time, and *A.* paid off the bond, and plaintiff replies, they did not pay it *modo et forma*, &c. and it appears, that testator paid part in his life, and *A.* the rest after his death, this does not maintain the plea. *Hudson v. Stalwood*, *T. 8 G. 2. B. R. H. 133.*]

*Solvit ad diem* ought to be concluded with an averment, and not to the country. *R. 1 Sid. 215.*

[If payment in full is pleaded, it is sufficient, if it is proved that plaintiff accepted the sum paid as in full. *Price v. Brown*, *H. 12 G. Str. 691.*]

[If any interest has been paid after the day upon an old bond, (where the only evidence of payment is the length of time,) defendant must plead upon *stat. 4 & 5 Ann. c. 16.* *Moreland v. Bennet*, *M. 11 G. Str. 652.*]

[It is now an invariable rule, that if there is no demand for money on a bond for twenty years, the judges will direct a jury to find it satisfied, from the presumption arising from the length of time. *Gratwick v. Simpson*, *H. 1740, 2 Atk. 144.* *Oswald v. Legh*, *B. R. T. 26 Geo. 3. 1 T. R. 270.*]

If he pleads payment before the day, the plaintiff may demur. *2 Mod. Ca. 346.*

[If

[If the bond is conditioned to pay *on or before*, payment before the day, *scil.* such a day, is good. *Anon. T. 3 G. 3. 2 Wilf. 173.*]

[If money is payable *at or before* such a day, and is paid before, it should be pleaded, paid at such precedent day; and plaintiff may reply, not paid that day, nor before nor after. *Fletcher v. Hennington, P. 33 G. 2. 2 B. M. 944.*]

[To an action of covenant to pay money on a particular day, the defendant cannot plead payment on a prior day, because if found one way it is not conclusive; but he must plead payment on the day. *Dyke v. Sweeting, C. P. M. 19 Geo. 2. Willes, 585.*]

[On a covenant to pay money at the end of six months, it will be understood to mean *calendar* (not *lunar*) months. *Semb. Ibid.*]

[A replication taking issue on a plea of payment to debt on an annuity bond must be signed by a serjeant. *Ellis v. Govey, C. P. T. 39 Geo. 3. 1 Bos. & Pull. 469.*]

(2 W 30.) *Release.*] So, to debt upon a bond or specialty, the defendant may plead a release by the plaintiff, after the bond given. *Vide post. (3 M 12.)—Vide ante, (2 V 11.)*

If there are two obligees, a release by one. 2 *Rol. 410. l. 47.*

If the bond was to a woman before *coverture*, a release by the husband. 2 *Rol. 410. l. 50. 52.*

A release by one executor or administrator, where the debt was to the testator, or to them in right of the testator. 2 *Rol. 411. l. 7. 10.*

But if the release produced has a material variance from the release in the plea, it is bad: as, if it be of a different date. *R. 2 Vent. 131.*

To a release pleaded, the plaintiff, being a party to the deed, cannot plead *ne releffa pas*, but must demur, or say *non est factum*. *R. 2 Bul. 55.*

Otherwise, if he be a stranger to the release. *Ibid.*

So, if there are two obligors, who bind themselves jointly, a release to one may be pleaded in bar by both. 2 *Rol. 412. l. 29.*

So, if they are bound jointly and severally. *Ibid. l. 22. Sal. 574.*]

[If the obligee of a bond covenant not to sue one of two joint and several obligors, and if he do that the deed of covenant may be pleaded in bar, he may still sue the obligor. *Dean v. Newball, B. R. H. 39 Geo. 3. 8 T. R. 168. Vide Lacy v. Kynaston, B. R. T. 13 Will. 3. 1 Ld. Raym. 690. Salk. 575. Holt, 178. 12 Mod. 548. S. C. Fitzgerald v. Trant, B. R. M. 8 Ann. 11 Mod. 254.*]

Tho' the release to one was before the other had executed the deed. *Ibid. l. 35.*

So, if they are severally bound for the same sum. *Semb. Ibid. l. 45.*

So, if the bond be by *A.*, for the faithful service of *B.*, a release to *B.* before the condition broken is a good bar. *R. 3 Leo. 45.*

But in debt for damages recovered in a real action by two demandants, a release by one is no bar; for this favours of the reality. 2 *Rol. 411. l. 17.*

So, in *quare impedit* by two, the release of one is no bar to the other. *Ibid. l. 15.*

Nor, in ejectment. *Ibid. l. 20. 45.*

Nor, in error to reverse a fine. *R. Skin. 343.*

So, if a bond be delivered by two to a third hand, to be delivered upon



upon condition, a release of the condition by one is no bar to the other; for this goes only in his discharge. 2 Rol. 411. l. 2.

So, if a bond be by two, a release to one, after his sealing, and before the other has sealed and delivered, is no discharge to the other. R. Cro. El. 161.

So, in *replevin*, if the defendant makes cognizance in right of B., and there is judgment for the plaintiff, in *scire facias* upon the judgment a release by B. is no plea. R. 2 Rol. 412. l. 5. *Vide ante*, (2 V 11.)

So, if a bond be, that B. shall serve truly, a release to B., being a stranger, after the forfeiture of the bond, is no plea. R. 3 Leo. 45.

So, if the bond was to A., as trustee for B., a release by B. with an averment that it was in trust for him, is no bar. R. Dal. 38. 1 Lev. 235. 3 Lev. 140.

[If the obligor of a bond, after notice of its having been assigned, take a release from the obligee, and plead it to an action brought by the assignee in the name of the obligor, the court will set the plea aside; and they will not under these circumstances allow the obligor to plead payment of the bond. *Legh v. Legh*, C.P. T. 39 Geo. 3. 1 Bos. & Pull. 447.]

So, a release by A., after an assignment by commissioners of bankruptcy against B. R. Pal. 505.

Nor, a release by A. of all actions on his own account. R. 1 Vent. 35.

[A release by plaintiff's testator's will sealed, cannot be pleaded to debt on bond. *Parsons v. Coward*, H. 10 G. 2. B. R. H. 357.]

So, if a man receives part of a debt due upon specialty, and releases it, this release does not discharge the residue. *Vide ante*, (2 G. 14.)

So, if a bond is in the penalty of 400 l. for payment of 200 l. and he receives and releases 300 l. R. 2 Rol. 413. l. 15.

So, it is no plea that he gave another bond in satisfaction. R. Cro. El. 716. R. Cro. Car. 85. R. Hob. 86. Acc. 2 Cro. 579. *Vide post*. (2 W 46.)

Or, that the plaintiff accepted a *statute-staple* after the day of payment in satisfaction. R. Cro. Car. 86. 6 Co. 44. b.

Or, that the defendant agreed by indenture to sell land in satisfaction of the debt. R. Cro. Car. 193.

Or, enfeoffed the plaintiff in satisfaction of the debt. Cro. Car. 86. R. 2 Cro. 650.

Tho' the other bond is after or before the day of payment by the prior bond. 2 Cro. 100.

Yet, if the plaintiff does not demur, but joins issue, that there is no other bond, and there is a verdict for the defendant, the plaintiff shall not have judgment. R. 1 Brownl. 74. Hob. 69.

(2 W 31.) *Comperuit ad diem*.] So, to a bail-bond the defendant may plead, *comperuit ad diem*. Bro. R. 203.

[But if, on justifying bail, proceedings on bail-bond are ordered to be stopt, and bond to stand for security; and after judgment in original action, plaintiff proceeds on bond, defendant cannot plead *comperuit*, &c. *Barnes*, 85.]

[2 W 32.] *Covenant, &c. that he would not sue.*] So, if a man covenants, &c. that he will not sue for a year, it will be a good plea, if he sues within the time. *Dy. 140. a. in marg.*

[To debt brought by husband and wife on a bond, conditioned for the payment of a certain sum at a certain day, defendant pleaded that by articles of agreement between the wife, her sister, and the defendant, the interest of the money was to be paid to one of the sisters upon an event which had happened; but, as the plea did not allege the payment of the interest it was holden bad. *Baldu v. Elers, B. R. E. 33 Geo. 3. 5 T. R. 250.*]

[2 W 33.] *Condition performed.*] So, to debt upon bond the defendant after *oyer* may plead condition performed. *Vide ante, (E 25, 26. — 2 V 13.)*

And it is sufficient to plead in the words of the condition.

So, if the condition be to pay, if a ship returns, (perils of the sea excepted,) but if it is lost, that the obligation shall be void; it is sufficient to say it was lost, without saying by peril of the sea. *R. 2 Lev. 7.*

If the condition be in the disjunctive, it is sufficient to plead performance of one part or the other.

And if the performance is to be upon a prior act by the plaintiff, he may plead that the plaintiff has not done such first act. *R. 1 Mod. 265.*

If the last words of the condition are an enlargement of the first, he need not plead to them; for it is sufficient, if the plea goes to the material part of the condition. *R. Mo. 477.*

So, in debt upon bond for performance of covenants, if the defendant pleads *condition performed*, and the plaintiff assigns breach for non-payment of rent *secundum formam conditionis predictæ*. it will be well on a general demurrer or verdict. *R. Hard. 319.*

So, in debt upon bond for performance of covenants in an indenture, if the defendant shews the indenture and pleads *covenants performed*, he need not say *quæ sunt omnes conventiones, &c.* *R. 13 H. 7. 19. b. R. 6 Ed. 4. 1.*

If the condition be to perform a will, whereby a legacy is given to the poor or churchwardens, it is sufficient to say, that he paid it to them, without naming them. *R. 1 Leo. 17.*

But the defendant cannot plead *conditions performed* to a bond for performance of covenants, without *oyer* of the deed, which contains the covenants. *R. 1 Sid. 50. 97. 425. 1 Vent. 37. R. Al. 72. Vide ante, (P 1. — 2 V 13.)*

And he must make a *profert in cur.* of the deed, otherwise it will be bad upon a special demurrer. *R. 1 Sand. 9. Vide ante, (P 1, 2.)*

And shew the substance of the deed in *Latin*, under seal of the plaintiff; or, if he has it not, the court *ex gratiâ* will direct that the other party shall give him a copy. *Ibid. 1 Sid. 5.*

If the condition of the bond be to do several things, the defendant cannot plead performance generally, tho' all are in the affirmative, but shall answer specially to every particular. *R. 1 Lev. 303. R. Kel. 95. b. R. 1 Sid. 215.*

Nor, if the things to be done are particular, and in the affirmative; but he must shew how and at what time. *Vide ante, (E 25, 26.)*

So,



So, if the condition consists of several parts, he must answer to all the particulars. *R. Mo. 591. R. 2 Mod. 305.*

[So, to debt on bond for a receiver of rents to account, and behave himself as a steward ought to do, if defendant pleads he received but one penny, which he paid to obligee, it is bad; for he should also have pleaded, that he had behaved as a steward ought. *Fletcher v. Richardson, M. 10 G. 2. B. R. H. 322.*]

Yet, where the condition consists of multifarious particulars, *performance generally* has been allowed. *Lut. 593.*

So, the defendant cannot plead *quod conditio obligationis nunquam fracta fuit*, but must shew how it was performed. *R. 2 Vent. 156.*

*That no covenants or no suits are mentioned in the condition*; for he is estopped. *R. Cro. El. 756. Vide ante, (2 V 6.)*

If the condition is to save harmless from rent for a tenement against *A.*, it is no plea that no rent is due, but he shall say *not damnified*. *R. Sav. 90.*

Yet, if the condition is to indemnify, &c. the defendant may plead in the negative *non fuit damnificatus*. *Vide ante, (E 25.)*

Tho' the condition be to acquit, discharge, and keep indemnified. *R. 3 Mod. 252. R. 5 Mod. 243. Adm. 2 Sand. 84.*

[The only pleas to bond to indemnify, are, *non damnificat.*, or by plaintiff's own fault. *Halland v. Malken, T. 33 & 34 G. 2. 2 Wilf. 126.*]

[If defendant in debt by churchwardens, on a bond to indemnify parish from a bastard, pleads *non damnificatus*; replication he did not provide, and parish paid 5 *l.*, rejoinder he did provide; and verdict for plaintiff; judgment shall not be arrested, because it does not appear on the record that the child was born in the parish; for the court will intend it was proved at the trial. *Cooke v. Pettit, P. 26 G. 2. 2 Wilf. 5.*]

[To debt on bond to save harmless from expences by reason of naming one to a curacy, or from suits by reason thereof, if the defendant plead *non damnificatus*; the plaintiff may reply and assign for breach that he was obliged to pay such a sum by reason of such nomination, without saying *how* he was obliged. *2 Wilf. 11.*]

So, if the condition be to deliver a deed, &c. it is sufficient to say that he has delivered it. *R. Sal. 498.*

So, regularly, performance of the condition ought to be pleaded in the words of the condition. *Sal. 520.*

But excuse of performance need not pursue the words of the condition: as, if upon a bail-bond he plead *judgment undetermined*, it is sufficient, without saying that the plaintiff did not discontinue, nor was nonsuited. *Ibid.*

If the condition be to leave his wife 50 *l.*, it is not sufficient to say that he made his wife executrix, and gave her to the value of 100 *l.*, without saying that she administered, and accepted it. *R. 3 Lev. 218.*

So, if the condition be to exhibit an inventory into the spiritual court before 1 *M.*, it is not sufficient to say there was no court, without saying that he was ready at the day; for he ought to shew every thing possible on his part. *R. 1 Sal. 172.*

So, if the condition be to levy a fine, it is no plea that no writ of covenant was sued, without saying that he was ready at the day. *Ibid.*

Or, to pay money to *A.*, it is no plea that *A.* did not come, without saying that he was ready there. *R. 1 Sel. 172.*

If the condition be to repair, it is no plea that he repaired till such a day, and then pulled down and rebuilt. *R. Sav. 96, 97.*

If it be, that his wife may make a devise of 100 *l.* to be paid within a year after her death, it is no plea to say that his wife devised 100 *l.*, if he does not say also that he paid it. *R. Crp. Car. 597.*

[If *A.* gives bond, conditioned to pay *B.* so much money as *C.* is awarded to pay him, and *C.* is awarded to give *B.* a promissory note, it is within the condition of the bond. *Booth v. Garnett, M. 11 G. 2. Andr. 28.*]

[Wherever defendant pleads performance, plaintiff must assign an absolute breach; but this is not necessary, if he pleads a collateral matter; as, a release. *Tryon v. Carter, M. 8 G. cited and agreed to. Fletcher v. Hennington, P. 33 G. 2. 2 B. M. 944.*]

[To debt on bond conditioned for the payment of money, the defendant cannot plead that it was given as an indemnity against another bond, and that the plaintiff has not been damnified. *Cowp. 47.*]

(2 W 34.) *Upon a statute or recognisance. Release.*] To debt upon a statute or recognisance, the defendant may plead a release. *Vide ante, (2 W 30.)*

A release by one conusee. *2 Rol. 411. l. 5.*

But a release of part due upon a statute or recognisance does not discharge the residue. *R. 2 Rol. 413. l. 5. Vide ante, (2 W 30.)*

(2 W 35.) *Defeasance.*] So, the defendant may plead a defeasance for payment of a less sum which he has paid. *1 Bro. Ent. 174. Vide post. (2 W 37.)—Ante, (2 V 12.)*

[A bond conditioned for payment of money on 25th of December; a subsequent deed between the same parties, by which the obligee covenanted that if the obligor should pay on the 25th December 5 *s.* in the pound, &c. such payment should be accepted in full discharge and satisfaction of all sums due, &c. and might be pleaded and given in evidence, &c.; the obligor (to an action on the bond) pleaded a tender and refusal of the 5 *s.* in the pound on the 25th of December, and holden good. *Trevett v. Angus, C. P. T. 11 & 12 Geo. 2. Willer, 107. (Com. 568.) S. C.*]

A defeasance that he shall not be sued till such a day, and, if he be, that he may plead it in discharge. *Hard. 113. But it was resolved contr.* where it was not an absolute discharge; for it shall be but a covenant. *Sbo. 46. Carth. 64.*

A letter of licence, by which it is agreed that, if he sues within such a time, the debt shall be forfeited. *R. Carth. 64.*

So, to debt for rent he may plead a covenant to deduct so much for charges, &c. *R. 1 Lev. 152.*

But a defeasance, which is not in writing under seal, is not sufficient. *R. Mo. 573.*

But to debt upon a statute or recognisance, it is no plea that he had judgment before in a *scire facias* upon the same recognisance. *R. Cro. El. 608.*



(2 W 36.) *Upon judgment. Execution done.*] To debt upon a judgment, the defendant may plead that the plaintiff had sued out execution by *elegit*, upon which an extent was made. Dy. 299. b. *Vide ante*, (2 W 13.)

And it will be good without shewing the return of the extent. Dy. 299. b.

Or, that the plaintiff had execution by *feri facias*. *Adm. Cro. Car.* 328. *R. Sav.* 123.

But it is no plea that the plaintiff sued out a *ca. sa.* and took the defendant and kept him in execution till he satisfied the debt. *R. Lut.* 641. 3.

Or, that he sued several *elegits*, upon one of which part of the debt was levied. *R. 1 Lev.* 92.

That error is depending upon the judgment in the *Exchequer*. *R. Skin.* 388. 590.

(2 W 37.) *Defeasance.*] So, to debt upon a judgment the defendant may plead a defeasance. 2 *Mod. Int.* 231. *Vide ante*, (2 W 35.)

So, now by the *st.* 4 & 5 *An.* 16. if debt be brought upon any judgment, if the defendant has paid the money due on such judgment, it may be pleaded in bar of such action.

But a bond given for a sum, which was in satisfaction of the judgment, is no plea; for being only to give another action for the debt, it would not be a bar to the bond, *a fortiori* not to the judgment. *R. 2 Cro.* 579. *Vide Condition*, (L 2, 3.)

So, to a *scire facias* upon a judgment he cannot plead a judgment in debt upon the same judgment. *R. Cro. El.* 817.

(2 W 38.) *Nul tiel record. When this plea is necessary.*] So, to debt upon a judgment, the defendant may plead *nul tiel record*. *Vide ante*, (2 W 13.)—*Vide Record* (B).

So, if there is a material variance between the judgment and the declaration: as, if it varies in day or continuance. *Lut.* 945. *What variance is material, vide Record* (C).

So, if it varies in the attorney's name. *Dub.* 2 *Mod.* 246.

[Variance from *scurphey* in judgment, to *curphey* in recognizance, fatal. *Barnes*, 475.]

[On debt on recognizance of bail, if the record is conditional, and the declaration not, plaintiff cannot have judgment. *Barnes*, 60.]

(2 W 39.) *When error may be pleaded; when not.*] So, if error be pending on the judgment in *C. B.* where the record itself is removed, it may be pleaded in abatement. *R. 2 Vent.* 261. *Dub.* 4 *Mod.* 247. *Vide Dett*, (A 2.)

And he must plead in abatement; for if the defendant demurs, the plaintiff shall have judgment. 2 *Vent.* 261.

But to debt upon a judgment, the defendant shall not plead in abatement, error depending thereon. *Semb. Lut.* 602.

If error be in the *Exchequer* or *Parliament* upon a judgment in *B. R.* for only the transcript of the record is removed. *R. 1 Sid.* 236. *R. 4 Mod.* 247. *R. Sho.* 98. *R. Roy.* 100. *R. Sho.* 146. *Carth.* 1. 136. *Vide Dett*, (A 2.) Nor,

Nor, can he plead in bar error in the original judgment. 1 *Rel.* 604. l. 20.

(2 W 40.) *But matter entitling to an audita querela cannot be pleaded.*] Nor, matter which entitles him to an *audita querela*; for he shall be put to his writ of error, or *audita querela*. 1 *Rel.* 604. l. 25.

(2 W 41.) *Nor, arbitrament.*] Nor, an arbitrament. 1 *Rel.* 604. l. 25.

(2 W 42.) *Demurrer.*] Nor, can he demur to the declaration, if it shews error depending upon the judgment. *R.* 2 *Vent.* 261.

(2 W 43.) *Upon contract. Nil debet.*] To debt upon a contract the defendant shall plead *nil debet*. *Vide ante*, (2 W 17.)

So, to debt upon a judgment in a county, hundred, &c. not of record. *Sho.* 71.

To debt upon a grant of a rent-charge; for he has remedy also by distress. *Hard.* 333.

(2 W 44.) *Nil detinet.*] So, if debt be in the *detinet* only, he may plead *nil detinet*. *Al.* 76.

And if he pleads *nil debet*, it shall be aided after verdict. *Ibid.*

The defendant may plead one plea to part, and another plea to the residue of the debt. 1 *Sal.* 180.

(2 W 45.) *Wager of law.*] So, to debt upon a simple contract the defendant may wage his law. 2 *Inst.* 45.

So, the defendant may wage his law in debt upon a by-law. 2 *Lev.* 106.

And in debt upon an arbitrament. *Co. Lit.* 295. a. *R. Cro. El.* 600.

In debt upon a simple contract, tho' assigned to commissioners of bankrupt. 2 *Lev.* 106.

In debt for a penalty, or amercement in a court baron, hundred, or other court not of record. *Co. Lit.* 295. a. *Mo.* 276. 2 *Rel.* 106. l. 10. *Bend. pl.* 200. *R.* 1 *Lev.* 203. 2 *Lev.* 106.

So, in debt upon a recovery in a court not of record. *R.* 2 *Vent.* 171. *Cont.* 2 *Mod.* 140.

In debt upon an account made before one auditor only. *Co. Lit.* 295. a.

In debt upon a contract for sale of land. *R. Cro. El.* 750.

In debt upon contract where a bond was given for the money. *Dal.* 53.

But in debt upon a deed or specialty the defendant cannot wage his law. *Co. Lit.* 295. a.

Nor, in debt upon a statute. *Ibid.*

Or, upon an arbitrament. *Lut.* 213.

So, the defendant shall not wage his law in debt for *scavage* or other duty, by the custom of *London*, which is confirmed by parliament. *R.* 2 *Lev.* 106.

In debt upon a judgment in an inferior court. *R.* 2 *Mod.* 140.



In debt upon an account as bailiff. *R. Cro. El.* 579.

Nor, in debt for rent upon a lease for years. *Co. Lit.* 295. a.

Nor, in debt upon an account before auditors for balance or surplusage of the account. *Ibid.*

Or, for a fine or amercement in a feet or other court of record. *Ibid.*

Nor, in debt for his diet. *Per Gaudy, Cro. El.* 818.

Nor, in debt to the king, tho' due to the king's debtor. *Godb.* 291.

So, a man infamous cannot wage his law; as, if he be convict in attain, or upon an indictment of conspiracy, perjury, &c. *Co. Lit.* 295.

Nor, a man outlawed. *Co. Lit.* 295. a.

Or, within age. *Ibid.*

Nor, an executor or administrator; for he shall not wage his law for another's debt. *Ibid.*

Yet, in debt against husband and wife, *dum sola*, both may wage law. *R. Cro. El.* 161.

So, if an *alien* be plaintiff, the defendant shall not be allowed to wage his law. *Co. Lit.* 295. a.

Or, if the suit be by the king, or for his benefit; as, in *quo minus*, &c. *Ibid.*

Or, by a gaoler against a prisoner for his victuals. *Ibid.* 9 *Co.* 87. b.

Or, by an attorney against any one for his fees. *Co. Lit.* 295. a.

Or, by a servant, retained according to the statute for his salary. *Ibid.*

So, wager of law shall never be allowed where the declaration supposes a contempt, trespass, deceit, or wrong. *Ibid.*

As, in an action upon the case or trespass. *Ibid.* 2 *Inst.* 45.

So, it shall not be allowed upon a *quo minus*. *Godb.* 291.

So, in debt upon a joint contract, if one pleads *nil debet*, the other shall not wage his law. *R. Cro. El.* 646.

If the defendant comes to wage his law, the court examines every point of the declaration. 3 *Leo.* 212.

And if it appears that the defendant is indebted, tho' it was agreed to be allowed out of a debt due to him from the plaintiff, he cannot safely wage his law. *Ibid.*

And he must have compurgators, which are usually eleven, and swear *de credulitate*. 2 *Vent.* 171. 2 *Inst.* 45.

But they may be a less number than eleven. 2 *Vent.* 171.

And with the plaintiff's consent the oath of the compurgators may be omitted. 1 *Vent.* 4.

And when the defendant has his hand upon the book, the plaintiff may be nonsuited. 2 *Vent.* 171.

(2 *W* 46.) *An obligation for the same debt.*] So, to debt upon a contract, the defendant may plead a bond given for the same debt; for this determines the contract. 2 *Cro.* 33. *Cra. Car.* 415. *Vide ante*, (2 *G* 12.)

So, to debt upon a bond against the heir, he may plead a bond by the executor or administrator in satisfaction of the same bond. *Vide ante*, (2 *E* 3.)

To debt by bill, by the *st.* 4 & 5 *An.* 16. he may plead payment generally. But

But he cannot plead *another bond given in satisfaction* to debt upon bond. *R. 3 Lev. 55. 1 Mod. 225. R. Lit. 58. R. 1 Brownl. 47. 71. Vide ante, (2 W 30.)*

Nor, an agreement to accept a bond of the executor or administrator, and a bond given accordingly, to debt upon a bond by the testator, &c. *R. 3 Lev. 56. Cont. per three J. 2 Mod. 137.*

Nor, an agreement by *parol* to give a longer day of payment. *R. Mo. 573. Cro. El. 697.*

Nor, words by the plaintiff, which hindered the marriage the defendant undertook to procure, without shewing that the defendant did his endeavour. *R. Cro. El. 694.*

But in debt upon a contract, defendant cannot traverse the contract; for this amounts to *nil debet*; and therefore, he cannot say that the contract was for a less sum, or another thing, &c. *R. Dal. 49.*

(2 W 47.) Upon a demise. *Nil debet.*] To debt for rent upon a demise the defendant may plead *nil debet*. *Win. Ent. 225.*

Or, *levy by distress*. *Dy. 20. b. 1 Ed. 4. 3. b. Vide ante, (2 V 14.)*

And upon *levy by distress et sic nil debet*, if the issue is upon the *nil debet*, a release, payment, &c. which proves nothing due, will be allowed in evidence. *Per Holt, 1 Sal. 284.*

(2 W 48.) *Nil habet in tenementis, or non demisit.*] If the demise be by deed-poll, or by *parol*, the defendant may plead *nil habet in tenementis*. *Co. Lit. 47. b. 2 Vent. 251. Tho. Ent. 153.*

Or, may plead *non demisit*, and give the other matter in evidence. *Co. Lit. 47. b.*

Or, if the plaintiff demised by *parol*, he may give in evidence upon *nil debet, quod nil habuit, &c.* *4 Mod. 254. Per Holt, 13 W. 3. (Vide 1 Ld. Ray. 746.)*

Or, if the demise is by writing, if the plaintiff was not in possession, *Per Holt, 13 W. 3. (Vide 1 Ld. Ray. 746.)*

But he cannot plead *nil habet in tenementis, or non demisit*, if the demise is by indenture. *Co. Lit. 47. b. R. 3 Lev. 146. [Com. 391. Wilkins v. Wingate, B. R. M. 35 Geo. 3. 6 T. R. 62.]*

[In an action brought on the indenture by the assignees of the lessor, (a bankrupt,) the defendant cannot plead this plea. *Parker v. Manning, B. R. E. 38 Geo. 3. 7 T. R. 537.*]

Nor, traverse the demise. *R. 2 Cro. 73.*

Nor, can he plead *nil debet* to part, and *nil debet in tenementis* to other part; for this will be double. *R. 4 Mod. 254.*

[*Nil habuit in tenementis*, is a bad plea to *assumpsit*, for the use and occupation in lands; and in debt for rent on deed-poll, it must be, plaintiff had nothing at the time of action or at any other time. *Lewis v. Willis, H. 25 G. 2. 1 Wils. 314.*]

If the defendant pleads *nil habet* to debt for rent upon a lease by indenture, the plaintiff may demur; for the *estoppel* appears upon the record. *R. 1 Sal. 277. R. 3 Lev. 146.*

Otherwise, if the *estoppel* does not appear; for he ought by replication to shew the *estoppel*, and rely thereon. *R. 1 Sal. 277.*

If two demises are alleged, *tempore demissionum predicti, nil habuit*, is bad.



bad; for he ought to plead distinctly to each demise. *R. 2 Vent. 253. 271. 4 Mod. 76. Skin. 307.*

So, in covenant for payment of rent-arrear, the defendant cannot plead *nil habet in tenementis*. *2 Vent. 69.*

[But to *debt* for rent, *riens in arriere* is a good plea. *Cowp. 588.*]

[So, is bankruptcy of the defendant. *Semb. 1 T. R. 91.*]

The plaintiff replied that *A.* seised in fee by fine conveyed to him. *Tho. Ent. 153.*

The plaintiff by his replication to *nil habet*, &c. ought to shew what estate he has; for it is not sufficient to say generally that he has a good title or estate. *R. 3 Lev. 193. R. 2 Cro. 312. Yel. 227. 2 Bul. 41. Adm. per C. B. M. 6 Geo.*

So, in covenant for non-payment of rent, if the defendant pleads *nil habet*, &c. *R. 3 Lev. 193.*

But it shall be aided after verdict. *R. 2 Cro. 312. 1 Mod. 292. R. Yel. 227.*

And since it has been resolved and affirmed in error, that a general replication that *A.* having title, leased to the plaintiff, without shewing what title *A.* had, is sufficient. *2 Vent. 252, 271. 4 Mod. 78. R. in C. B. H. 6 Geo.*

[If in debt for rent against defendant as assignee of a term, he pleads he has made a further assignment before the time for which the rent is demanded, and plaintiff replies *non assignavit*, he cannot give fraud in evidence. *Lekeux v. Nash, H. 18 G. 2. Str. 1221.*]

[There is no fraud in the assignee of a term assigning over his interest to whom he pleases, with a view to get rid of a lease, altho' such person neither take possession of the premises nor receive the lease. *Taylor v. Shum, C. P. E. 37 Geo. 3. 1 Bos. & Pull. Rep. 21.*]

[*Quere.* Can the replication *per fraudem* to a plea of assignment be good in any case where the party assigning derives no benefit from the premises? *Ibid.*]

(2 W 49.) *Tender.*] So, the defendant may plead a tender of the rent at the day, and always ready. *2 Mod. Int. 236. Lut. 367. Vide ante, (2 W 28.)*

But if he does not plead a tender upon the land at the last hour before sun-set, &c. it is bad. *R. 2 Cro. 423.*

Yet, a tender afterwards to the person, and refusal supplies the want of tender at the last hour, &c. *R. Lut. 593.*

So, he need not say precisely how long before the sitting, if he was there before, and staid after. *R. 2 Cro. 499.*

So, if he says that he was ready to pay from sun-rise to sun-set, it is sufficient, without saying *quod obtulit*. *R. Ray. 419.*

(2 W 50.) *Entry and expulsion.*] So, the defendant may plead an entry by the lessor and expulsion of the defendant. *1 Sand. 203. 2 Mod. Int. 235.*

So, eviction by a stranger. *2 Vent. 68.*

So, an extent or taking in execution upon an *elegit* against the lessor before the rent became due. *R. Cro. El. 398.*

So, to debt upon a lease at will *quod non occupavit*. *Per Fitzh. Dy. 14. a.* But

But expulsion or eviction will be a plea only as to rent incurred afterwards. 2 Vent. 68.

And therefore, where the plaintiff alleges enjoyment, if the defendant pleads eviction, he must traverse the enjoyment. *Ibid.*

So, it is no plea in debt for rent upon a lease for years, *quod non habuit aut occupavit.* R. Dy. 14. a.

[In debt for rent, that A. a stranger, before rent due, entred and turned defendant out of possession, and still keeps him out; and that A. at the time of his entry, was and now is seised in fee, is not a good plea; he must shew a higher title. *Cooper v. Young*, T. 5 & 6 G. 2. Fort. 360.]

[That A. at the time of the lease was and is seised in fee, is bad; for it must be pleaded as prior. *Cooper v. Young*, P. 8 G. 2. Fort. 360.]

[That A. having a prior and better title, evicted defendant, is not sufficient; defendant must shew what evictor's title was. *Jordan v. Twells*, M. 9 G. 2. B. R. H. 171.]

[Defendant must shew that evictor had a title to enter. *Ibid.*]

[Must shew by what process he was evicted. *Ibid.*]

#### [(2 W 51.) Pleas to Debt on Escape.]

[To debt for an escape, defendant pleaded a negligent escape and voluntary return, since which the prisoner had been safely kept; plaintiff in his replication admitted the negligent escape and voluntary return, but alleged that the prisoner had not been safely kept since that time; having again escaped, which was a different escape from that mentioned in the plea, and the same for which the action was brought; defendant in his rejoinder traversed the allegation that the prisoner had not been safely kept, and then pleaded to the latter part of the replication, as to a new assignment, a negligent escape, voluntary return, and safe keeping, since in the same manner as in the plea: this latter part of the rejoinder the court refused to strike out on motion, but held it bad on special demurrer. *Griffiths v. Eyles*, C. P. E. 39 Geo. 3. 1 Bos. & Pull. Rep. 413.]

[A plea, that if the prisoner escaped several times, (without specifying them,) he returned as often, is bad. *Ibid.*]

#### (2 W 52.) Judgment in Debt.

If the plaintiff declares in debt upon a contract for delivery of goods; the judgment shall be conditional, as in detinue, viz. *so much corn, &c. or the value.* R. 11 H. 7. 5. b. *Vide ante*, (Z 1.)

So, if the declaration is for 40 pieces monet. *forinsecq ad val. 40 l.* the judgment shall not be for the debt, but for so many pieces, and there shall be a writ of inquiry as to the value. R. Cro. El. 536.

#### (2 X) Pleading in Detinue,

##### (2 X 1.) Process.

**D**etinue may be sued in the county by *justicies*, as well as debt. F. N. B. 138. B. *Vide ante*, (2 W 1.)

Or, may be sued in C. B.



And upon the pretence of privilege in *B. R.* (in all cases except in detinue for charters, which concern the freehold, which shall be only in *C. B.*) 4 *Inst.* 71. *F. N. B.* 138. *C.*

But if detinue for charters is brought in any other court than *C. B.* a *superfedeas* lies. *F. N. B.* 138. *C.*

When detinue lies, *vide Detinue (A).*

When detinue for charters, *vide Charters*, (B 1.)

The process in detinue is summons, attachment, and distress. *F. N. B.* 138. *B.* 139. *A.*

And by the *β.* 25 *Ed.* 3. 17. in detinue for chattels, the same process as in account; and therefore process goes to outlawry.

But in detinue for charters, which concerns the realty, no process runs to outlawry. 44 *Ed.* 3. 41. *b.* *Co. Lit.* 280. *b.* *Dy.* 223. *a.*

#### (2 X 2.) Declaration.

The declaration in detinue shall be grounded upon bailment, or upon *devenerunt ad manus.* *Co. Lit.* 286. *b.*

[Or, upon goods lost and found. *Kettle v. Bromfall*, *C. P. M.* 12 *Geo.* 2. *Willes*, 118.]

[And the declaration should state a request on the defendant by the plaintiff to deliver, &c. *Ibid.*]

The declaration must describe the goods demanded so certainly that they may be known to be delivered to him in *specie.* *Co. Lit.* 286. *b.*

And therefore, detinue for money at large is not good; for it cannot be known. *Ibid.* *R. Cro. El.* 457. 1 *Rol.* 606. *l.* 20.

Nor, for corn out of a sack or bag. *Co. Lit.* 286. *b.*

So, he must shew the value of each particular by itself, and not of altogether. 2 *Rol.* 96. *Vide infra.*

But it lies for money in a bag not sealed. 1 *Rol.* 606. *l.* 12. 14.

Or, for money not in a bag, if it is taken in sight of another. *Ibid.* *l.* 16.

Or, for a particular piece of gold, or for so many ounces. *Ibid.* *l.* 25. *Yel.* 81.

Or, for twenty quarters of barley or wheat. *Bro. Detinue*, 51.

The declaration may mention the value of every particular, or of all in gross. *Bro. Detin.* 4. 48. *R.* 1. 3. 3. *Vide supra.*

#### (2 X 3.) Pleas in Detinue.

(2 X 3.) *Nil detinet.*] To an action of detinue the defendant may plead *nil detinet.*

(2 X 4.) *Wager of law.*] So, in detinue generally, he may wage his law. *Co. Lit.* 295. *a.* *Vide ante*, (2 W 45.)

Tho' it be upon bailment by another hand, for by whom bailed is not traversable. *Co. Lit.* 295. *a.*

So, where he has a right to the deed, tho' he has it in his custody. *R. Dal.* 106.

So, in detinue of charters, or a box of charters, without shewing any charter in certain. *R.* 19 *H.* 6. 9. *b.*

But,

But, in detinue of charters he cannot wage his law. *Co. Lit.*  
295. a.

If he shews any charter in certain. 19 *H. 6. 9. b.*

Tho' it be for an indenture of demise for years. *Co. Lit.* 295. a.

(2 X 5.) *Uncore prift.*] So, he may plead *uncore prift.* 1 *Bro. Ent.*  
149.

(2 X 6.) *Delivery to him to whose use, &c.*] So, he may plead de-  
livery to *A.* to whose use they were bailed.

Tho' the delivery was after the action brought. *F. N. B.* 138. *M.*

(2 X 7.) *Release.*] So, a release after bailment by the husband of  
the plaintiff. *R. Dal.* 30.

(2 X 8.) *Garnishment; when allowed.*] So, the defendant may plead  
that the goods were delivered to him by the plaintiff, and *A. aqua  
manu* upon a condition which he knew not was performed, and pray  
that *A.* be garnished. *Sav.* 29.

And it will be good without saying what was the condition. 1 *Rol.*  
733. l. 4.

So, if both bring several detinues for the same goods, the defendant  
may plead to both, that they were delivered upon condition, &c. and  
pray that the plaintiffs may interplead. 1 *Rol.* 734. l. 10.

Tho' one declares upon bailment, the other upon trover. *Ibid.*  
l. 40.

Whether the delivery were joint or several. 1 *Rol.* 733. l. 50.

Tho' the delivery was by a corporation and others, and the de-  
fendant is one of the corporation. 1 *Rol.* 732. l. 15.

So, if *A.* bails goods of *C.* to *B.* in detinue by *C.* against *B.*, he  
may plead bailment by *A.* to be re-delivered to him, and pray that he  
may be garnished. *Mod. Ca.* 216.

If the defendant prays garnishment, he ought to profer the goods  
in court.

And the goods antiently remained in court till the plea deter-  
mined; but now they remain with the defendant till trial. 1 *Rol.*  
736. l. 5.

And the defendant cannot afterwards deliver them to either party  
without the award of the court. 1 *Rol.* 736. l. 15.

Nor, can he plead any plea afterwards; for he is out of court,  
except for the delivery of the goods, and therefore not demandable  
till judgment, when he must deliver them, *Ibid.* l. 25.

But the court may require sureties of the defendant for the goods.  
*Ibid.* l. 10.

(2 X 9.) *Process against garnishment.*] After a prayer of garnish-  
ment a *scire facias* goes against the garnishee. 19 *H. 6. 9. b.*

And a *scire facias* ought to be awarded.

If a *scire facias* goes against two garnishees, and one is returned,  
served, and the other, dead, another *scire facias* goes against the exe-  
cutors of the deceased, and *idem dies* shall be given to him, who was  
served and appeared. *R. 10 H. 6. 9. b. 55. b.*

If the garnishee appears, he may imparl.



If the plaintiffs interplead, they ought to do it in proper person.  
1 Rol. 734. l. 20.

The interpleading shall be upon the original of the oldest date.

1 Rol. 735. l. 45.

Tho' the other counted first. *Ibid.*

But if both originals are of the same date, it shall be upon that whereon there is the first count. *Ibid.* l. 53.

Or, the court may assign upon which the interpleader shall be.  
1 Rol. 736. l. 2.

(2 X 10.) *Pleas by him.*] A garnishee can regularly plead nothing except conditions performed. 1 Rol. 732. l. 35.

Or, a release from the plaintiff. 1 Rol. 733. l. 15.

But the garnishee cannot plead that he himself alone delivered,  
1 Rol. 732. l. 50.

That the delivery was to the defendant and a stranger. 1 Rol. 733. l. 2.

Or, upon other conditions that the defendant has mentioned; for, if the defendant mistakes the conditions, he will be charged by oath, and therefore the garnishee has no mischief. 1 Rol. 732. l. 50.

But if the defendant does not mention the conditions, the garnishee may, and the plaintiff may allege other conditions, and traverse those mentioned by the garnishee. 1 Rol. 733. l. 5.

So, the garnishee cannot plead bailment in another county. *Ibid.* l. 7.

Or, an agreement by the plaintiff that he should have the goods upon a condition which he has performed. *Ibid.* l. 10.

Or, performance of the condition in the bond for which detinue is brought. 1 Rol. 732. l. 37.

So, in detinue of a deed the garnishee shall not plead a bar to the original deed: as, *non est factum*, within age, &c. 1 Rol. 733. l. 25.

(2 X 11.) *When garnishment not allowed.*] But garnishment shall not be allowed if the defendant acknowledges the action of one plaintiff, tho' the plaintiff in another action prays it; for it shall be granted only at the request of the defendant, being for his safety. 1 Rol. 734. l. 10.

So, it will be a good counterplea of the garnishment, if the plaintiff says the delivery was by him alone. 1 Rol. 732. l. 30.

So, if there are two *detinues*, the defendant cannot pray an interpleader, if both are not returnable the same day. 1 Rol. 734. l. 18.

So, if one demands charters upon bailment, the other upon title. *Ibid.* l. 40.

#### (2 X 12.) Judgment in Detinue.

The judgment against the defendant in detinue shall be for recovery of the thing detained, *vel valorem inde*, and costs. *Per Frowick, Kelw.* 64. b.

And if judgment be upon confession, *non sum informatus*, demurrer, &c. a writ of inquiry shall be awarded to inquire of the value. *Vide ante*, (Z l.)

And after judgment, if a *distringas* goes *ad deliberandum bono*, and the defendant does not, the plaintiff shall have damages taxed by the inquest,

inquest, so that it lies in the defendant's election to deliver the goods, or the value. *Per Frowick, Kelw. 64. b.*

So, after judgment against the defendant, the plaintiff may have a *distringas*, or a *scire facias* against the defendant for the thing detained. *1 Rol. 737. l. 35.*

If detainee be for charters, the verdict must find some damages, which the plaintiff shall recover, if the charters are lost. *Semb. Sav. 29.*

If the plaintiff recovers after interpleader by the garnishee, there shall be judgment against the defendant for recovery of the thing detained. *1 Rol. 736. l. 46.*

And there may be a *scire facias* or *distringas* for it against the defendant. *1 Rol. 737. l. 35.*

So, the plaintiff may recover damages against the garnishee for delay after the writ purchased. *Ibid. l. 21.*

Tho' the recovery is upon a demurrer or default, as well as upon a verdict. *Ibid. l. 10.*

And he may recover more damages than are alleged in the declaration; for it was not against him. *Ibid. l. 25.*

But if the garnishee does not appear after *scire feci* returned against him, the plaintiff shall not recover damages against him. *1 Rol. 733. l. 35.*

So, if the garnishee appears, and the plaintiff and defendant both make default, there shall be judgment for the garnishee. *Ibid. l. 30.*

## (2 Y) Pleading in Dower, *Dower unde nil habet.*

### (2 Y 1.) The Process.

**D**ower may be recovered by writ of dower *unde nihil habet*, or by *right of dower.* *F. N. B. 148. a.*

Writ of right in dower, *vide Reg. 3. a.*

Dower *unde nil habet.* *Reg. 170. a.*

Writ of dower *unde nil habet* lies only against the tenant of the freehold, or guardian in chivalry. *F. N. B. 148. A.*

And shall be sued in C. B. or in the county by justices. *Ibid.*

Or, upon a special custom by plaint. *Dub. 1 Vent. 267. Ray. 233.*

But it shall not be sued by plaint without a special custom. *Ibid.*

The process in C. B. is summons, *grand and petit cape.* *F. N. B. 148.*

By custom there shall be a resummons. *2 Sand. 43.*

And in the *hustings* in London there are three summonses. *Co. Ent. 176. b.*

At the return of the summons the defendant may cast an essoin.

By the *stat. 51 H. 3. of return in dower.* *32 H. 8. 21. and 16 Car. 6.* the writ of dower *unde nil habet* coming in, and being returnable on any common return day, there shall be day given in it till the fifth common return-day next ensuing inclusive.

If the tenant casts an essoin at the return of the summons, it must be entered upon the essoin-day of the same return.

And if no essoin be then entered, upon the day of exceptions the demandant may enter a *ne recipiatur.* (*Vide Comp. Att. 72. 196. Edit. 1695.*)

There



There are five effoins; 1. *de servitio regis*; 2. *in terra sancta*; 3. *ultra mare*; 4. *de malo lecti*; 5. *de malo veniendi*, which is called the common effoin. 2 *Inst.* 125.

By the common law, he who casts an effoin must swear the cause to be true. 2 *Inst.* 137.

But by the *st. Marl.* 52 H. 3. 10. he need not as to a common effoin (for the general words of the statute are restrained to this). *Ibid.*

And by the *st. of Effoins*, 12 Ed. 2. *effoin de servitio regis* is ousted in dower.

If any effoin is cast, except the common effoin, the demandant will be delayed for a year and a day. 2 *Inst.* 137.

If the common effoin is cast, the demandant must adjourn the effoin to the fifth return after. (*Vide Com. Att.* 204.)

At the return of the summons; or, if an effoin is cast, at the day given by the adjournment of the effoin, if the tenant does not appear, a *grand cape* issues. (*Vide Com. Att.* 203, 204.)

[Proclamation must be made 14 days before the return of the summons, or the *grand cape* shall be set aside. *Freeman v. Canham*, C. B. P. 8 G. 2. *Barnes*, 1.]

And if *nulla tenementa*, &c. be returned, a *testatum grand cape*.

So, if the sheriff does not return his writ, an *alias grand cape* shall be awarded at the return of the *grand cape*: if the tenant alleges that he was not able to come, it does not save his default. R. 3 *Leo.* 2.

But, if no summons is returned, a *grand cape* cannot issue. *Noy*, 22.

If the tenant appears upon the *grand cape*, he may wage his law of *non summons*. *Co. Ent.* 175. b.

And he shall have day in the same or the next term for 15 days at least to wage his law. (*Vide Comp. Att.* 72.)

If he does not wage his law, there shall be final judgment against him.

If he wages his law, and the demandant holds to the default of the tenant, the writ shall abate. (*Vide Comp. Att.* 204.)

So, if the demandant holds to the default, and the tenant is an infant who cannot wage his law of *non summons*.

But when the tenant wages his law of *non summons*, the demandant may release the default. *Co. Ent.* 176. a. 1 *Bro. Ent.* 203.

#### (2 Y 2.) Count in Dower.

If the tenant appears upon the summons, or the adjournment of the effoin, or if he appears at the return of the *grand cape*, and the demandant releases the default, the demandant shall count. *Co. Ent.* 171. a. 176. a.

The count shall be of the third part of such a messuage, &c.; for if it be of three messuages, &c. where there are several, and three is the third part of all, it is bad. 3 *Leo.* 169.

But it may be amended. *Per two J. Lev. cont.* 3 *Leo.* 169.

If dower is demanded of lands of the nature of *gavelkind*, it must be of a moiety *dum sola et casta*; and if the plaintiff demands a third part, it is a good bar that the land is *gavelkind*. R. 1 *Leo.* 133.

It must describe the lands so certainly, that seisin may be delivered by the sheriff; and therefore of a third part of three tenements, is bad. R. 2 *Mod. Ca.* 355. If

If the plaintiff is not named, *que fuit uxor B.* in the first part of the writ, it is bad; tho' afterwards the lands demanded are called *terra B. quondam viri sui.* R. 2 Cro. 217.

## (2 Y 3.) View.

When the demandant has counted, the tenant may demand a view of the lands demanded. Co. Ent. 177. a. 47 Ed. 3. 6. a.

Or, if dower is demanded of a rent, of the land out of which it issues.

And a view shall be granted in dower *unde nihil habet*, as well as in right of dower. Cont. Dy. 179. a. Cont. 2 Inst. 481. 45 Ed. 3. 17. a. Acc. Raft. Ent. 231. a. Ash. Ent. 292. Clift. 299. Semb. cont. per C. B. M. 9 An.

And it may be demanded after a general imparlance, tho' it is safer to demand it before. Dy. 210. b.

But by the *3 W. 2. 13 Ed. 1. 48.* in dower, the tenant shall not have a view, if the husband of the demandant aliened to the tenant himself. 2 Inst. 481. 3 Lev. 169. Vide View.

So, if the husband died seised of the land. 2 Inst. 481. 3 Lev. 169.

If a prior writ of the demandant abated by a plea, which arose upon the view. 2 Inst. 480.

If dower is demanded of tithes. R. 2 Rol. 728. l. 45.

Or, of a thing certain: as, of the *marshalsea.* Ibid. l. 25.

If the tenant demands a view, when it is not allowable, the demandant may counterplead: as, if the demandant's husband died seised. Clift. 299. Raft. 231. b. 3 Lev. 168.

If the husband aliened to the tenant. 3 Lev. 220.

And it is sufficient to say *alienavit.* Ibid.

The counterplea prays that the view may be excluded; but if it demands dower, it is not bad. R. 3 Lev. 169.

So, the demandant in the counterplea of the view may say that the tenant entred, and continued the possession. Ash. Ent. 296.

And upon the counterplea issue may be taken. 34 H. 6. 10. b. Raft. 231. b.

If the tenant demurs to the counterplea, and it is adjudged against him, it will be peremptory.

After the return of the writ for a view, the tenant may have the common essoin.

So, the attorney of the tenant may be essoined. Co. Ent. 177. a.

And at the return of the view, or at the adjournment of the essoin, the demandant shall count *de novo.* (Vide Com. Att. 204.)

If after a view the tenant pleads in abatement to part, the demandant may abridge his demand. Vide Abridgement, (A 1.)

So, tho' the tenant does not plead in abatement. Lev. Ent. 76, 2 Sand. 330.

What pleas may be after a view, vide Abatement, (I 25.)

## (2 Y 4.) Pleas in Dower.

(2 Y 4.) *In abatement.*] To a demand of dower the tenant may plead in abatement: as, *antient demesne.* Ash. Ent. 297. Vide Abatement.

That



*That the demandant took husband pending the writ.* Co. Ent. 173. b.

*That her husband was attaint.* 1 Leo. 3.

*Non-tenure.* 1 Bro. Ent. 205. *Rast. Ent.* 225. a. *Mo.* 80. *Dal.* 100.

Or, *non-tenure of part.* Lut. 716.

So, the tenant may plead in abatement, *that he holds jointly with A. not named.* *Rast. Ent.* 225. b.

*That the land is gavelkind; so that a moiety ought to be demanded, when the declaration demands only a third part.* R. to be a plea in bar. Sav. 91.

(2 Y 5.) *In bar. Touts temps prist.*] So, the tenant may plead in excuse of himself, or in bar of the dower: as, he may confess the demand, and say *touts temps prist.* 1 Bro. Ent. 205. Co. Lit. 32. b.

And if the tenant pleads *touts temps prist.* the first day of the return of the summons, he shall be excused from damages. *Ibid.*

So, he may plead that the demandant abated, and was in by abatement till such a day, and afterwards *touts temps prist.* Lut. 715. Dal. 100.

Upon this plea the demandant may have judgment immediately, but shall lose her damages and *mesne profits.* Co. Lit. 32. b. 1 Bro. Ent. 205.

Or, if she had demanded her dower, she may plead the demand. Co. Lit. 32. b. Lut. 717.

Tho' the demand was by request *in pais.* Co. Lit. 32. b.

If the defendant pleads *touts temps prist.*, and there is judgment; tho' damages are given, it is no error, for perhaps there was delay. 2 Mod. Ca. 25.

(2 Y 6.) *Detainment of charters.*] So, the heir may plead detainment of charters, and always ready, *fi, &c.* *Rast. Ent.* 224. b. *Mo.* 81.

So, detainment of charters as to parcel. Dal. 100.

So, a guardian in *chivalry*, in dower against him, may plead detainment of his ward. Hob. 199.

But a guardian cannot plead detainer of charters; for they do not belong to him. Co. Lit. 39.

Nor, the heir after imparlance. R. Sho. 271. 1 Sal. 252.

*Replication.*] To this plea the demandant may reply *non detinet.* *Rast.* 224. b. *Mo.* 81.

Or, that she is ready to deliver, and thereupon there shall be judgment for her immediately. *Rast. Ent.* 224. b. Hob. 199.

But, if a woman replies *quod non detinet*, and it is found against her, it will be a bar of dower. Hob. 199.

(2 Y 7.) *Ne unques seifie, &c.*] *Ne unques seifie que dower.* Co. Ent. 176. a. Clift. 303.

Or, *ne unques seifie* as to part, with another bar to the residue. *Ibid.*

(2 Y 8.) *Within age dowable.*] That the demandant was under age dowable. 1 Bro. Ent. 204. Co. Lit. 33. a.

*Replica-*

*Replication.*] To which the demandant replies, that she was of the age of nine years and an half. 1 *Bro. Ent.* 204.

(2 Y 9.) *Husband alive.*] So, the tenant may plead that the husband of the demandant is alive. 1 *Bro. Ent.* 205. *Bend. pl.* 131. *R.* 1 *And.* 20.

*Replication.*] To this plea the demandant replies, that her husband is dead, and thereon a day is given for proof of his death, which must be made in court by two witnesses at least. *Bend. pl.* 131. *Dy.* 185. a.

And at the same day the tenant may examine his witnesses that the husband is alive. *Ibid.* *Mo.* 14.

And if it appears to the court by witnesses that the husband is dead, the demandant shall have judgment immediately. *Bend. pl.* 131.

So, if the proof of the death is not direct, if there is no proof of his being alive. *R.* 1 *And.* 20. *Mo.* 14.

(2 Y 10.) *Ne unques accouple.*] So, the tenant may plead *ne unques accouple* in lawful matrimony. *Co. Ent.* 180. a.

*Replication.*] And the demandant replies, that at *B.* in such a diocese, she was accoupled in lawful matrimony. *Ibid.*

[If plaintiff replies a sentence in the spiritual court, in a suit by a third person against her for adultery, in which the deceased was no party, decreeing that she was the wife of the deceased, it is bad; for there can be no trial but by the bishop's certificate; and besides, this sentence is only evidence, and therefore cannot be replied. And this is the general issue, to which no new matter can be replied; and there must be such a replication as will join the issue, and awarding the writ to the bishop is the issue. *Vide Robins v. Crutchley*, P. 33 G. 2. T. 33 & 34 G. 2. 2 *Wils.* 118. 122. 127.]

If this plea is in *London*, or other inferior court, it shall be removed to *C. B.* by *mittimus*; for no one except *B. R.* or *C. B.* or justices of gaol delivery, &c. can write to the bishop for his certificate. *Co. Lit.* 134. a. *Co. Ent.* 180, b. *Vide Bastard*, (D 2.)

Upon this plea a writ goes to the bishop to certify. *Co. Ent.* 181. a. 1 *Bro. Ent.* 204.

[The lawfulness of a marriage in *Scotland* may be tried by a jury. *Ilderton v. Ilderton*, C. P. T. 33 Geo. 3. 2 *H. Bl.* 145.]

[A replication to a plea of *ne unques accouple*, alleging a marriage in *Scotland*, may conclude to the country. *Ibid.*]

[And need not state that the marriage was had in any place in *England*, by way of *venue*. *Ibid.*]

The plaintiff has the carriage of the writ; and if there be a default in him, the defendant shall not have it without notice to the plaintiff, or motion. *R.* 2 Jan. 38.

[The bishop must return the fact, and not the evidence. *Easterby v. Easterby*, C. B. M. 7 G. 2. *Barnes*, 1.]

The answer of the bishop ought to be positive; for he is judge of it. *Dy.* 368. b.

And therefore he cannot return the special matter. *R. Dy.* 305. b.  
And



And tho' he returns special matter, and concludes *et sic legitime matrimonio copulati fuerunt*, it is not good. *R. Dy. 313. 2 Rol. 591. l. 10.*

If the bishop refuses a good certificate, he may be amerced. *Dy. 305. b.*

And it is no answer to say he was inhibited by the arches. *2 Rol. 592. l. 10.*

Yet a certificate, that she was accoupled *in vero sed clandestino matrimonio*, is good. *R. 2 Rol. 591. l. 25.*

That he finds by good proof that she was accoupled. *Ibid. l. 20. Dy. 368, 9.*

If the certificate is insufficient, a new writ goes to the bishop. *Townsh. Jud. 96.*

(2 Y 11.) *Elopement.*] So, the tenant may plead an elopement by the wife during coverture. *Co. Lit. 32. 1 Bro. Ent. 204. Dy. 107. a.*

*Replication.*] To which the demandant replies, *that she did not elope.* *2 Bro. Ent. 109.*

*That she was afterwards reconciled to her husband.* *1 Bro. Ent. 204. Co. Lit. 32. b. Dy. 107. a.*

And if the issue is upon the reconciliation, it is sufficient if the husband lies several nights with his wife, tho' she afterwards continues in adultery; for there may be several elopements. *Dy. 107. a.*

(2 Y 12.) *Divorce.*] So, the tenant may plead a divorce *a vinculo matrimonii*.

(2 Y 13.) *Jointure.*] So, the tenant may plead that the demandant had a jointure. *Co. Ent. 171. b. 172.*

A jointure after coverture, to which the wife agreed after her husband's death.

And it is sufficient to plead a jointure generally, without saying that she agreed; for it shall be intended, till it is alleged on the other side, that she refused. *Per two J. Warb. cont. Hob. 71. 104.*

*Replication.*] The demandant may reply, that the estate was not made to such uses. *Co. Ent. 172. b.*

*That it was not for a jointure.* *Co. Ent. 172. a.*

And a devise, if it is not expressly made for a jointure, cannot be averred to be a jointure. *Mo. 31. Vide Dowry, (E 1.)*

(2 Y 14.) *Fine or recovery.*] That the husband levied a fine, and the demandant made no claim within five years. *Co. Ent. 171. a. Dal. 107. Clift. 305.*

That husband and wife levied a fine.

Or, suffered a common recovery.

*Replication.*] The demandant by replication may say that she sued for her dower within five years. *Co. Ent. 171. b.*

So, a fine by husband and wife, *come ceo that he has of the gift of the husband*, of lands limited for a jointure after marriage, does not bar her

her of dower; for her election does not come till her husband's death. 1 *Leo.* 285.

(2 Y 15.) *Assignment of dower.*] That lands were assigned for dower by the heir. R. Mo. 26.

Or, by himself who was assignee of the husband.

That a rent or annuity was assigned for dower, and accepted. Mo. 59. Cro. El. 451.

That her husband devised to her lands in lieu of dower which she accepted. Bro. V. M. 266. Semb. 1 *Leo.* 137.

That 20 acres of wheat, common of pasture or other profit out of the soil, was assigned. Mo. 59.

But an assignment by the husband's executor is no plea. R. Mo. 26.

If the tenant pleads an assignment of rent, &c. he must shew that he had a sufficient estate out of which the rent might be assigned. R. 2 *Leo.* 10.

That the assignment was absolute; for upon condition, &c. is not sufficient. C. Cro. El. 452.

And he must plead *quod assignavit*; for *quod dedit et concessit* is not sufficient; tho' they are the words of the deed. *Ibid.*

(2 Y 16.) *Term for years in esse.*] That there was a demise for years before coverture, rendring rent, and praying that the demandant may be endowed of the reversion and rent.

But if a term for years is not pleaded, it shall not be allowed; as, a prior title, in ejectment by tenant in dower after her recovery. 1 *Sal.* 291.

(2 Y 17.) *Release.*] That the demandant has released her dower to the tenant of the freehold.

But a release to the tenant in possession, without saying *tenen. liberi tenementi*, is no plea. R. 2 Cro. 151.

#### (2 Y 18.) Voucher in Dower.

So, the tenant may vouch the heir.

And if the heir enters into warranty, and says *riens per discent*. the demandant shall have judgment against the tenant immediately. R. Mo. 25.

So, tho' the heir has only an estate tail. *Dub. Ibid.*

So, by the *st.* 32 H. 8. 1. if tenant by knight's service devises, (which will be void for a third part,) dower shall be recovered out of two parts, where the heir enters generally with the devisee, or makes partition with him. 2 *Leo.* 131.

Otherwise, if the heir enters into a third part in severalty. *Ibid.*

#### (2 Y 19.) Judgment in Dower.

If the tenant appears and makes default in the same term, there shall be final judgment against him. 2 *Sand.* 46.

If he confesses the action, or *nihil dicit*, or pleads *non informatus*, there shall be judgment thereon. 1 Bro. Ent. 202. 204.



If the tenant makes default in another term, a *petit cape* shall issue. 2 *Sand.* 46. 1 *Vent.* 60.

And if he cannot save his default upon the return of the *petit cape*, there shall be final judgment against him.

So, if the tenant pleads that the husband is alive, and the demandant at the day for trial is ready with her proofs, there shall be final judgment against the tenant, if he makes default. 2 *Inst.* 80.

If the demandant is not present with her proofs, there shall be a *petit cape* awarded. *Ibid.*

So, if the tenant makes default at a trial by jury, there shall be a *petit cape* against him, and if he does not save his default, there shall be final judgment against him.

So, there shall be judgment by default, tho' the tenant is an infant. R. 2 *Cro.* 111.

The judgment in dower shall be *quod querens recuperet seisinam de 3 parte tenementor. petit.*

By the *fl. Mert.* 20 H. 3. 1. *si recuperaverit tenementa de quibus vir obiit seifitus, tenens reddat damna, viz. valorem dotis a tempore mortis viri usque ad diem, quo, per judicium curie, seisinam suam recuperaverit.*

And therefore after judgment for seisin, and *habere facias seisinam* awarded, if the demandant makes a suggestion upon the roll, that her husband died seised, there shall be a writ to inquire what damages, &c. *Clift.* 302. 1 *Lev.* 38.

And upon the return of the inquisition, there shall be judgment *quod recuperet valorem* and her damages. *Town. Jud.* 101. *Ray.* 366. 2 *Mod. Ca.* 25.

Or, the jury, who try the issue, may also inquire of the value of the damages.

Or, the demandant may remit the value and damages, and have an *habere facias seisinam* immediately. *Town. Jud.* 100.

Or, if she remits the damages, and the inquisition is afterwards annulled, she may have another inquisition for the value of the land. R. *Ray.* 366.

If the inquisition finds that the husband did not die seised *prout eis constare poterit*, there shall be a new inquisition. 4 *Leo.* 21.

If the demandant suggest that her husband died seised, where he was seised in fee and afterwards granted a rent-charge, and retook an estate-tail, she will be subject to the rent; for she is concluded by her own suggestion, and cannot say that she has not dower out of the second estate. *Co. Lit.* 33. a.

[Damages shall be given *a morte viri*, tho' demandant has not shewn any demand of dower *in pais*, unless the tenant pleads *touts temps prist.* *Dobson v. Dobson*, P. 7 G. 2. B. R. H. 19.]

[Damages shall be given till the demandant has seisin, tho' she had a writ of seisin a year before. *Ibid.*]

If the jury give damages *a morte viri* to the time of the inquisition, tho' it is after the judgment, it will be good. R. 1 *Leo.* 56.

So, tho' they give damages beyond the annual value of the land. *Ibid.*

But the demandant shall not recover the value or damages, if her husband did not die seised of the freehold and inheritance. *Co. Lit.* 32. b.

Nor,

Nor, in a writ of dower *ad ostium ecclesie ex assensu patris*, right of dower, &c. but only in dower *unde nihil habet*. *Co. Lit.* 32. b.

Or, if the heir comes the first day upon summons, before any demand of dower. *Ibid.* *Vide ante*, (2 Y 5.)

Nor, if she has dower by the assignment of the heir, in Chancery, &c. for she must recover by plea. *Co. Lit.* 33. a.

So, the demandant, upon judgment by default after a *grand cape*, shall have no damages upon the inquisition found, if there was no notice of executing the writ of inquiry. *R.* 3 *Lev.* 409.

[On a writ of inquiry, the damages should only be the third of the value of the land, after deducting reprises, from the death to the time of awarding inquiry. *Barnes*, 234.]

So, if the demandant has judgment and seisin, and afterwards upon the inquisition the jury give damages for the rent after seisin till inquisition taken, it will be error. *R.* 1 *Leo.* 56.

So, if the tenant dies after judgment in dower, and writ of seisin executed, the demandant shall not have a *scire facias* for inquiry of damages after the death of the tenant, against his heir or terre-tenants. *R.* 3 *Lev.* 275. *R.* 1 *Sid.* 188. 1 *Lev.* 38.

So, if there is error of a judgment in dower, and it is affirmed, and before the writ of inquiry executed the demandant dies, her executor or administrator shall not have a *scire facias* for the damages. *R.* 1 *Sal.* 252. 3 *Lev.* 275. *Sho.* 97. 3 *Mod.* 281. *Carth.* 135.

So, if the sheriff, upon a writ of seisin after judgment in dower, assigns 20 acres to the demandant, whereof 10 are the lands of a stranger, and she enters and accepts the residue, she cannot afterwards avoid it by *scire facias*; tho' it is not a third part. *R.* *Mo.* 679.

If dower is demanded of meadow, pasture, &c. the sheriff may assign all meadow, &c. for dower. *R.* *Mo.* 12. 19.

But if the demand is of three manors, the sheriff cannot assign one manor, but must assign a third part of each. *Ibid.*

## (2 Z) Pleading in Ejectment.

### (2 Z 1.) Declaration.

(2 Z 1.) *Must demand* **BY** whom it lies, *vide Ejectment* (A—B).  
a thing certain.] Ejectment is now usually brought for trial of the title to lands, &c.

[Very exact description is not equally necessary in ejectment as in a *præcipe*. *Cottingham v. King*, T. 31 G. 2. 1 *B. R.* 623.]

[Nor, so much strictness as was formerly required in ejectments; nor such exactness that the sheriff may know without any other information; for plaintiff is to shew and take possession at his peril. *Ibid.*]

And it lies of a manor, messuage, so many acres of land, meadow, pasture, wood, &c. 11 *Co.* 55.

So, *de una domo*. *R.* 2 *Cro.* 654. *R.* *Noy*, 37. *Cont.* 2 *Roll.* 486.

*De cotagio*. *D.* 1 *Lev.* 58. *R.* *Cro. El.* 818.

*De coquina*. *R.* *Noy*, 109.

*De cubiculo*. *D.* 1 *Noy*, 109. 3 *Leo.* 210.



*De stabulo.* R. 1 Lev. 58.

*De romed.* R. 3 Leo. 210.

[Of a *prebendal* stall, after collation to it. 1 *Wils.* 14.]

[Of the part of a house, if by the pleading it appears what part. *Sullivan v. Seagrave*, P. 12 G. Str. 695.]

[Of part of a house; as, *locum vocatum* a passage-room, and ascertained in what part. *Bindover v. Sindercombe*, H. 13 G. Ld. Raym. 1470.]

So, it lies *de pomario*. R. Cro. El. 854. R. 2 Cro. 654. R. Noy, 37. D. 1 Lev. 58.

[Of *parcella area*, *parcella pomarii*, *parte piscina*, if sufficiently described by the abutments. *Bindover v. Sindercombe*, H. 13 G. Ld. Raym. 1470.]

[Of *clauso pastura vocat.* five acres, containing five acres. *Ibid.*]

*De virgata terra.* Ow. 18.

*De villa.* Dub. Sho. 49.

So, it lies of tithes, and *portione decimarum*. Hard. 57.

*De herbagio.* Hard. 330.

Or, *prima tonsura*. R. Cro. Car. 362.

*De pastur. pro 100 ovibus.* Dal. 95.

[*Pro communia pastura* generally, if joined with lands, will be good after verdict, tho' the kind of common not expressed. *Newman v. Holdmyast*, E. 3 G. Str. 54.]

[Of messuages and lands, with common of pasture, *cum pertinentiis*, good; for it shall not be taken for common in gross, and the *cum pertinentiis* shall relate to the land. *Baker v. Roe*, T. 8 G. 2. B. R. H. 127.]

[For cattle-gates in *Yorkshire*. Per Lee J. *Barnes v. Peterson*, M. 10 G. 2. Str. 1063.]

[For a beast-gate in *Suffolk*: it imports land and common for one beast. *Bennington v. Goodtitle*, H. 11 G. 2. Str. 1084. *Andr.* 106.]

[Cattle-gates shall be understood to mean common of pasture for cattle; and after verdict, for common appurtenant. *Metcalf v. Roe*, M. 9 G. 2. B. R. H. 167.]

Of a coal-mine. R. 2 Cro. 150. R. Noy, 121. [Vide *Doug.* 205.]

Of a boillery of salt. D. 2 Cro. 150. Noy, 132. 1 Lev. 114.

Of land and a coal-mine in the same land, for it is no *bis petit.* in a personal action. R. 2 Cro. 21.

*De subbosco.* R. 2 Cro. 483.

[It lies for *alder carr*, in *Norfolk*. *Barnes v. Peterson*, M. 10 G. 2. Str. 1063.]

*De quadam fabrica.* Hard. 58.

*De terra montana.* Hard. 58. R. cont. 2 Rol. 167. 189.

[Of one hundred acres of mountain, good in *Ireland*, where mountain describes the quality rather than the situation. *Ld. Kildart v. Fisher*, M. 4 G. Str. 71.]

[(After verdict and affirmance of judgment there) these descriptions were held sufficient in *Ireland*.]

[In the county of R. without naming a vill.]

[Town and tenement of B. and the fairs and markets thereto belong.]

[Quarter.]

[Quarter.]

[Part of S. M. and D.]

[A large deer-park in the county of R.]

[A small park or field in the possession of A. (not saying where.)]

[And although the quantity and quality of the land is not specified.]

*Cottingham v. King*, T. 31 G. 2. 1 B. M. 623.]

Of so many acres of bog. R. Cro. Car. 512.

[It lies by the owner of the soil, for land, part of the highway; for he has a right to all above and under ground, except only right of passage, and ought to have specific remedy to recover the land itself. *Goodtitle v. Atker*, H. 30 G. 2. 1 B. M. 133.]

[Land is a sufficient description, though part of a house is built by encroachment upon it; for plaintiff-claims the land, not the nuisance; and more latitude is allowed in ejectments (where sufficient certainty is enough) than in real actions. *Ibid.*]

But it does not lie where no certainty appears, whereof the sheriff can deliver possession: as, if the declaration is *de tenemento*. Mar. 96.

*De repositorio*. Per three J. Mar. 96. Dub. Cro. Car. 555. Jon. 454.

*De messuagio sive tenemento*. R. Noy, 86. D. 2 Cro. 125. 621. Cro. Car. 188. R. 3 Lea. 228. R. 3 Mod. 238. R. after verdict. 1 Sid. 295.

[For a messuage, garden, and a tenement. *Goodtitle v. Walton*, P. 2 G. 2. Str. 834.]

[For one messuage or tenement. *Barnes*, 173. *Goodright v. Flood*, M. 10 G. 3. 3 Wils. 23.]

[But if it be brought of a messuage and tenement the court will give leave to strike out the words *and tenement*. 3 Wils. 23.]

[And now, an ejectment for a messuage and tenement, or for a messuage or tenement, is good after verdict. 1 T. R. 11.]

[So, for a messuage in A. or B. or one of them. *Barnes*, 184.]

*De messuagio et terris eidem spectant.*

*De peciâ terræ*. Ow. 18. Mo. 422. 702.

*De peciâ terræ vocat.* B. Ow. 18. Mo. 422. 702.

Or, continen. 20 acr. R. Jones, 400. Vide infra.

*De clauso terræ*, containing three acres. R. 11 Co. 55. Dub. Cro. El. 339. but R. cont. Cro. El. 235. R. 2 Cro. 435. D. 2 Cro. 654. 1 Lev. 58. R. 3 Lev. 97. Cont. Hard. 57. Vide infra.

*De tali parte messuagii in occupatione D. quæ stat super ripam*. R. Mar. 97, 8.

Of common in grofs. D. P. 2 J. B. R.

Nor, of a fishery, rent, or other profit *aprendre*. R. Cro. Car. 492.

So, it does not lie without shewing the quantity and quality of the land: as, how many acres of land, meadow, and pasture, &c. R. 11 Co. 55. 1 Sal. 254.

And so much by estimation is not sufficient. Ley. 82. R. Cro. Car. 573.

It does not lie *de omnibus decimis in D.* without saying, whether they are tithes of corn, &c. Mo. 837.

Nor, *de quartâ parte prati*, without saying how much the whole contains. 1 Lev. 213.

Nor, *de castro, villâ, et terris in K.* Tel. 118.

Nor, *de quinque clausis vocat.* F. continent. 3 acr. terre et passur., without



out saying how much land or pasture each contains. *R. 4 Mod. 27.*  
*1 Sal. 254. Sho. 338. Vide infra.*

Nor, *de 300 acres vasti.* *R. Hard. 57, 58.*

So, it does not lie *de rivulo*, or *aquæ cursu*; for it must be so many acres of land *aquâ coopert.* *R. Yel. 143.*

Nor, *de pannagio*; for this is only a privilege to take pannage, *1 Lev. 213. 1 Sid. 417.*

Yet, it seems sufficient, if so much certainty appears, upon which the sheriff can deliver possession: as, *ejectment de peciâ terræ vocat. B.*, or *clauso terræ vocat. B.* *R. 2 Cro. 435. 3 Lev. 97. Vide supra.*

*De 2 clausis terræ continent. 3 acr. terræ*, tho' it is not said how much each close contains. *Per three J. 2 Cro. 435.*

*De quodam loco vocat. the vestry.* *R. 3 Lev. 96.*

*De terris de K. continent. 90 acras.* *Dub. Sho. 49.*

So, *de mineris carbonum in A.* without saying how many, if it be the usual phrase of the country. *R. 4 Mod. 143. Sho. 364. 1 Sal. 255.*

So, *de messuagio five tenemento et 4 acris terræ eidem spectan.* is sufficient for the four acres; for *eidem spectan.* shall be rejected. *R. 3 Leo. 228.*

*De messuagio five burgagio in H.*, for they are synonymous in a borough. *R. Hard. 173.*

*De messuagio five tenemento vocat. the Black Swan.* *3 Mod. 238. 1 Sid. 295.*

So, it shall be aided, if the verdict finds the defendant *not guilty* for a part which is uncertain. *1 Sid. 295.*

Or, if the plaintiff releases as to that. *1 Sid. 295. Hard. 58.*

[Ejectment lies in *C. B.* for land in *Wales.* *Barnes, 181.*]

[The court will not consolidate declarations in ejectment against different persons, tho' the title be the same in all. *Smith v. Crabb, H. 14 G. 2. Str. 1149.*]

[But, if there are several ejectments against different persons, and all the ejectments for the same premises, they shall be consolidated, *Barnes, 176.*]

[(2 Z 1.) When Notice to quit is necessary.]

[In the case of a tenancy from year to year, as between landlord and tenant, there must be half a year's notice to quit, ending at the expiration of the year, and *any* six months will not do. *1 T. R. 159.*]

[And where the landlord in ejectment cannot prove the time when the term commenced, and the tenant prove it to be different from the time to quit mentioned in the notice, he will be nonsuited. *Ibid.*]

[But till the contrary be shewn, notice to quit at *Lady-day*, &c. will be *primâ facie* evidence of a holding from *Lady-day* to *Lady-day.* *Ibid.*]

[Tenant from year to year, before a mortgage or grant of the reversion; is entitled to six months' notice from the mortgagee or grantee. *Ibid. 380. 382.*]

[And where an infant becomes entitled to the reversion of an estate leased from year to year, he cannot eject the tenant without giving the same notice as the original lessor must have given. *2 T. R. 159.*]

[But, where one in remainder, after the expiration of an estate for life, gave notice to the tenant to quit on a certain day, and afterwards accepted half a year's rent; such acceptance, being only evidence of a holding

holding from year to year, was considered as rebutted by the previous notice to quit; and the notice to remain good. 1 T. R. 161. *Vide* *Corrup.* 243.]

[A distress taken for rent accrued after the expiration of a notice to quit, is a waiver of the notice. *Zouch v. Wallingall*, C. P. H. 39 Geo. 3. 1 H. Bl. 311.]

[If a landlord receive rent *ex nomine* due after the expiration of a notice to quit, it is a waiver of such notice. *Charter v. Cordwent*, B. R. E. 35 Geo. 3. 6 T. R. 219.]

[A notice delivered to a tenant at Michaelmas 1795 to quit at Lady-day, which will be in the year 1795, was holden to be a good notice to quit at Lady-day 1796. *Bedford v. Kightley*, B. R. M. 37 Geo. 3. 7 T. R. 63.]

[In the case of a lease granted by tenant for life, which is void as to the remainder-man on account of its having exceeded the power, if the remainder-man accept rent, as rent, after the death of the tenant for life, it is an admission that the defendant is his tenant, and thereby entitled to notice to quit. *Martin v. Watts*, B. R. H. 37 Geo. 3. 7 T. R. 83.]

[Where tenant for life grants a lease for years, which is void against the remainder-man, and the latter before he elects to avoid it receives rent from the tenant, whereby a tenancy from year to year is created, yet this is with reference to the old term, and therefore a half-year's notice to quit from the remainder-man ending with the old year, is good. *Collins v. Waller*, B. R. H. 38 Geo. 3. 7 T. R. 478.]

[Tho' by the statute of frauds it is enacted that all leases by parol for more than three years shall have the effect of estates at will only, such a lease enures as a tenancy from year to year. *Clayton v. Blakey*, B. R. M. 39 Geo. 3. 8 T. R. 3.]

[And where the term of a lease is to end on a precise day, there is no occasion for a notice to quit; because the lease is of course at an end, unless the parties come to a new agreement. 1 T. R. 54. 162.]

[If a landlord lease for seven years by parol, and agree that the tenant shall enter at Lady-day, and quit at Candlemas, tho' the lease be void by the statute of frauds as to the duration of the term, the tenant holds under the terms of the lease in other respects; and therefore the landlord can put an end to the tenancy at Candlemas only. *Rigge v. Bell*, B. R. M. 34 Geo. 3. 5 T. R. 471.]

[Where power is given to a party to determine a lease on giving a notice in writing, he cannot determine it on giving a parol notice. *Legg v. Benion*, C. P. H. 11 Geo. 2. *Willes*, 43.]

[By *stat. 11 G. 2. c. 19.* the tenant to whom a declaration in ejectment shall be delivered, shall forthwith give notice to his landlord on pain of forfeiting the value of three years' improved rent.]

[But a tenant to a mortgagor, who does not give notice of an ejectment brought by the mortgagee to enforce an attornment, is not liable to the penalties of this act. 1 T. R. 647.]

(2 Z 2.) *Must be upon a good demise.*] So, the declaration in ejectment must shew a good demise; and therefore, if he declares upon a demise of 10 *acr. terre et* 20 *acr. prati. per nomen* 10 *acr. prati plus vel minus*, it is bad. *R. Tel.* 166.

On a demise of tithes, without saying, by deed. *R. 2 Cro.* 613.



Upon a demise by *A. and Ann* his wife, where she was named *Agnes*. *R. Cro. El.* 776.

Upon a demise of the fourth part of a messuage, by virtue whereof he entred into *tenementa prædicta*. *Cont. Cro. El.* 286. for it shall be restrained to so much as was demised.

So, if the declaration does not shew the *vill* where the land demised lies, except in the *per nomen*, &c. *R. Cro. El.* 822.

[But the vill in which the demised lands lie, tho' omitted in the declaration, shall, after verdict for the plaintiff, be collected from the vill in which the ejection is laid to have been committed. 2 *Bl.* 766.]

But a declaration of *Hilary* term; upon a demise within the same term, is good. 1 *Vent.* 135.

Or, upon a demise, 30 Feb. *habendum a die dat.* (which is impossible,) for the lease commences immediately. 1 *Vent.* 137.

Or, upon a demise *per scriptum obligator. habendum a die dat. indentura prædicta*. *Ibid.*

Or, upon a demise 20 Feb. *habendum a die dat.*, for it shall be intended to commence upon the day of the demise. *R. 2 Cro.* 646.

Or, *habendum* from *Michaelmas ante dat.* *R. Cro. El.* 606.

Or, *habendum a consecratione*, without saying when it was delivered. *R. Cro. El.* 773.

[In the case of a tenancy from year to year as long as both parties please, if the tenant die intestate, his administrator has the same interest in the land which his intestate had; and the lessee of such an administrator may declare in an ejectment on a term for seven years; for the time is not conclusive. 3 *T. R.* 13.]

[Demise from heir by descent laid on the day of the death of the ancestor to hold from the day before, is good after verdict. *Roe v. Hersey*, *M.* 12 G. 3. 3 *Wils.* 274.]

So, upon a demise by a college or ecclesiastical person, without shewing that there was a rent reserved, &c. pursuant to the *stat.* 13 *El.* *R. Sav.* 129.

If the declaration alleges a demise, *virtute cuius* defendant *fuit possessionat. et postea eject.*, it is good, tho' the entry or ejectment is alleged at a day precedent, blank, or impossible. *R. 2 Cro.* 96, 154. 312. 662. 2 *Bul.* 29. *Dub.* 1 *Sid.* 8. *Cont. Cro. El.* 766. *R. cont.* 3 *Mod.* 198.

[The court will on consent, but not without, give leave to enlarge the time of the demise. *Thrustout v. Gray*, *M.* 9 G. 2. *B. R. H.* 165.]

[The term was enlarged, being so laid that it had expired twelve years before the action brought, on payment of costs; tho' a special jury had been struck, and the parties had gone down to the assizes, before the mistake was discovered. 2 *Bl.* 940. 2 *Str.* 1272. 4 *Burr.* 2447. *Corop.* 841.]

So, mispision in the demise may be amended, if the declaration delivered was good. *Vide Abatement*, (L 2.)

[There can be no alteration in the declaration in the issue, from the first declaration delivered, only in the defendant's name. *Bass v. Bradford*, *M.* 12 G. 2 *Ld. Raym.* 1411.]

[The surrenderee of copyhold lands may recover against the surrenderor on a demise laid between the time of surrender and admittance,

tance, because the title relates back from the time of the admittance to the surrender against all persons but the lord. 1 T. R. 600.]

[So, a surrender of chambers in *New Inn* to the treasurer and ancients of the society, made with their assent, to the intent that they may grant the said chambers to a purchaser, passes the estate to such purchaser before admission; and therefore, on the death of the surrenderee before admission, the society may maintain ejectment for them. *Ibid.* 393.]

## (2 Z 3.) Plea.

[Leave may be given to plead to the jurisdiction in ejectment, before judgment *nisi* against the casual ejector. 1 Bl. 197.]

[The new defendant in ejectment may give a rule to reply, and *non prof.* the plaintiff; but can have no costs unless the lessor of the plaintiff has joined in the rule by consent. 2 Bl. 763.]

When a declaration is delivered to the tenant in possession, the course now is, that he who claims title must procure himself to be admitted as a defendant, and enter into the general rule, whereby he agrees to appear and receive a declaration, and plead *not guilty*, and at the trial to confess, *lease, entry, and ouster*.

By the *st.* 4 Geo. 2. 28. the court may give leave to the landlord to defend with the tenant in possession, if he appears, or if not, to defend alone.

[The court will not permit a lessee *alone* to defend an ejectment against his landlord or those claiming under him, on a supposed defect of the landlord's title. 2 Bl. 1259.]

[Nor, shall a man defend himself in it, by an estate which makes part of the title of the lessor of the plaintiff. *Cowp.* 46.]

[Where the lessor made an actual entry in *September* 1744, and the demise was laid in *October* 1744, and the defendant levied a fine 1745, it was held that the lessor had no occasion to make another entry. 1 *Wils.* 190.]

[Service of ejectment at the house may be made good by a subsequent rule of court. 1 Bl. 290. 317.]

[If servants refuse to call their master, or to take declaration, the court will order leaving it at the house to be good service. *Str.* 575.]

[If copy of declaration is tendred to wife of tenant in possession, in the shop, the notice to appear is *offered to be read*, but she goes away, and declaration is left in the shop, the court will grant rule to shew cause why not good service: so, if tenant keeps out of the way to avoid being served. *Doe v. Roe*, P. 5 G. 3. 2 *Wils.* 263.]

[If declaration is tendred (through a window,) and refused, and violence threatened, it is sufficient to leave declaration. *Barnes*, 174.]

[Or, if tendred, and on non-acceptance left on the floor, and the subscription read, so that the tenant who had retired might hear, it is good. *Barnes*, 185.]

[And where tenants abscond, court will order service on a servant to be good. *Barnes*, 188, 189, 190.]

[Or, if lunatic, on the person who has the custody. *Barnes*, 190.]

[So, if declaration is delivered to a daughter or a father, and owned by tenant, it is good. *Barnes*, 175, 176. 183.]

[Service of a declaration before the essoign-day of the term on the daughter of the tenant in possession, in the absence of the tenant  
and



and his wife, is good, provided it appears that the daughter delivered it to the wife, tho' it should not appear that such delivery was before the effoign-day. *Smith v. Hurst*, C. P. T. 31 Geo. 3. 1 H. Bl. 644.]

[If tenant absconds, declaration delivered to servant, and another fixed on door, is good. *Barnes*, 173.]

[Service on churchwardens and overseers, for a house they rented for lodging the poor, good. *Barnes*, 181.]

[On the wife of tenant, as she informed deponent, and he believes, good. *Barnes*, 194. *Vide* 2 Bl. 800.]

[Notice to appear given in beginning (tho' not first day) of Michaelmas term in London, good. *Barnes*, 175.]

[The notice must be to appear on the first day in full term, not on the effoign-day. *Holdfast v. Freeman*, T. 9 G. 2. Str. 1049.]

[Appearance must be entred with filazer, and marked on common rule. *Barnes*, 177.]

[Tho' declaration and subscription is read to wife thro' a window, and then fixed to the door, and husband owns the receipt, it is not good service. *Barnes*, 171.]

[Affidavit of service on wives of A. and B., who, or one of them, are tenants, bad. *Barnes*, 174.]

[So, on A. B. tenant, or C. his wife. *Barnes*, 173.]

[A declaration in ejectment may be served on the wife, either on the premises or at the husband's house. *Morland v. Bayless*, B. R. T. 36 Geo. 3. 6 T. R. 765.]

[Service of a declaration on one of two tenants in possession, is good service on both. *Doe v. Roe*, C. P. H. 39 Geo. 3. 1 Bos. & Pull. Rep. 369.]

[The mere acknowledgment of the wife of the tenant in possession, that she has received a declaration in ejectment, is insufficient to bind the husband. *Goodtitle v. Badtitle*, C. P. H. 39 Geo. 3. *Ibid.* 384.]

[Service of a declaration on a person appointed by the court of Chancery to manage an estate for an infant, is insufficient. *Ibid.* 385.]

If the plaintiff in ejectment, or in an action for the mesne profits, afterwards releases, he may be committed for a contempt; for he is only nominal. 1 Sal. 260.

By the st. 4 Geo. 2. 28. if no tenant in possession, the declaration may be fixed on the door of the house; or, if no house, on some notorious part of the land.

[This act seems to relate only to ejectments for non-payment of rent, where the landlord has a right to re-enter.]

[Ejectment on vacant possession in London or Middlesex may be moved any time in term. *Barnes*, 172.]

[Landlord is not made defendant in cases of vacant possession, (except within the act concerning landlords and tenants by lease, with clause of re-entry,) but he that first seals lease on premises must have possession. *Barnes*, 177.]

[Tenants are not obliged to appear, tho' indemnified. *Barnes*, 173.]

[If tenant in possession refuse to appear and make defence, there is no relief. *Goodright v. Hart*, P. 2 G. 2. Str. 830.]

[N. B.]

[N. B. This was before, and was the occasion of the *ſ. 11 G. 2. c. 19.* by which, if tenant does not appear, judgment againſt caſual ejector, but landlord may have leave to appear and enter into common rule, and execution ſhall be ſtaid till further order.]

[If landlord obtains a rule to be made defendant, the plaintiff at trial muſt prove that defendant or his tenant was in poſſeſſion. *Smith v. Mann, T. 21 & 22 G. 2. 1 Wiſſ. 220.*]

He who claims title muſt be a defendant with the tenant in poſſeſſion. *Per C. B. M. 7 An.*

Or, he may appear alone by order of the court, or by conſent of the attorney for the plaintiff.

[The court (of *B. R.*) will not order the landlord to be made defendant in the room of the tenant in poſſeſſion, on an affidavit that he is a material witneſs. *Bourne v. Turner, T. 11 G. Str. 632.*]

[If ejectment is brought by one claiming as heir of a copyhold, and the lord of the manor, who claims by eſcheat *pro defectu heredis*, applies to be admitted to defend with the tenant in poſſeſſion, or alone; the court will direct the lord to bring ejectment againſt the heir, and the heir to be admitted to defend with tenant, or alone; if the lord reſuſes, they will diſcharge his rule to be admitted; if the heir reſuſes, they will admit the lord to defend. *Fairclaim v. Shamittle, H. 2 G. 3. 3 B. M. 1290. 1 Bl. 357.*]

[Landlord is not to be made defendant without tenant in poſſeſſion, tho' he reſuſes to appear, only joined. *Barnes, 172.*]

[So, if tenant has quitted poſſeſſion. *Barnes, 175.*]

So, he who claims title ſhall be joined as defendant, tho' the plaintiff oppoſes it, and he is entitled to privilege. *1 Sal. 256.*

Tho' ſhe is wife to the leſſor. *1 Sal. 257.*

But he ſhall not be joined upon the plaintiff's motion, without his requeſt. *1 Sal. 256.*

Nor, ſhall he be made a plaintiff by rule who is entitled to privilege. *Qu. 1 Sal. 256.*

[The court will order an infant leſſor of the plaintiff to name a good plaintiff, to be answerable for coſts. *Noke v. Windham, P. 12 G. Str. 694. Throgmorton v. Smith, P. 5 G. 2. Str. 932. Birchman v. Noright, T. 7 G. 2. B. R. H. 56.*]

[But not a leſſor having privilege of parliament. *Preſſon v. Lingen, M. 8 G. Str. 479.*]

[If the guardian undertake for coſts, it is ſufficient. *Cowp. 128.*]

So, the defendant may pray a ſpecial rule to defend for ſo much.

If it be a church, in which he ought to perform divine ſervice, he may have a ſpecial rule to defend for that. *1 Sal. 256.*

[In ejectment for a chapel, the parſon cannot defend only for a right to enter and perform divine ſervice, notwithstanding. *Salk. 256. Martin v. Davis, M. 5 G. 2. Str. 914.*]

So, there may be a rule to amend the declaration and plead in a ſpecial manner, to bring the merits of the caſe in queſtion. *Carth. 180.*

[Defendant need not plead the ſtatute of limitations, for plaintiff muſt ſhew a right of poſſeſſion as well as of property. *Taylor v. Horde, H. 30 G. 2. 1 B. M. 60. 4 Burr. 1963.*]

Tho'



[Tho' defendant confesses lease, &c. he may afterwards move to set aside verdict for variance. *Barnes*, 175.]

[If an affidavit, on which a motion is originally made, is entitled in the name of the casual ejector, and the rule to shew cause, &c. is in the name of the tenant in possession, it is wrong, and the rule shall be discharged; for it appears to be a different cause, and a rule in one cause cannot be supported by an affidavit in another. *Davenport v. Jackson*, P. 12 G. 2. *Andr.* 368.]

(2 Z 4.) Judgment.

If the defendant does not appear within four days after the beginning of the term, after the declaration delivered, (if the action is in *London* or *Middlesex*;) upon an affidavit of the delivery of the declaration to the tenant himself or his wife, before the essoign-day of the same term, with notice to appear at the beginning of the term, there shall be judgment against the casual ejector named in the declaration, and thereupon an *habere facias possessionem*, to put the plaintiff in possession.

Or, upon delivery to the servant, if by letter or otherwise the tenant in possession afterwards acknowledges notice thereof. 1 *Sal.* 255.

[Declaration must be delivered before the essoign-day of the term, or no judgment till next term. *Barnes*, 172.]

[Declaration of *Trinity*, with notice to appear next *Hilary*, appearance of *Michaelmas* is bad. *Barnes*, 250.]

If the plaintiff has judgment for the whole, when he had title only to a moiety, it is no error. *Dub. Cro. Car.* 7.

So, if the defendant does not appear within a week after the term, when the action lies in another county, and an affidavit is made of the delivery of the declaration before the essoign-day of *Hilary* or *Trinity* term, with notice to appear the next term.

If the declaration be delivered in such county, before the essoign-day of *Michaelmas* or *Easter* term, with notice to appear the next term, upon such affidavit, there shall be a rule for the defendant to appear in *Hilary* or *Trinity* term; and if upon service of the rule he does not appear accordingly, there shall be judgment against the casual ejector.

But after judgment signed, a judge, before the assizes, if possession is not taken, may direct the plaintiff to accept a plea. *Sal.* 516.

If the term expires *pendente lite*, yet the plaintiff may recover damages, tho' not the term. (*Vide* 2 *Str.* 1056.)

And the term shall not be enlarged without consent, tho' the plaintiff was delayed by injunction. 1 *Sal.* 257. *Mod. Ca.* 130. *Carth.* 3.

If the declaration be delivered of a house or land void of a possessor, there must be a lease executed upon the land, &c. and before judgment, there shall be an affidavit of the lease, entry, &c. and a rule upon motion for a peremptory plea. *R.* 1 *Sal.* 255.

[There shall be a rule for judgment, on affidavit of the messuage being empty and door shut, of lessor entering by standing in the threshold,

threshold, and taking hold of the knocker, lease, entry, ouster and delivery of ejectment. *Bidgood v. Hawes*, P. 8 G. 2. B. R. H. 112.]

[Leaving beer in an alehouse-cellar, is keeping possession; and if judgment is signed on a lease sealed, as on a vacant possession, it shall be set aside. *Savage v. Dent*, M. 10 G. 2. Str. 1064.]

But motion for judgment against the casual ejector in London or Middlesex will not be allowed, if it is not made within a week after the first day of Michaelmas or Easter term, or within four days after the first day of Hilary or Trinity term. *Per Rule*, Tr. 32 Car. 2. Mills, 80.

[The clerk of the rules of the court of B. R. shall for the future keep a book, in which shall be entered all the rules which from time to time shall be delivered out in ejectments, instead of the present book, containing a list of the ejectments moved; in which book shall be mentioned the number of the entry, the county in which the premises lie, the names of the nominal plaintiff, the first lessor of the plaintiff, (with the words "and others," if there be more than one,) and also the name of the casual ejector. *Reg. Gen. B. R. M. 31 Geo. 3. 4 T. R. 1.*]

[Unless the rule for judgment shall be drawn up and taken away from the office of the clerk of the rules within two days after the end of the term in which the ejectment shall be moved, no rule shall be drawn up or entered in the book, nor shall any proceedings be had in such ejectment. *Ibid.*]

Or, there is not a new notice given to the tenant in possession. 1 Sal. 257.

[Where the plaintiff is nonsuited for want of the defendant's confessing lease, entry, and ouster, he is not entitled to sign judgment against the casual ejector till the *possea* comes in on the day in bank. *Doe v. Copeland*, B. R. M. 29 Geo. 3. 2 T. R. 779. *Vide Lilly's Pr. Reg. Tit. Possea.* 1 Salk. 259.]

[Casual ejector cannot confess judgment. *Hooper v. Dale*, M. 9 G. Str. 531.]

If judgment is obtained upon service of *A.* who counterfeits himself tenant in possession, there shall be restitution. *Mod. Ca.* 73.

[If judgment is set aside, and possession ordered to be restored, but lessor of plaintiff absconds, so the rule ineffectual, a writ of restitution shall issue. *Barnes*, 178.]

So, if the plaintiff was nonsuited, or had a verdict against him in a former ejectment for the same tenements, he shall be restrained from proceeding upon motion till he pays the costs of the former action. 4 Mod. 379.

[If the defendant in a former ejectment, who was then evicted, bring another ejectment for the same premises, the court will stay the proceedings until he pay the costs of the former cause. *Williams v. Holdfast*, B. R. E. 35 Geo. 3. 6 T. R. 223.]

[If plaintiff had rule for trial at bar, but it being on wrong demise, delivers new ejectment, the court will not grant new trial at bar, but on payment of costs of the former ejectment. *Ld. Coningsby's Case*, H. 9 G. Str. 548.]

[Plaintiff shall not proceed in new ejectment till he has paid costs of



of the first, tho' he has brought writ of error. *Grumble v. Bodily*, 7 G. 2. Str. 554.]

[Altho' in such former ejectment the lessor of the plaintiff never entered into the consent rule. 2 Bl. 904. 1158. 1180.]

[If there is judgment for defendants in ejectment on the demise of husband and wife, (the remainder being in the wife, who proceeds after her husband's death,) because tenant for life, tho' a papist, educated abroad, may conform; and on his death, wife brings new ejectments against some of the former defendants and others; the court will stay proceedings in the new till the costs of the old are paid. *Doe v. Hatherby*, P. 14 G. 2. Str. 1152.]

If the first ejectment was in C. B. and there was a rule there to stay him in a second till costs paid, there shall be the same rule in B. R. if he afterwards sues there. 1 Sal. 255.

But the defendant in a former ejectment shall not be restrained, if the verdict was against him till he pays the costs; for, tho' he was barred before, the new ejectment by him is not vexatious. R. 4 Mod. 379.

So, if the defendant brings error, and afterwards delivers a declaration in ejectment, he shall not be bound to pay the costs upon the first ejectment. 1 Sal. 259.

Yet the court will stay all proceedings on the second ejectment, till error determined. 1 Sal. 258.

[If a mortgagee brings ejectment, the court will order him to shew cause why, on payment or bringing into court principal, interest, and costs, proceedings should not be stayed. *Anon. H. 7 G. 2. Str. 413.*]

[On the application of the mortgagor, or his assignee of the equity of redemption, the court will stay proceedings in ejectment on payment of principal, interest, and costs, without paying money due on a bond; but not if it was an heir. *Archer v. Snatt*, 21 H. G. 2. Str. 1107. And. 341.]

[If mortgagee has given notice that he requires a bond, (a lien on the estate,) to be paid, as well as mortgagee, there cannot be a rule to stay proceedings on payment of principal, interest, and costs, on mortgage only. *Barnes*, 177.]

[But this extends not to bond due to an assignee in his own right. *Barnes*, 182.]

[On payment of principal, interest, and costs, the court will stop proceedings in ejectment on a mortgage, and on the bond for performance of covenants; and will discharge defendant out of custody, tho' he had agreed to convey equity of redemption to plaintiff, if plaintiff has not tendred him a conveyance to be executed. *Skinner v. Stacy*, M. 18 G. 2. Wilf. 80.]

[The court will not stay the proceedings on the mortgagor paying principal, interest, and costs, if he has agreed to convey the equity of redemption to the mortgagee. *Taysum v. Pope*, B. R. E. 37 G. 3. 7 T. R. 185.]

[After judgment on re-entry for non-payment of rent, and before writ of possession executed, the court will stay proceedings, on payment of rent and costs. *Goodtitle v. Holdfast*, P. 4 G. 2. Str. 900.]

[On

[On staying proceedings on payment of arrears of rent and costs, the landlord shall only allow land-tax for the rent, and not what was paid more on account of improvements. *Yeo v. Leman*, T. 16 G. 2. Str. 1191. Wilf. 21.]

[On staying proceedings, on payment of money due, the prothonotary will make just allowances. *Barnes*, 176.]

[Rent due to lessor of plaintiff as devisee, more due to him as executor, proceedings stayed on paying what due to him as devisee. *Barnes*, 184.]

[In ejectment on two demises of different lands, judgment to recover *terminum suum*, in the singular, is good. *Worral v. Bent*, T. 3 G. 2. Str. 835.]

[If there are two counts in the declaration on two demises of different persons of the same premises, and judgment is entred for plaintiff on one count, and for defendant on the other; the court, on error, will interpret the *tenementa prædicta* as to the second, to mean the term in the premises, and it will be well. *Fisher v. Hughes*, T. 5 G. 2. Str. 908.]

[Or, if the judgment is that plaintiff recover his terms (in the plural) on two demises of the same premises for the same term, both as to commencement and duration; on error brought, the court, in order to support the judgment, will intend that the two lessors were joint-tenants, and made separate leases. *Morris v. Barrey*, H. 16 G. 2. Str. 1180. 1 Wilf. 1.]

[If judgment is regularly signed, but without loss of trial, it may be set aside on payment of costs and taking notice of trial. *In B. R. as in C. B. Dobbs v. Passer*, P. 7 G. 2. Str. 975.]

[The court cannot stay proceedings after special verdict in ejectment, tho' the lessor of plaintiff's title is at an end; for he may proceed for damages and costs. *Thrustout v. Grey*, M. 10 G. 2. Str. 1056.]

[Not every person claiming title is landlord within 11 G. 2. but one who is in some degree of possession; as, by receiving rent, &c. *Barnes*, 193.]

[If landlord (by virtue of *stat. 11 G. 2. c. 19.*) appears alone, and after judgment for plaintiff brings error, plaintiff cannot have execution till error determined. *Jones v. Edwards*, M. 19 G. 2. Str. 1241.]

[If the landlord on tenant's not appearing makes himself defendant, and plaintiff obtains judgment against him, and moves for leave to take out execution against casual ejector, and defendant, who has regularly sued out error before this, does not shew it for cause against the rule for execution, which is made absolute, and possession delivered, this shall not be afterwards set aside as irregular. *George v. Wisdom*, H. 32 G. 2. 2 B. M. 756.]

[If landlord is added defendant to one tenant, who appears for part, and defends alone for other part where tenant refuses to appear, plaintiff shall have judgment for this last part against casual ejector, with stay of execution. *Barnes*, 179.]

[If some defendants confess lease, &c. and there is verdict against them, and others do not confess, and are acquitted, plaintiff shall have judgment against casual ejector. *Barnes*, 174.]



[If landlord made defendant does not appear to confess, &c. execution shall be against the casual ejector. *Barnes*, 182. 185, 186.]

[The court will not give leave to take out execution on judgment against casual ejector, after verdict for plaintiff, pending error brought by defendant. *Barnes*, 208.]

[For non-payment after issue, it may be signed against defendant, but not against casual ejector. *Barnes*, 253.]

[If lessor of plaintiff dies after issue joined, and before the assizes, and plaintiff is nonsuited because defendant does not confess lease, &c. executor of lessor shall not have costs taxed on the common consent-rule. *Thrustout v. Bedwell*, T. 26 & 27 G. 2. 2 *Wils.* 7.]

[If in ejectment against two one dies after issue, but before trial, the death must be suggested on the plea-roll, but need not on the *nisi prius* roll; it must be awarded, that proceedings stay against the deceased, but no need of *quod quer. nil capiat*; and judgment must be, not for a moiety, but that plaintiff recover his term; but he must take execution for no more than he has a right to recover. *Far v. Denn*, T. 30 & 31 G. 2. 1 *B. M.* 362.]

[A judgment in ejectment is a recovery of the possession without prejudice to the right; and he who enters under it can only be possessed according to right; and he who recovers a naked possession only, without right, can convey no other to his feoffee. *Taylor v. Horde*, H. 30 G. 2. 1 *B. M.* 60.]

[On a special verdict it ought to appear that lessor of plaintiff might enter at the time he brought the ejectment. *Ibid.*]

[A lease under a power made unfairly, and in prejudice of those in remainder, found in the custody of the maker at his death, ought, at the trial, to be presumed to have been surrendered, to let in the statute of limitations *Ibid.* *Vide Pojar.*]

[One who recovers land, part of a highway, must recover it subject to the easement, and the sheriff must deliver possession subject to it. *Goodtitle v. Alker*, H. 30 G. 2. 1 *B. M.* 133.]

[The nominal plaintiff and casual ejector are to be considered as the fictitious form of an action really brought by the lessor of the plaintiff against the tenant in possession, who are substantially the only parties to the suit.]

[The English notice at the foot of the declaration was subscribed by the nominal plaintiff instead of the casual ejector, and the rule for judgment was discharged. *Peaceable v. Troublesome*, M. 7 Geo. 2. *Barnes*, 172. *Barker v. Merryfield*, 1 *Barnard*, 116.]

[The court refused to set aside the proceedings for irregularity upon a similar objection being made. *Hazelwood v. Thatcher*, B. R. T. 29 Geo. 3. 3 T. R. 351.]

[The notice at the foot of the declaration was not signed, and the court set aside the proceedings for irregularity. *Holdfast v. Pedigree*, B. R. E. 1 Geo. 2. 1 *Barnard*, 43.]

[In certain cases the court will permit an amendment to be made in a notice at the bottom of the declaration. *Bass v. Roe*, B. R. H. 38 Geo. 3. 7 T. R. 469.]

[Ejectment against several tenants, the name of each was prefixed to the notice served on him; only one rule necessary on motion for judgment against the casual ejector. *Burton v. Roe*, B. R. H. 38 Geo. 3. 7 T. R. 477.]

[There

[There is no distinction between judgment on verdict, or by default.]

[An action for mesne profits is consequential to a recovery in ejectment, and may be brought by lessor of plaintiff in his own name, or that of the nominal lessee.]

[The tenant is concluded by the judgment, and cannot controvert the title; consequently, cannot controvert plaintiff's possession, which is part of his title.]

[This judgment only concludes the parties as to the subject-matter of it; beyond the time laid, it proves nothing at all.]

[As to the length of time the tenant has occupied, or as to the value, the judgment proves nothing; therefore they must be proved, and the occupation must be within the time laid in the demise. *R. by all the Judges unanimously. Aslin v. Parker, M. 32 G. 2. 2 B. M. 665.*]

[If one tenant in common recover against another in ejectment, by default; trespass lies for the mesne profits. *3 Wilf. 118.*]

[If tenant in possession absconds, and plaintiff (the landlord) serves his housekeeper, and fixes another copy of declaration on the premises, on motion and service of the rule in like manner, judgment shall be entred against casual ejector. *Sprightly v. Dunch, H. 1 G. 3. 2 B. M. 1116. Fenn v. Denn, T. 1 G. 3. 2 B. M. 1181.*]

[The court will not arrest judgment of *Hilary, 1 G. 3.* because the declaration alleges defendant entred against the peace of the said king, and lays the demise in the thirty-third year of the said king. *Small v. Cole, P. 1 G. 3. 2 B. M. 1159.*]

[If the declaration is wrong intituled, (as, *17 G.* instead of *16 & 17 G.*) no rule for judgment. *Barnes, 186.*]

[On nonsuit for want of confessing lease, &c. plaintiff must proceed for costs on the common rule; if, instead thereof, he takes *fi. fa.*, it shall be set aside. *Barnes, 182.*]

[On judgment against the casual ejector, mesne profits should be recovered from the delivery of declaration to tenant in possession, or from actual demand; on judgment against tenant in possession, (or landlord,) from *ouster* admitted by common consent-rule. *Barnes, 87.*]

[Actions for mesne profits should not be favoured, as they tend to create double expence, and plaintiff should be ready at trial of ejectment to prove his damages. *Ibid.*]

[In action for mesne profits, if the tenant has been served, but has not entred into the common rule, the title needs not be proved, but possession must be proved in both: if he has entred into common rule, if action is by lessor, his possession must be proved; if by lessee, it need not. *Barnes, 456. 472, 473.*]

[Action for mesne profits may be brought in name of nominal plaintiff, after judgment by default against casual ejector; costs of ejectment inserted in declaration as consequential damages; on trial, it is sufficient to give in evidence, the judgment, writ of possession, and return of execution, defendant's occupation of premises, their value, and costs of ejectment. *Barnes, 472, 473.*]

[If a rule to defend for two-thirds, and judgment for the rest, there should be an indorsement of what part to take possession. *Barnes, 191.*]



[If judge who tried cause reports that general verdict was good for part, bad for part; rule that plaintiff shall take possession of that part only which judge reported good. *Earnes*, 468.]

[If the sheriff, on ejectment for five-eighths of a cottage, give possession of the whole, the tenant shall be restored to his possession of three-eighths. 3 *Wils.* 49.]

[If judgment is regularly obtained against casual ejector, the tenant having neglected to give notice to his landlord, (an infant,) the court will set aside judgment and writ of possession, order tenant to pay costs, and landlord to be made defendant under terms. *Doe v. Roe*, M. 7 G. 3. 4 B. M. 1996.]

[Judgment signed against casual ejector for mistake in body of plea of name of lessor of plaintiff, instead of nominal plaintiff, shall be set aside with costs. *Barnes*, 191.]

[If declaration is delivered without prothonotary's name on it, yet on motion the court will make rule for judgment, unless appearance in the usual time, notice of prothonotary's name being given. *Barnes*, 192, 193.]

[Proceedings shall be staid, if the premises are lands in ancient demesne. *Barnes*, 194.]

### (3 A 1.) Proceeding in a Writ of Entry.

A writ of entry is of divers natures. *Vide Action*, (D 2.)—*Vide dum fuit infra Ætatem* (A).

The process is summons and *grand cape*, and after appearance a *petit cape*.

And therein shall be a view, imparlance, voucher, *aid prier*, and rescuit.

A writ of entry *sur disseisin* lies only against the tenant of the freehold. *Vide Com. Att.* 132. or 157. *edit.* 1695. *West. Symb.* 2 Pt. 76. b.)

And if it is upon a disseisin by the tenant himself to the demandant or his ancestors, it is in the nature of an assise, and is called a writ of entry in the *quibus*. (*Vide F. N. B.* 191. C.)

If upon a disseisin by any, by whom the tenant claims, it shall be a writ of entry in the *per*. (*Vide F. N. B.* 191. D.)

If upon a disseisin by B: to whom A. owes title, by whom the tenant claims, it shall be in the *per & cui*. *Ibid.*

If upon a disseisin beyond these degrees, it shall be a writ of entry in the *post*. (*Vide F. N. B.* 191. D. 192. F.)

A writ of entry *sur disseisin in le post* lies at the common law.

So, upon intrusion; but it did not lie upon alienation in the *post* till the *st.* *Marl.* 52 H. 3. 30.

### (3 A 2.) To have a Common Recovery.

(3 A 2.) *The manner of passing it.*] When it shall bar an intail, *vide Estates*, (B 27, &c.)

Upon a writ of entry *sur disseisin in le post*, the common recovery for assurance of lands is usually suffered.

And for passing such recovery, an attorney of C. B. must make a note of the *præcipe*, by which the curfitor may draw the writ of entry,

entry, and which mentions the demandant, tenant, and the particulars of the land. (*Comp. Att.* 133. or 155. *edit.* 1695.)

This note shall be entred upon the remembrance of the prothonotary, with the *teste* and return of the writ of entry, and the names of the vouchees, and of the sheriff who makes the return. (*Com. Att.* 132. or 155.)

If the tenant and vouchee appear in person at the bar, the recovery may be suffered at the bar before the writ of entry is sealed. (*Vide Com. Att.* 132. or 157.)

If the tenant or vouchee do not appear in person, there must be a warrant for an attorney to appear for them. (*Vide Com. Att.* 133. or 158.)

And the party must appear before him who takes the warrant of attorney, and acknowledge the warrant, upon which the judge or commissioners subscribe their names and the day of the caption. *Ibid.*

Any judge or baron, and any serjeant in his circuit, may take a warrant of attorney without a *dedimus potestatem*. *Ibid.*

If any other takes it, he must have a *dedimus potestatem*. *West. Symb.* 2 Pt. 76. b.

After the warrant of attorney acknowledged, a writ of entry shall be sued. (*Vide Com. Att.* 133. or 138.)

And a fine for alienation shall be paid upon it, as upon a fine. (*Vide West. Symb.* 2 Pt. 76. b.)

Then it shall be sealed, and delivered to the prothonotary, who enters it and endorses the return, and makes a copy of the count, and re-delivers them to the attorney. (*Vide Com. Att.* 123, 124. or 158, 159.)

If the recovery is with single voucher, or with double, and the vouchee appears in person, when the tenant has made his warrant of attorney, and the writ of entry is sealed, entred, and returned, the recovery may pass at the bar the same term. (*Vide Com. Att.* 124. or 159.)

But, if the vouchee does not appear in person but by attorney, there must be a summons *ad warrantizandum* for him, as well as a warrant of attorney. (*Vide Com. Att.* 123, 124. or 158, 159.) [*Vide post.* (3 A 6.)]

By the *st.* 16 Car. 2. the return of the summons shall be at the fifth return after the *teste* inclusive.

[But by 24 G. 2. c. 48. s. 8. the writ of summons shall be made returnable the fourth return inclusive.]

[And the usual course is to *teste* it the fourth day inclusive from the return of the writ of entry. 2 Bl. 1201.]

[And the vouchee cannot appear before the return of the writ. 1 Wilf. 35. *Vide post.* (3 A 6.)]

And at the return of the summons the recovery may pass.

So, a common recovery may be suffered upon a writ of right upon a *præcipe in capite*. (*Vide West. Symb.* 2 Pt. 79.)

But the demandant need not appear in person, or by attorney. (*Vide Com. Att.* 123. or 158.)

After the recovery is passed, the writ of entry shall be filed with the *custos brevium*. (*Vide Com. Att.* 157. *West. Symb.* 2 Pt. 77. b.)

And by the *st.* 23 El. 3. it may be inrolled in the office of inrolments;



ments; and if it is afterwards lost, the inrolment shall be of the same effect as if the writ was extant. *Lit.* 299.

So, if a writ of entry is lost out of the office, when it appears to be once filed, upon a petition to the *chancellor* it may be supplied by a new writ *nunc pro tunc*. *Ibid.*

But, if it does not appear that it was ever filed, it shall not be supplied. *Ibid.*

(3 A 3.) *Against whom a writ of entry lies.*] A writ of entry for a common recovery ought to be against him who has the freehold of the estate: (By *st.* 14 G. 2. 20. the recovery shall be good, without the surrender of freehold leases at reserved rents); and therefore, if it is against him in remainder after an estate for life, it is error. R. 2 *Leo.* 57.

And by the *same statute*, it is sufficient if the deed or fine to make a tenant to the *præcipe* be levied or executed before the end of the term, great sessions, session or assizes in which the recovery is suffered.

How a good tenant to the *præcipe* shall be made, *vide Recovery*, (B 3.)

But it is sufficient that the tenant has the freehold before the return of the writ of entry, tho' he had not at the *teste*. (*Vide Com. Att.* 157.)

Or, at any time before judgment, tho' it is after the return of the writ and voucher. *Sho.* 347.

So, a common recovery by a tenant in fee is a bar to him and his heirs, tho' it is not against the tenant of the freehold. *D. Ray.* 323.

So, a recovery by husband and wife of the wife's land bars them and their heirs. *Pr. Reg.* 490. *Cro. Car.* 389.

So, a recovery by *cestuy que trust* in tail bars the estate-tail in equity, tho' there be not a legal tenant of the freehold. *Vide Chancery*, (4 S 4)

(3 A 4.) *Of what things.*] A writ of entry lies of all things demandable in a *præcipe*. *Vide West. Symb.* 2 Pt. 77. a.

[Of an advowson in gross, and one acre of land, *sur disseisin in l. post.* *Bayley v. Oxford*, P. 33 G. 2. 2 *Wilf.* 116.]

But it does not lie of a garden, croft, or cottage. 1 *Rel.* 2.

Nor, *de superiori camera*. (*Vide West. Symb.* 2 Pt. 77. b.)

Nor, *de stagno, fossato, piscaria*. (*Ibid.*)

Nor, *de communia pastur*. (*Ibid.*)

Nor, of services; as, homage, fealty, &c. (*Ibid.*)

Nor, of estovers, *minera, fodina, mercatu*. (*Ibid.*)

Nec, *de selione, bovata, or virgata terra*, for they are uncertain. (*Ibid.*)

Nor, ought to name the same thing twice; for it will be *bis petit*. (*Ibid.*)

Nor, *de tenementis*. *Semb. Mo.* 691.

The writ must describe the lands demanded in a *vill*, parish, or hamlet. *Hut.* 105.

Or, in a place known out of the *vill*, parish, or hamlet. *Ibid.*

As, within the liberty of S., for this is in the nature of a place known, and it will be good for lands in a *vill* within the same liberty. *But* *Mod.* 48.

But if it mentions a *vill*, and a hamlet within the same *vill*, it is bad. (*Vide West. Symb. 2 Pr. 77. b.*)

Or, a place known within a *vill* or hamlet. *Hut. 105.*

So, if it is agreed to have a recovery of *Southwick* marsh in *Cambey* island in the parish of *N.*, and the recovery is of lands in *A. B.* and *Cambey*, omitting *N.*, the land in *N.* does not pass; for *Cambey*, tho' it is a place known, is within several parishes. *Ibid.*

Yet, if a recovery be of a manor, this extends to a manor in reputation. *Cont. Noy, 7.*

And to land reputed of the manor; if, by the indenture to lead the uses, it was intended to be conveyed. *R. 1 Vent. 51, 52. 1 Sid. 190.*

So, if the recovery is of land in *A.*, and there is a parish and a *vill* in it called *A.*, and by the indenture it appears that the recovery was intended of the land in the parish of *A.*, it shall be good for lands in the parish. *R. Mod. 250. 2 Mod. 233. 2 Vent. 31.*

[There is not so much certainty of description required in a recovery as in an adverse action. *Cowp. 349.*]

(3 A 5.) *Count.*] When a common recovery is suffered, the demandant counts, and the defendant makes defence as in an adverse action.

(3 A 6.) *Voucher.*] If the recovery is upon double voucher, the tenant vouches the tenant in tail, or him who is intended to be barred by the recovery, and prays that he may be summoned.

When the vouchee appears, the demandant shall count against him, and he vouches the common vouchee.

And in a writ of entry *sur disseisin in le post*, any one may be vouch- ed, and he need not be within the degrees.

The vouchee must appear either by attorney, or in person. *1 Leo. 86.*

And regularly, when he appears by attorney, he must acknowledge his warrant, and the day of the caption shall be returned. *Vide ante,*

(3 A 2.)

And the warrant of attorney and *dedimus potestatem* (if it is acknowledged upon a *dedimus potestatem*) ought regularly to be dated after the summons *ad warrantizand.*

Yet, if they are tested before the summons, it will be good. *R. 1 Lev. 130. 1 Sid. 213. Ray. 70.*

Or, the warrant of attorney is tested after appearance; for it shall be intended that he appeared without process, as he may. *R. 1 Sid. 213. Ray. 70. 96.*

[It is no objection to passing a common recovery, that the order of the names of the vouchees in the *præcipe* at bar, and the *dedimus*, varies. *Lang v. Woodhouse, C. P. E. 37 Geo. 3. 1 Bos. & Pull. Rep. 31.*]

[Nor, that the warrants of attorney of the several vouchees are on separate pieces of parchment. *Ibid.*]

[The common vouchee cannot appear by attorney before the day of the return of the writ of summons. *Wynne v. Thomas, C. P. E. 18 Geo. 2. Willes, 563. Barnes, 17. S. C.*]



[If the vouchee die before the return of the writ of summons, the recovery is erroneous. *Barnes*, 17. S. C.]

[But now the *teste* of the writ of summons *must* precede the actual acknowledgment of the warrant of attorney by the vouchee. 2 *Bl.* 1201.]

[And by rule of *C. B. Hil.* 14 *G.* 3. an affidavit must be made of the true time of the caption of the warrant. *Ibid.* 1202.]

[If the vouchee reside in a foreign country at such a distance that the warrant of attorney cannot be returned before the return of the writ of summons, the tenant's appearance may be entred in the term in which the writ of summons is returnable, and then they may imparl from term to term, till the warrant of attorney arrive, when the recovery may be arraigned; and then if the vouchee was alive at the time of the arraignment, the recovery will be valid, otherwise not. 2 *Bl.* 1224.]

And, if there be a writ of summons, he may afterwards appear by attorney, or in person. *R.* 1 *Leo.* 86.

But if there is not a writ of summons, he cannot appear by attorney. *Ibid.*

Yet, if the appearance by attorney is entred by the court without summons, it is well. *R.* 1 *Leo.* 291.

So, if the vouchee makes a warrant of attorney, and dies in the morning of the first day of the term, and the recovery passes the same day, it will be good. *R.* 1 *Co.* 93. 106. *b.* *Mo.* 136.

But if the vouchee, after the warrant of attorney made, dies before the term, it will be error. *D.* 2 *Vent.* 90.

And in such case the court will stay the passing of the recovery. *R.* *Ibid.*

[If the writ of summons is returnable at a return within the term, the effoin-day of which is a *Sunday*, and on that *Sunday* the vouchee dies, the recovery is bad; for the judgment cannot relate to any day prior to the return, and judgment cannot be given on a *Sunday*. *Swann v. Broome*, *M.* 5 *G.* 3. 3 *B. M.* 1595. Affirmed (on the opinion of *all* the judges) in the house of lords 2d *May* 1766.]

[If the vouchee dies six days before the return of the writ of summons, it is error, and the judgment cannot be made good by relation to the first day of term; and tho' it appears on the face of the record that the vouchee appeared by attorney at the return of the writ of summons, yet plaintiff is not estopped to assign it for error, for it is collateral matter, and not contrary to the record. *Wynne v. Wynne*, *M. & H.* 17 *G.* 2. *Wils.* 35. 42.]

[The death of the vouchee before judgment is error, and may be assigned as such. *Sheepshanks v. Lucas*, *M.* 31 *G.* 2. 1 *B. M.* 410.]

(3 A 7.) *Judgment and execution.*] After an imparlance allowed and default of the common vouchee, there shall be judgment against the tenant, and that he recover in value against the vouchee, and he against the common vouchee. (*Vide West Symb.* 2 *Pt.* tit. *Recoveries.*)

After judgment an *habere facias seisinam* shall be awarded.

[And a recovery found by special verdict, without any writ of seisin awarded, is bad, and is no bar. 1 *Wils.* 55.]

Which shall be tested upon the day of the return of the writ of summons,

summons, or (if there was no summons) of the writ of entry. (*West. Symb. 2 Pt. 77. b.*)

And it shall be returnable *indilate*, or at a day certain. (*Com. Att. 157.*)

Upon which the sheriff returns, that he delivered seisin. (*West. Symb. 2 Pt. 77. b.*)

The writs of summons and of seisin, as well as the writ of entry, shall be filed with the *custos brevium*. (*West. Symb. 2 Pt. 77. b.*)

If tenant in tail suffers a recovery, the recoverors are not in possession till execution sued by a writ of seisin.

Tho' he had made a lease for years, and the recovery was of the reversion. *R. 1 Co. 94. a. 106. a.*

But execution may be sued out, tho' the tenant in tail dies before the recovery executed. *Co. Lit. 361. b. R. 1 Co. 94. a. 106. a. Mo. 137.*

And if execution is sued and returned upon record, it is well, tho' seisin was not actually given, nor the recoveror entred. *Dub. 2 Leo. 48.*

By the *st. 23 El. 3.* the writs of entry and summons, and warrants of attorney, may be enrolled, &c.

And no recovery shall be reverfable for false *Latin*, rasure, interlining, misentring the warrant of attorney, misreturning or not returning of the sheriff, or other want of form.

How error shall be sued to reverse a common recovery, *vide Tk. Br. 99, 100, &c.*

[3 A 8.] *How a recovery shall be pleaded.*] A common recovery is a record, and must be pleaded entire. *Hob. 24.*

So, if a common recovery is pleaded, it must be shewn to be a good recovery. *Vide how pleaded, Lut. 833. 1550. 963.*

He must plead that the recovery was executed, for till execution he was seised in tail as before. *R. Jon. 10. Lut. 1550. R. cont. but Lev. makes a quare, 2 Lev. 31.*

And therefore, if he says that a recovery was had *de tenementis prædict.*, it is bad; for he ought to shew that it was by such names, of which a *præcipe* lies. *R. Mo. 691.*

So, if he pleads that *A.* being seised in tail, a *præcipe* was brought against *B.*, *ad tunc tenen. liberi tenementi*, without shewing how he had the freehold, it is bad. *R. 1 Mod. 218. 2 Mod. 70. Semb. cont. Lut. 1549.*

Or, that *A.* being seised for life, remainder to *B.* in tail, a recovery was had against *B.* *tunc tenen. liberi tenementi*, &c. *3 Co. 59. a.*

So, if he says that *cestuy que use* entred *super recuperationem prædictam*, and was seised in fee, it is bad; for he ought to shew entry or execution by force of the recovery, and seisin by force of the *st. 27 H. 8. 10. R. Jon. 10.*

[If a special verdict finds a common recovery, but does not find writ of seisin or execution, no advantage can be taken of the recovery; nor shall a *venire facias de novo* go, tho' there was in fact a writ of seisin and a return, as appears by a verdict in another cause. *Lewis v. Witham, P. 16 G. 2. Str. 185.* affirmed on error in parliament by the unanimous opinion of *Hardwicke C.* and all the judges. *P. 17 G. 2. Wils. 48.*]



## (3 B) Proceeding in Error.

(3 B 1.) In what Court it shall be brought.

(3 B 1.) *When in* Error shall be brought in the same court where the judgment was, or in another court.Error may be in the same court where the judgment was given, when the error is not assigned for any fault in the court, but for some defect in the execution of process. 1 *Rol.* 746. l. 6. *Yel.* 157. *F. N. B.* 21. l.So, for default of the sheriff or other officer upon an irregular process: as, if the defendant is outlawed upon an *exigent* awarded before a *pluries capias*, or upon a *capias ad satisfaciendum* where no *capias* lies in process. 7 *H.* 6. 28. b. *R. Dy.* 196. a. 1 *Rol.* 746. l. 15, &c.So, for misprision of the clerk: as, for false *Latin*, &c. 1 *Rol.* 746. l. 9. *F. N. B.* 21. l.So, for default in execution. *R.* 1 *Rol.* 746. l. 11.So, for error in fact: as, that the defendant appeared by attorney, being an infant; that the plaintiff was a *feme-covert*, or died before issue, &c. *R.* 1 *Rol.* 747. l. 5. 20.And for error in fact, it must be in the same court. 1 *Sid.* 208. except where it was in the *Exchequer*. *R.* 3 *Lev.* 38. *Vide post.*

(3 B 4.)

[Error *coram vobis* lies not on a judgment after affirmance in *Exchequer-chamber*. *Lambell v. Pretty John*, *H.* 12 *G. Str.* 690.]So, in criminal cases upon indictment, error may be in *B. R.* upon a judgment in the same court, as well for error in law as for error in fact. *R.* 1 *Lev.* 149. [3 *Salk.* 147.]But *semb.* that it was only for error in fact. 1 *Sid.* 208.But error in the same court, which *coram vobis residet*, does not lie for default of the court itself: as, if error be assigned for matter in law. 1 *Rol.* 746. l. 4. *R. Mo.* 186.Or, for default in *adjudicatione executionis*. *R.* 1 *Rol.* 746. l. 55.Or, for default of a continuance. *R. Dy.* 196. a.[If writ of error be quashed for any fault but variance, error *coram vobis* lies. *Cooper v. Ginger*, *M.* 11 *G. Str.* 606. *Ld. Raym.* 1403.](3 B 2.) *When in C. B.* Error lies in *C. B.* of a judgment before justices of assize. 1 *Rol.* 745. l. 39. But it was *R. cont. Dy.* 250. 1 *Leo.* 55. 3 *Leo.* 159.So, of a judgment in *London*, or other inferior court. *F. N. B.* 20. *D.*So, a writ of false judgment lies in *C. B.* as well as in *B. R.* 2 *Inst.* 138.(3 B 3.) *In B. R.* Error lies in *B. R.* of a judgment in *C. B.* 1 *Rol.* 744. l. 46. 4 *Inst.* 22.Or, of a judgment upon the plea-roll in *Chancery*. *Dy.* 315. 1 *Rol.* 744. l. 55. 4 *Inst.* 80. *Pl. Com.* 393. a.Or, in a county palatine. *Dy.* 321. *Dav.* 62. 1 *Rol.* 745. l. 10. 21 *H.* 7. 33. b.Or, in the *Cinque Ports*. *Dub.* 1 *Sid.* 166. *Vide cont. infra.*

So, of a judgment in *Ireland*. 1 *Rol.* 745. l. 22. *Dav.* 62. 7 *Co.* 18. a. *Vau.* 290. 298. *F. N. B.* 24. C. 3 *Mod.* 170.

[But since the *st.* 22 *G.* 3. c. 53. a writ of error lies from the *B. R.* in *Ireland* to the house of lords there, and not to *B. R.* here.]

Or, in any of the king's dominions: as, *Calais*, &c. *Vau.* 290. 402. *Cont. Kel.* 202. b. *Acc.* 4 *Inst.* 282. *Cont.* 21 *H.* 7. 33. b.

So, in *Wales*. *Cont.* 1 *Rol.* 745. l. 27. 30. 21 *H.* 7. 33. b. By the *st.* 28 *H.* 8. 3.—(This statute is mentioned in *Cay* as expired, and *qu.* if it should not be 27 *H.* 8. 26.)

[In a real action, tho' error in a personal action is before the president and council of the *marshes*. *Mo.* 248.

So, in an ejectment in *Wales*; tho' it is a mixt action. *R. Mo.* 248.

So, error lies in *B. R.* upon a judgment against a peer attainted before the lord high steward. *Per Twissd.* 1 *Sid.* 208. 1 *Lev.* 149.

And upon a judgment at the sessions of *Old Bailey* by commission. 2 *Leo.* 107.

So, upon a judgment in *London* before the mayor, upon an information. 2 *Cro.* 538. *Vide infra.*

But error does not lie in *B. R.* of a judgment in the *Exchequer*. 4 *Inst.* 71. 106.

Or, of a judgment before justices in *Eyre*. 1 *Rol.* 745. l. 35.

Or, of a judgment in *London*. 2 *Leo.* 107. *Vide supra.*

Or, a judgment in the *Cinque Ports*. 1 *Rol.* 745. l. 5. *R. Dy.* 376. *Dub.* 1 *Sid.* 166. *Vide supra.*

Or, a judgment in the *stannaries*. 1 *Rol.* 745. l. 20.

Nor, upon a judgment in a summary way before the censors of the college of physicians. *R.* 1 *Sal.* 144.

Nor, upon a judgment in *B. R.* upon a case stated sent to them by *Chancery*. *Mod. Ca. in Eq.* 5.

(3 B 4.) *In the Exchequer.*] By the *st.* 27 *El.* 8. on judgment in *B. R.* in debt, detinue, covenant, account, action upon the case, trespass, or ejectment, the party grieved may remove the record into the *Exchequer*, before the justices of *C. B.* and barons of the *Exchequer*, who, or six of them at least, may affirm or reverse the judgment, but not for want of jurisdiction in *B. R.*, or want of form, &c. *Lev. Ent.* 82. *Vide Courts*, (D 6.)

And this extends to debt upon the *st.* 2 *Ed.* 6. 13. for not setting out his tithes. *Cro. Car.* 142. 1 *Sid.* 240.

And debt upon the *st.* of usury. *Dub.* 1 *Sid.* 240. *D. cont.* 5 *Mod.* 230.

Tho' the action be by the king and party. *D. Cro. Car.* 142. *R. Ray.* 275. *Cont.* 1 *Vent.* 49. *Acc. Doug.* 353. n.

And error lies in the *Exchequer* for error in fact, as well as for error in law. *R. Cro. El.* 731. *R. 2 Cro.* 5. *R. Hob.* 5. *Per three J. Berkley cont. Cro. Car.* 514. *Vide infra.*

And it shall be tried by *nisi prius* out of the *Exchequer*. *Cro. Car.* 514.

So, for error in proceedings in *B. R.* 5 *Co.* 28. a.

But error does not lie by this statute in the *Exchequer*, when the suit is commenced in *B. R.* by original. *D.* 1 *Sand.* 346. 1 *Sid.* 424.

Nor, upon a judgment in *B. R.* in a writ of error. 2 *Bul.* 162.

Nor,



Nor, where the king is a party: as, in an action by *qui tam*, &c. *Ley*, 82. [*Cont. Doug.* 353. n. (*Vide supra.*)]

Nor, in an action not mentioned in the statute, for it shall not be extended by equity; as, in *rescous*, tho' it is of the nature of trespass. *R.* 2 *Cro.* 171.

Nor, in *replevin*. *Cro. Car.* 142. 2 *Rel.* 140.

*In scandalum magnatum*; for it is not a mere action upon the case, but founded upon the *st.* 2 *R.* 2. *R. Cro. Car.* 142. *R.* 1 *Sid.* 143. *Jon.* 194, 195. 1 *Vent.* 49. *R. Ley*, 82. *Jon.* 423. [*Doug.* 351.]

[Error does not lie in the *Exchequer* upon an award of execution in a *scire facias* only, but the writ must also include the judgment in the former action; for a judgment not founded on the merits of the cause is not within *stat.* 27 *Eliz.* c. 8. *Crow v. Maddock*, *M.* 12 *G.* 2. *And.* 287.]

Nor, in a *scire facias* against bail. *R. cont. Cro. El.* 730. *R. acc.* 2 *Cro.* 171. *Yel.* 157. *Hob.* 72. 2 *Cro.* 384. *R. acc. Cro. Car.* 300.

Or, a *scire facias* against an executor or administrator upon a judgment in debt. *Adm. cont.* 2 *Cro.* 186. *Dub. Cro. Car.* 286. *Semb. acc. per three J.* *Cro. cont. Cro. Car.* 464. *Cont. per Hale*, *Mod.* 79. and *per Holt*, 1 *Sal.* 263.

Nor, in a *scire facias* upon a judgment in debt or other action named in the *st.* 27 *El.* after an affirmation of the first judgment in the *Exchequer*. *R.* 5 *Mod.* 230. 1 *Sal.* 263.

So, error does not lie in the *Exchequer* for error in fact, except such by which the writ abates. *R. Hob.* 5. *R.* 2 *Lev.* 38. *Vide supra.*

So, if a writ of error in the *Exchequer* is discontinued, after the record removed, error does not lie, which *coram vobis*, &c. but there must be a new writ of error. *R. Jon.* 14. *Semb. cont.* 2 *Cro.* 135. *R. acc.* 2 *Cro.* 384. 620.

[A writ of error from *B. R.* into the *Exchequer-chamber* cannot be quashed in *B. R.* *Doug.* 350.]

[Nor, in the *Chancery*. *Ibid.* n.]

(3 B 5.) *In the Exchequer-chamber.*] By the *st.* 31 *Ed.* 3. 12. on complaint of error in the *Exchequer* the lord chancellor and lord treasurer shall cause the record to come before them, and taking the justices and other sages as to them seemeth, and calling the barons to hear their informations, and the causes of their judgments, shall examine the business, and if they find any error, amend the rolls, and send them to the *Exchequer*, &c. for execution.

Before error in the *Exchequer* was examined in parliament, or before special commissioners. 4 *Inst.* 105. *Vide Parliament*, (L 6.)

The chancellor and treasurer are the judges here, and judgment shall be entred pursuant to their sentence, tho' the other justices differ in opinion. 4 *Inst.* 105. *R.* 7 *W.* 3. *inter Att. Gen. and Hornby.* 5 *Mod.* 42. *R.* 8 *H.* 7. 13. a.

And therefore, if there is no chancellor or treasurer, error cannot be brought. *Dub. Hard.* 147.

But, by the *st.* 16 *Car.* 2. 2. if the chancellor or treasurer, or either of the chief justices, be present, error shall not abate or be discontinued; but no judgment shall be given unless both lord chancellor and treasurer be present; or by the *st.* 20 *Car.* 2. 4, if lord keeper be present in the vacancy of lord treasurer,

*For a more full account of the statutes relating to this court of error, vide Courts, (D 6.)*

The writ of error shall be directed to the treasurer and barons; for the record is in their custody. 4 *Inst.* 105. *Sav.* 36. 1 *Co.* 11.

And it lies upon a judgment, where the trial is by records, as well as upon a judgment by confession, upon a verdict or a demurrer. *R.* 4 *Lea.* 101, 105.

So, it will be error, if the chancellor and treasurer do not call in the other justices. *Semb.* 8 *H.* 7. 13.

Error does not lie in the *Exchequer-chamber*, on an award of execution only. *Bertie v. Clutterbuck, M.* 12 *G.* 2. *Str.* 1102.

(3 B 6.) *In parliament, &c.*] Error of a judgment in *B. R.* lies in parliament. 4 *Inst.* 21. *Vide Parliament, (C 1, &c.)*

As well for error in a judgment there given upon a writ of error, as in an original cause. 1 *Rol.* 745. l. 25. 2 *Sand.* 214. *Ha. J. P.* 21. *Godb.* 247.

So, tho' error may be in the *Exchequer*, by the *st.* 27 *El.* 8. in several cases; yet it may be in parliament immediately. *R. Ca. in Parl.* 56.

Or, after judgment in the *Exchequer.* *Ca. Parl.* 110. and this by the *st.* 27 *El.* 8.

So, error lies in parliament upon a judgment in the *Exchequer-chamber.* *Ca. Parl.* 12. 58.

But upon an original judgment in the *Exchequer*, error does not lie in parliament before it is affirmed in the *Exchequer-chamber.* *Ca. Parl.* 56. *Sal.* 511.

So, upon a judgment in *Chancery*, it lies in parliament as well as in *B. R.* *D.* 37 *H.* 6. 14. b. 1 *Rol.* 745. l. 4.

So, upon a judgment before justices in *eyre.* 1 *Rol.* 745. l. 35.

Or, a judgment before commissioners at *St. Martin's.* 2 *Sand.* 228.

So, error lies in parliament upon an attainder for treason; for tho' the *st.* 33 *H.* 8. 20. says that judgment of attainder by common law shall be of as good force as-if done by authority of parliament, this shall be intended of a lawful attainder. *Ha. J. P.* 19.

So, upon a judgment for the king as well as for a common person. *Ha. J. P.* 22.

So, upon a judgment in appeal, by which the defendant was acquitted. *H. Parl.* 20.

But it does not lie in parliament upon a judgment in *C. B.* before it is affirmed in *B. R.* *H. Parl.* 20, 21.

*In other courts.*] Error of a judgment in the *hustings* of London lies before commissioners at *St. Martin's.* *F. N. B.* 23. *E.* 1 *Rol.* 745. l. 50. 4 *Inst.* 247. 1 *Lev.* 309. 2 *Sand.* 228.

Of a judgment before the sheriffs of London, lies in the *hustings* there. *F. N. B.* 22. *H.* 4 *Inst.* 247, 8.

Of a judgment in the *Cinque Ports*, lies before the warden of the *Cinque Ports* at *Shepway.* 1 *Rol.* 745. l. 7. *Vide Franchises, (E 2.)*

Of a judgment in the *stannaries* an appeal lies to the warden of the *stannaries*, and from him to the prince; or, if no prince, to the king's council. 1 *Rol.* 745. l. 20.

(3 B 7.)



## (3 B 7.) Upon what Judgment.

Error lies of any judgment in a court of record.

Tho' it be void, as being out of the jurisdiction in an inferior court.

1 *Rol.* 744. l. 30.

Tho' it be upon a writ of false judgment; for the last judgment is of record. 1 *Rol.* 744. l. 27.

It lies upon a judgment for costs upon a nonsuit. 1 *Rol.* 744. l. 23.

[*Newell v. Pidgeon*, M. 6 G. Str. 235.]

Upon a judgment in *scire facias* upon a statute or recognizance. Dy. 315. 1 *Rol.* 744. l. 40. 751. l. 45.

Upon a judgment by any judge or court of record, which acts according to the course of the common law, tho' newly erected by act of parliament. R. 1 Sal. 263.

Upon a judgment on an indictment. Adm. 1 Sal. 266.

[If defendant is found not guilty as to part, there must be a judgment for him as to that part, or error lies. *Smith v. Tuller*, M. 1 G. 2. Str. 786.]

But error does not lie upon a decree in *Chancery*. 37 H. 6. 14. b. 1 *Rol.* 744. l. 44. •

So, it does not lie upon a peremptory *mandamus*. R. in B. R. and *aff. in parliament*, 2 Mod. Ca. 27. [*Rex v. Dean and Chapter of Dublin*, M. 9 G. Str. 536.]

[Nor, on a *mandamus*, when the return is allowed. *Rex v. Hearle*, P. 11 G. Str. 625.]

Nor, upon an order by justices of the peace, tho' they are justices of record. 1 *Rol.* 744. l. 48. Dub. 2 Jon. 167.

Nor, upon refusal of a prohibition in B. R. Semb. 1 Sal. 136.

Nor, upon an order, &c. of a jurisdiction newly erected, which does not proceed according to the common law. 1 Sal. 263.

Nor, upon a *habeas corpus* denied. Dub. Sal. 504. D. 2 Mod. Ca. 29.

Nor, for a matter of fact, which does not appear upon the record; as, if a statute *statute* is not sealed. R. Cro. El. 233.

Nor, does it lie upon an interlocutory judgment before the final judgment: as, upon a judgment in partition, *quod partitio fiat*. Co. Lit. 168. a. 11 Co. 40. b. R. 2 *Rol.* 126.

Upon a judgment *quod computet* in account. R. 11 Co. 38. b. 2 Cro. 356. R. 2 Cro. 324. 1 *Rol.* 750. l. 5. 2 Bul. 104.

Upon a judgment in trespass, &c. by default, before a writ of inquiry returned and final judgment thereon. R. 1 Leo. 193.

Nor, does it lie upon a judgment for part, till the whole plea is determined: as, in a suit against several if there is judgment against one, error does not lie till judgment against all the defendants. 11 Co. 39.

Nor, if the judgment is for part of the demand, till judgment for the whole. 11 Co. 39. b. R. Dy. 291. b.

Yet, if the party dies, so that nothing more is done, error lies for the party grieved by the award or interlocutory judgment. 11 Co. 41. a.

So, in ejectment, error lies upon the judgment for the term, before a writ of inquiry. R. Latch, 212.

Or,

Or, if there is a suit against several upon several originals, error lies upon a judgment against one. 11 Co. 41. a. 2 Rol. 126.

So, it lies after final judgment, before execution or writ of inquiry. 1 Rol. 751. l. 13. 20. 750. l. 35. 40. 50. 749. l. 45. 52.

(3 B 8.) At what Time it shall be sued.

And therefore, if a writ of error is sued out before final judgment, tho' a *mittit*. is entred upon the roll, and the record certified; yet it is not thereby removed. R. 11 Co. 41. b.

[If the writ of error is returnable before judgment, it shall be quashed. *Vice v. Burton*, H. 4 G. 2. Str. 891.]

Yet, after judgment signed, error may be sued before entry upon the roll; for it is not entred till the vacation. R. 1 Rol. 750. l. 25.

So, it may be sued, returnable in B. R. of the same term, in which judgment was given in C. B. R. 1 Sid. 104.

Tho' it is tested before judgment given. 1 R. 3, 4.

And, for error in process, which *coram vobis*, &c. it must be sued the same term in which judgment was given. *Per Williams*, Tel. 157.

[Although error should be sued within 20 years after the judgment, yet the court will not quash it, if brought 29 years after, because it would deprive him of replying the exceptions in the statute. *Higgs v. Evans*, T. 3 G. 2. Str. 837.]

(3 B 9.) By whom it shall be sued.

*By or against whom execution shall be.*] All parties against whom judgment is given ought regularly to join in error. R. 3 Mod. 134. Carth. 7. 2 Mod. Ca. 305. *Vide Execution (E—F)*.

Tho' some get nothing by the reversal, they must join for conformity. 1 Rol. 747. l. 35.

As a bishop, in *quare impedit*, who claims nothing but as ordinary. R. 3 Leo. 176. Cro. El. 65.

[If judgment is against two, and one only brings error, it is bad, even tho' the other is dead, if it does not appear; but if it appears any where that the other defendant is dead, the survivor may bring error without being executor of the deceased. *Brewer v. Turner*, M. 6 G. Str. 233.]

[If judgment is against two, writ of error *ad grave damnum* of one only will not lie. *Cooper v. Ginger*, M. 11 G. Str. 606. 2 Ld. Raym. 1403. *Radcliffe v. Burton*, T. 8 G. 2. B. R. H. 135.]

[The writ of error must describe the suit by the names of all the parties, tho' *ad grave damnum* of those only who bring error. *Lady Case v. Title*, H. 12 G. Str. 682.]

[If indictment sets forth that the *inhabitants of such part* of three parishes as the way lies through are bound to repair, and writ of error is of a judgment against the *inhabitants in general*, *ad grave damnum* of them, it shall be quashed. *Rex v. All Saints, Derby*, P. 12 G. 2. Str. 1110.]

So, all executors against whom the judgment was, tho' one only appeared. R. 1 Sal. 312.

[If



[If in action against three executors one pleads *plene administravit*, generally, and there is judgment against him *de assets in futuro*; and the other two plead judgments and *plene administravit ultra*, and a verdict against them; they must all three join in error. *Vavafor v. Faux*, P. 18 G. 2. *Wils.* 88.]

But if one makes default, he may be severed. *Mod. Ca.* 40.

[If two executors join in a writ of error, and one of them will not assign errors, the court will give the other time to summon and sever. *Frescobaldi v. Kinafton*, M. 1 G. 2. *Str.* 783.]

And a party may have error, tho' he was not an original party: as, tenant by *voucher* or *resceipt*. 1 *Rol.* 747. l. 38.

So, error may be by him who is privy: as, by the heir. *F. N. B.* 21. N.

And he need not say, how heir. *R. 2 Cro.* 160.

By an executor, or administrator. *F. N. B.* 21. N.

So, error upon an attainder for treason or felony may be brought by an executor, as well as by an heir. *R. Sho.* 13. 1 *Sal.* 295. *R. 1 Leo.* 325.

So, by a privy in estate: as, by him in reversion or remainder after a term for life or years, when the term is determined. 1 *Rol.* 748. l. 7. *Dy.* 16.

And by the *ss.* 9 *R. 2.* 3. while the estate for life or years continues. 3 *Co.* 4. a.

So, by him in reversion after an estate tail, after the entail is determined. *R. 3 Co.* 4. a. 1 *Rol.* 747. l. 8.

Tho' it be upon a fine by tenant in tail; for thereby the remainder was discontinued. *R. 2 Jon.* 182. *Ray.* 461. *Vide Fine*, (H 4.)

[Tenant in remainder may bring error against a common recovery where the tenant in tail, *vouchee*, died before the judgment; and he need not set out a complete title, but only shew the connexion and privity between him and the person against whom the recovery was had. *Sheepshanks v. Lucas*, M. 31 G. 2. 1 *B. M.* 410.]

But it must be by such privy as has benefit by the reversal; as, error upon a judgment against a tenant to him and his heirs females shall be by the daughter, who is heir to the special tail. 1 *Rol.* 747. l. 30. *Dy.* 90. a. *F. N. B.* 21. M.

Upon a judgment for land of the nature of *Borough English*, it shall be by the youngest son. *F. N. B.* 21. L.

It must be by him in the immediate remainder. *R. 5 Mod.* 396.

And if the remainder was not executed, the plaintiff in error ought to make himself heir to him who had in him the estate executed. *Dy.* 90. a.

If an annuity in fee be recovered against the heir upon the grant of his ancestor, the administrator of the heir shall not have error. 1 *Rol.* 749. l. 35.

And a man, who is neither party nor privy, shall not have error. 1 *Rol.* 747. l. 33.

As, if money is taken in the hands of B. by foreign attachment, B. shall not have error to reverse the judgment. 1 *Rol.* 747. l. 50.

If the tenant alien *pendente lite*, the alienee shall not have error. 1 *Rol.* 748. l. 41.

Nor,

Nor, an alienee of lands after a statute or recognizance acknowledged. *Semb. 1 Rol. 748. 1. 15. Cont. F. N. B. 22. B.*

Nor, bail of a judgment against the principal. *R. 1 Rol. 749. 1. 5. 20. Cro. Car. 300. Per two J. Cro. Car. 481. R. Hob. 72. Cro. 384. R. Cro. Car. 561. R. 1 Lev. 137.*

Tho' joined with the principal. *R. Cro. Car. 408. 575. 1 Lev. 137. R. Godb. 440.*

So, a stranger cannot assign error in arrest of judgment upon an indictment. *1 Sal. 60.*

So, if there are five defendants and three are acquitted, error must be by the other two only. *R. 2 Cro. 138.*

So, a reversal by him who ought not to have error, may be reversed. *R. 5 Mod. 396. R. 2 Cro. 138.*

[It cannot be taken out in the name of the casual ejector. *George v. Wisdom, H. 32 G. 2. 2 B. M. 756. Barnes, 179.*]

[Executors against whom a *scire facias* is sued out to recover damages, assigned on an interlocutory judgment against their testator before his death, cannot bring error, if the testator's attorney agreed for him that no writ of error should be brought in *that action*; and the court will on motion order the attorney to *non-prof.* the writ. *Wright v. Nutt, B. R. M. 27 Geo. 3. 1 T. R. 388.*]

### (3 B 10.) Against whom it shall be sued.

Error ought to be sued against all the parties to the recovery.

So, against any who was party or privy to the judgment.

And if any who was party has now nothing, yet he shall be named a defendant in error. *F. N. B. 18. I.*

So, in error of a judgment, which concerns land, there shall be a *scire facias* to the tertenant before he can be ousted. *Dy. 321. Ray. 17.*

And this usually issues before the *scire facias ad audiend. error.* *Dy. 321.*

And it is now the course of the court to have a *scire facias* against the heir and tertenants. *R. 3 Mod. 274.*

Tho' the heir is within age. *Ibid.*

So, in error upon a fine and common recovery. *R. Carth. 112. Skin. 273.*

So, in error upon a judgment for the king in an action by *qui tam*, &c. there shall be a *scire facias* against the informer. *Sav. 10.*

[In error to reverse a common recovery, (for the death of the vouchee before judgment,) *scire facias*, or any warning to the heir, is not necessary. *Sheepshanks v. Lucas, M. 31 G. 2. 1 B. M. 410.*]

### (3 B 11.) The Manner of suing Error.

To obtain a writ of error, the attorney from the dogget of the prothonotary finds the number of the roll, and thereby finds the roll in the treasury, of which he takes a copy, and thereupon the cursitor makes out a writ of error. *Vide Comp. Att. 63.*

Several writs of error may be sued at the same time; as, one by the tenant, another by the vouchee. *F. N. B. 21. M.*

And it shall be sued *ex officio*, tho' it be against the king, without petition. *1 Sal. 264. Cont. 1 Ver. 170. 175.*

When



When the writ of error is made out, it shall be entred on the remembrance of the clerk of the errors, who takes a note for bail, if bail is required. (*Com. Att. 63.*)

And then the party and his bail enter into a recognizance before the chief justice who subscribes it. (*Com. Att. 64.*)

[But proceedings shall not be stayed on application in *B. R.*, because the chief justice of *C. B.* has not subscribed the return. *Str. 1063. B. R. H. 344.*]

In what cases bail is required, and in what manner it shall be given, *vide post. (3 B 12.)—Vide Bail, (G 2.)—Costs (B).*

If error is brought in criminal cases, it must be allowed by the attorney-general, for it is *ex gratia*, and the *Chancery* will not direct it. *Eq. Ca. Ab. 414.*

But if it is real error, and the attorney-general refuses, there may be a petition to the king. *Ibid.*

If error is brought in parliament, it shall not be allowed without the king's warrant, for which five pounds are paid, and four pounds for the writ. *Vide Intr. 5. Per Cook C. J. Godb. 247. (Vide Parliament, (L 2.))*

So, error upon an attainder by indictment shall not be allowed without a petition to the king. *Per two J. 1 Rol. 175.*

So, in every case where the king is party, and the error is in the substance of the judgment, and not in process or a collateral matter. *Sav. 131.*

But the defendant shall not be discharged out of custody upon bail, upon a writ of error in parliament. *1 H. 7. 20. a.*

If error be of a fine, &c. in a county palatine; tho' it be returnable in *B. R.*, yet the court there may after reading the writ, without *scire facias* to the defendant, or with it, reform manifest error. *Dy. 231. a.*

And if the first judgment be reversed upon a special writ of error, both judgments may be examined in *B. R.* *Ibid.*

If error be upon an indictment, the proper course is to remove it by *certiorari*, then to have error, which *coram nobis*, &c. and thereupon the defendant in error gives a rule to assign errors. *1 Sal. 266.*

And if, upon such rule, the plaintiff does not assign errors, the defendant may move for a peremptory rule; and then, if he does not assign, he shall be nonsuited, and the defendant may take out execution. *Ibid.*

The process in error shall be *alias* and *pluries*, and if the record is not then removed, an attachment. *F. N. B. 22. G.*

The *pluries* may be returnable in the same court with the writ of error, or in *Chancery*. *Ibid.*

If it is returnable in *Chancery*, and thereupon the record certified there, the chancellor with his own hand may bring it to the court where error was brought, without a writ of *mittimus*. *Ibid.*

[The court will not *non-prof.* a writ of error brought contrary to plaintiff's undertaking, if it appears the judgment and undertaking were during his minority. *Stern v. Bern, P. 8 Geo. 2. B. R. H. 104.*]

[If a writ of error returnable in *Exchequer-chamber* abates by defendant's death, the new writ cannot be to the *Exchequer-chamber*, for

for only transcript of record is there, the record is in the *Exchequer*; the court will make a rule for a *remittitur* to be entred on the record, with a suggestion of the death. *Rex v. Cotton*, T. 1751, 2 *Ves.* 288. *Parker*, 112.]

[*B. R.* will oblige plaintiff in error in parliament upon a judgment in ejectment to enter into a rule not to commit waste or destruction pending the writ. *Wharod v. Smart*, M. 6 G. 3. 3 *B. M.* 1823.]

[Error is lost, if not returnable before death of chief justice; but execution may not be taken without leave of the court. *Barnes*, 201.]

(3 B 12.) When it shall be a *Superfedeas*.

A writ of error being allowed, (and bail given when bail is required,) it shall be a *superfedeas* of any subsequent execution. 1 *Sal.* 321.

[Where bail is required, it must be put in within four days after final judgment signed, without reference to the time of the allowance, or the service of the copy of it. 1 *T. R.* 279.]

And thereupon a *superfedeas* may be sued out and filed with the sheriff, &c. *F. N. B.* 239.

[Allowance of a writ of error, on a judgment by *nil dicit*, is so entirely a *superfedeas*, to a subsequent writ of execution and all proceedings grounded thereon against the bail, that all may be set aside on motion. 2 *Bl.* 1183. *Vide Barnes*, 205. 209. 376. 1 *T. R.* 279.]

[But the court will not stay proceedings in debt upon a judgment while a writ of error is depending, if the writ of error appear to be merely for the purpose of delay. 2 *T. R.* 78.]

[But to make this appear, it is not sufficient that the plaintiff in the original action swear that the writ of error is brought for delay, and that he offered to the defendant's attorney to waive the judgment, if he would point out any error, which was refused. *Ibid.*]

[But if the defendant has confessed that it is brought for delay, that will be sufficient. *Ibid.*]

[Or, if the defendant's attorney has confessed that the writ of error is brought merely for delay. *Mitchell v. Wheeler*, C. P. E. 32 *Geo.* 3. 2 *H. Bl.* 30. *Masterman v. Grant*, B. R. T. 34 *Geo.* 3. 5 *T. R.* 714.]

[The court will stay the proceedings in an action on a judgment pending a writ of error brought to reverse that judgment, notwithstanding that the plaintiff swear that the writ of error is brought for delay. *Christie v. Richardson*, B. R. H. 29 *Geo.* 3. 3 *T. R.* 78.]

[The court will not stay proceedings against the bail pending a writ of error on the judgment against the principal, if the principal has confessed that it is brought merely for delay. *Pool v. Charnock*, *ibid.* 79.]

[The court will not set aside a defendant's execution for the costs of a nonsuit sued out after notice of allowance of writ of error, because the writ of error can only be for delay. *Kempland v. Macaulay*, B. R. M. 32 *Geo.* 3. 4 *T. R.* 436. *Box v. Bennett*, C. P. E. 30 G. 3. 1 *H. Bl.* 432. *Levett v. Perry*, B. R. T. 34 G. 3. 5 *T. R.* 669. *contra.*]

[The court of *B. R.* will not suffer execution to be taken out pending a writ of error in parliament, on the ground that the writ of error is brought for delay, merely because the defendant suffered



the judgment to be affirmed in the *Exchequer-chamber* without any objection. *Harrison v. Grote*, B. R. T. 35 G. 3. 6 T. R. 400.]

[However, if the defendant bring a writ of error, and the plaintiff bring another action on the judgment, and recover, he cannot sue out execution on the second judgment, till the writ of error be determined. 3 T. R. 643.]

[The court refused to set aside the execution in the second action, (a writ of error having been brought on the first judgment,) because the defendant had not before applied to stay the proceedings in the second action. *Humphreys v. Daniel*, C. P. E. 9 Geo. 2. *Barnes*, 202. *Sir. G. Co.* 129. S. C. *Robinson v. Tuckwell*, C. P. M. 13 G. 2. *Willes*, 183. *Sir. G. Co.* 159. S. C. *Clarkson v. Physick*, C. P. M. 13 Geo. 2. *Willes*, 184. *Barnes*, 203. S. C.]

So, error with notice thereof shall be a *superfedeas* before the writ allowed. 1 Sal. 321. 2 Mod. Ca. 130.

[It is a *superfedeas*, tho' sued out before judgment. *Morfoot v. Gbivers*, T. 11 G. Str. 631.]

[But it can have no effect till the judgment is actually signed. 1 T. R. 279.]

In error upon a *quare impedit*, there shall be a *non molestand.* to stay execution till errors discussed. Dy. 76. b.

And, if execution be afterwards done, it will be a contempt. R. 2 Bul. 194.

[But no contempt is incurred by taking out execution till after notice of writ of error. *Barnes*, 376.]

[And the court will not set aside an execution sued out before, but executed after the allowance of a writ of error, served on the sheriff and the party, if the plaintiff in error has not regularly put in bail; otherwise if bail be put in in time. 2 T. R. 44.]

So, if execution be after a writ of error allowed, without notice of it, restitution shall be granted. R. 3 Lev. 312. 1 Sal. 321, 322.

[A writ of error is no *superfedeas* till allowance or notice of it. *Meriton v. Stevens*, C. P. T. 14 & 15 Geo. 2. *Willes*, 271. *Barnes*, 205. S. C.]

[And if the sheriff has levied under a *fi. fa.* after the issuing, but before the allowance of a writ of error, he must proceed to sell the goods. *Ibid.*]

Tho' the writ of error was not allowed till 24 Oct. and the writ of execution was tested the 23d, for of course judgment is not signed till four days after the beginning of the term, which was the 27th Oct. 3 Lev. 312.

[If plaintiff defers signing judgment till error spent, and then brings debt on judgment, the court will order new writ of error at attorney's expence. *Barnes*, 250. *Vid.* 1 T. R. 279. acc.]

[Execution after error allowed, and bail, is irregular, tho' the writ of error was returnable before judgment signed, if it was signed the same term, even tho' error returnable the essoign-day: not if signed in a subsequent term. *Barnes*, 197, 198. 260.]

[If there is verdict against four defendants, and judgment by default against a fifth, who brings error, without bail, court will give leave to take execution against the four. *Barnes*, 202.]

[A certificate from clerk of errors that bail is not put in, is not necessary before taking out execution. *Barnes*, 212.]

And

And a writ of error shall be a *superfedeas*, tho' it be of a judgment in a former writ of error, in which a *superfedeas* was granted. *R. per three J. Co. Cont. 2 Cro. 341. Godb. 250.*

Tho' the record is not removed, but only a transcript to the court where error is brought. *R. 2 Cro. 535.*

Tho' no notice of the writ allowed. *R. 2 Mod. Ca. 373.*

So, if judgment is affirmed, the *superfedeas* continues till the record is sent back.

If error is discontinued by the not coming of the justices. *R. 6 H. 7. 15. b.*

So, if the plaintiff in error is nonsuited, or discontinues, or error abates. *R. Sho. 404. 1 Sal. 261.*

But if the execution is executed before error allowed, or notice, there shall be no restitution. *1 Sal. 321. Mod. Ca. 130.*

Tho' it was returned or filed after error notified. *Mod. Ca. 130.*

And if it is levied in part, such part may afterwards be applied to the debt. *R. Yel. 6.*

For the sheriff may return the goods, and afterwards upon a *venditioni exponas* sell them. *Ibid. Vide Execution, (C 6. 8.)*

But without a *venditioni exponas* the sale will be void. *R. 1 Rol. 894. l. 10.*

[If defendant is taken in *ca. sa.* and bail in error is afterwards perfected, he shall be discharged; but on a *fi. fa.* the proceedings, so far as sheriff has gone, must stand. *Barnes, 212.*]

So, if a writ of error abates, a new writ of error in the same court is no *superfedeas*. *R. 1 Mod. 285.*

Nor, error in parliament, and errors assigned, if the parliament be dissolved. *R. Ray. 5.*

So, if error is in parliament, and it abates by prorogation, tho' there is no default of the party, yet a new writ of error, returnable at the next sessions of parliament, is no *superfedeas*. *R. 1 Vent. 31. 1 Sid. 413. 2 Lev. 93.*

So, where the first writ of error is returnable at the next sessions of parliament, it is no *superfedeas* in respect of the distance of the return. *R. 1 Vent. 266.*

Where a term intervenes. *Semb. 3 Mod. 125. 2 Leo. 120.*

[Writ of error in parliament is no *superfedeas*, if it be not transcribed in fourteen days, and the parliament be dissolved. *White v. Roberts, in Sc. T. 1720, Bunb. 64.*]

[If error is brought in parliament, tho' the house is prorogued, and the record has not been transcribed, the court will not on motion grant leave to take out execution. *Wright v. Grove, T. 1723, Bunb. 131.*]

So, if a writ of error is returnable in *B. R.* or *Exchequer*, after the next term. *1 Vent. 266.*

Or, on the last return of the next term, for it seems an affected delay. *Semb. 1 Sid. 45. 454. 1 Vent. 266.*

So, if judgment is affirmed in the *Exchequer-chamber*, and after a *scire facias* thereupon, a *quare execution. non*, &c. is brought, and execution is awarded, and then a writ of error is brought thereon, it shall not be a *superfedeas*. *R. 5 Mod. 230.*

[After affirmance, error *coram vobis* without leave is no *superfedeas*, for it cannot be allowed without leave. *Horne v. Busbel, P. 6 G. 2. Str. 949.*]



So, if after error the record is not removed, for a delay appears. *Pr. Reg.* 210.

And the plaintiff may have a writ *de executione judicii*. *Mod. Ca.* 210.

So, if by a defect in the writ of error, the record is not removed, execution may be taken out without motion. *1 Sal.* 265.

Otherwise, if the writ of error abates. *Ibid.*

[If error abates by the act of plaintiff, (as if *feme-sole* marries,) execution shall go. *Buller v. Lusitano*, *M.* 4 *G.* 2. *Str.* 880. *Jenkins v. Bates*, *P.* 8 *G.* 2. *Str.* 1015.]

So, by the *st.* 3 *Jac.* 8. error is no *superfedeas* upon a judgment in debt for money only, or rent or any contract, if the plaintiff does not find bail, &c. as, in debt, covenant, &c. for non-payment of rent, &c. *Sbo.* 14. 2 *Keb.* 131. *Vide Bail*, (*G.* 2.)

[A bond given by *A.* to *B.* to pay a sum certain, (the debt of *C.*) by instalments, the last whereof is still future, is an obligation for the payment of money only, within 3 *J.* 1. *c.* 8. *Chauvet v. Alfray*, *H.* 32 *G.* 2. 2 *B. M.* 746.]

But the *st.* 3 *Jac.* 8. does not extend where error was before the statute, and discontinued by the not coming of the justices, and then another writ is brought after the statute. *R.* 2 *Cro.* 135.

[Bail is not requisite on bringing writ of error on judgment, in an action of debt, founded on a prior judgment. *R.* by all the judges. *Bidleston v. Wytel*, *T.* 4 *G.* 3. 3 *B. M.* 1545.]

[Nor, on judgment in an action of debt upon a recognizance of error. *Trinder v. Watson*, *M.* 5 *G.* 3. 3 *B. M.* 1566.]

[In ejectment after verdict, tho' writ of error allowed, if no recognizance entred into, nor bail put in, plaintiff may take out *hab. fac. poss.* and take possession. *Barnes*, 212.]

Nor, by the *st.* 13 *Car.* 2. 2. on judgment after verdict in debt for not setting out tithes; in an action upon the case upon a promise for payment of money, trover, covenant, detinue, or trespass.

Nor, by the *st.* 16 & 17 *Car.* 2. 8. on judgment after a verdict in any personal action, or in ejectment or dower.

So, it is no *superfedeas*, if bail is not found pursuant to the *st.* 3 *Jac.* where error is upon a judgment in debt upon a bond for payment of so much money as *A.* shall declare due upon account between them. *R.* per three *J.* 1 *Lev.* 117.

So, error in parliament is no *superfedeas*, if a new recognizance is not given by bail, where there was bail upon error before brought in the same cause in *B. R.*, for such bail is not liable to the costs in parliament. *R.* 1 *Sal.* 97. *R.* 2 *Mod. Ca.* 79. *Colebrooke v. Diggs*, *T.* 8 *Geo.* *Str.* 527.

But bail is sufficient, tho' the defendant himself did not give his recognizance. *R.* *Carth.* 121.

So, there may be exception to the bail, without notice, but they cannot take out execution without a rule of four days for other bail. *1 Sal.* 98.

[If rule for better bail is served in vacation, defendant must justify before a judge, or execution may issue. *Barnes*, 211.]

[If a rule for better bail be served on a servant of the plaintiff's attorney on *Tuesday*, tho' it come not to his knowledge till *Saturday*, the

the court will not then grant time for better bail, unless real error be suggested. 2 *Wils.* 144.]

But by the *st.* 13 *Car.* 2. and 16 & 17 *Car.* 2. those clauses do not extend to error by an executor or administrator, nor are they within the *st.* 3 *Jac.* 8. if error is brought by them upon a judgment against the testator, or against themselves, as executor or administrator. *R.* 2 *Cro.* 350. *Cro. Car.* 59. *Lit.* 3. 1 *Sid.* 183. *Vide Costs (B).*

Otherwise, if the executor or administrator is chargeable *de bonis propriis.* 2 *Cro.* 350. *R.* 1 *Sid.* 368.

[Tho' an executor is not obliged to give bail, yet if he gives it, it is good. *Laferre v. Johnson*, *H.* 13 *G. Str.* 745. *Ld. Raym.* 1459.]

[Executor may revive, but cannot take out execution pending error. *Barnes*, 432.]

So, the *st.* 3 *Jac.* 8. does not require bail in error upon a judgment in debt upon a bond for performance of covenants. *R.* *Sho.* 15. *R.* 2 *Bul.* 54.

[Tho' there be judgment by default, and the condition do not appear on record; for that is examinable by affidavit. *Barnes*, 72.]

Tho' the breach be for non-payment of rent, &c. *Sho.* 15. *R.* 2 *Keb.* 131. *R.* *Carth.* 29.

Nor, in error upon a judgment in debt upon a bond for payment of money at the return of a ship and performance of the articles of a bottomree contract. *R.* *Sho.* 14. *Dub. Mod. Ca.* 38.

[On a bottomree-bond there must be bail. *Pett v. Coney*, *M.* 8 *G. Str.* 476.]

Nor, in debt for not performing an award. *Sho.* 14. *R.* 2 *Bul.* 54.

Or, for arrearages of an account. *Sho.* 15. *R.* 2. *Bul.* 54.

Nor, in error upon a judgment in an action upon the case upon a bill of exchange. *Sho.* 15.

Nor, in debt upon a bond to indemnify. *Sho.* 14.

Nor, in error brought against an avowant for rent by the plaintiff in replevin; for it is not debt brought by him. *R.* *Hob.* 265.

Yet, in error upon a judgment in debt upon a judgment, bail is required by the *st.* 3 *Jac.*, tho' the first judgment was in debt for not performing covenants. *R. per two J.* 1 *Lev.* 260.

[In error on a judgment after verdict on a *sci. fa.* against bail, there must be bail to the writ of error, that being a personal action. 2 *Bl.* 1227.]

[Where a writ of error is amended in the King's Bench, new bail shall be given to the amended writ in the Common Pleas, and the plaintiff below shall not in the mean time take out execution for want of bail. 2 *Bl.* 1067.]

[After error brought, plaintiff cannot take out a *ca. sa.*, and return *non est inventus*, in order to proceed against the bail. *Sweetapple v. Goodfellow*, *P.* 3 *G.* 2. *Str.* 867.]

[And if he does, it shall be set aside with costs. *Andrews v. Jer-nigan*, *M.* 10 *G.* 2. *B. R. H.* 315. *Smith v. Nicholson*, *P.* 16 *G.* 2. *Str.* 1186. *Wils.* 16.]

[Where a *ca. sa.* is returnable against the principal on a particular day before which a writ of error is allowed and served, that operates as a *superfedeas* to any proceedings against the bail, although the *ca. sa.*



has lain four days in the office, before the allowance of the writ of error. *Perry v. Campbell, B. R. T. 29 Geo. 3. 3 T. R. 390.*]

[If bail do not apply to stay proceedings pending error till the time to surrender is out, the court will not give them any time for that purpose, but only four days to pay the money after judgment affirmed. *Richardson v. Jelly, T. 21 G. 2. Str. 1270.*]

[If judgment be affirmed, the bail cannot surrender the principal; and therefore if he become bankrupt pending the writ of error, they can have no relief. 1 *T. R. 624.*]

[Plaintiff in error on ejectment enters into recognizance to prosecute in double the rent, and justifies. *Thomas v. Goodtitle, M. 10 G. 3. 4 B. M. 2501.*]

[On an action brought on the recognizance, on affirmance of judgment in ejectment, if defendant pleads no damages incurred, and plaintiff replies non-payment of costs, and, on defendant's motion, it is referred to the master to see what is due, plaintiff shall have the mesne profits as well as costs, and it shall stay in the master's hands till the writ of inquiry for mesne profits is executed, and then proceedings to stay. *Doe v. Roache, P. 10 G. 2. B. R. H. 373.*]

[If plaintiff pleases, he may waive the damages arising from waste and mesne profits, and be satisfied with the costs awarded; and then there is no need of writ of inquiry, but he may proceed on the recognizance without it. *Doe v. Roache, P. 11 G. 2. Andr. 153.*]

[If defendant a prisoner brings error, and puts in bail, he shall have *superfedeas*; for tho' writ should be *non-pros'd* for want of transcribing, bail are liable. *Barnes, 499.*]

[On error brought by defendant, and transcribed, but undetermined, if plaintiff brings new action on his judgment, and has judgment for want of plea and execution on it; the court will stay proceedings on it, and restrain also defendant from bringing bill in equity. *Taswell v. Stone, T. 9 G. 3. 4 B. M. 2454.*]

[A *superfedeas* obtained after judgment cannot be pleaded in bar to an action on such judgment, *Topping v. Ryan, B. R. T. 26 Geo. 3. 1 T. R. 273.*]

### (3 B 13.) Record, how removed.

When error is brought in *B. R.* of a judgment in *C. B.*, a *mittitur* is wrote upon the roll, and thereupon the record itself (except in the case of a fine) is transmitted to *B. R.* 1 *Rol. 752. l. 45. F. N. B. 20. F. [Cowp. 843.]*

And in error of a fine in the *hustings* of *Oxford*, the record itself shall be removed, 1 *Rol. 753 l. 5.*

The whole record shall be removed. (*Vide Com. Att. 65.*)

If the verdict is quashed for insufficiency in point of law, apparent upon the record, it shall be removed. *R. 2 Sand. 254.*

But, in error of a fine, only the transcript shall be removed; for if it is affirmed, *B. R.* has no chirographer, nor can hold plea in *quid juris clamat.* *D. Dy. 89. b. 1 Rol. 752. l. 50. F. N. B. 20. F. Vide Fine, (H 5. 7.)*

Yet *B. R.* may send for a note of the fine, and reverse it. 1 *Rol. 752. l. 55. F. N. B. 20. F.*

Or, command the treasurer and chamberlain to take it off the file. 1 *Rol. 753. l. 3.*

So, in error in the *Exchequer* upon a judgment in *B. R.* only the transcript shall be sent. 2 *Cro.* 535. [*Doug.* 352. n.] *Vide Courts*, (B 1.)

So, in error in parliament upon a judgment there, for the chief justice conveys the roll with the transcript to the house of lords, and leaving the transcript there takes back the roll. 4 *Inst.* 21. *Dy.* 375. a. 1 *Rol.* 753. l. 20. 2 *Cro.* 341. *Godb.* 247. [*Cowp.* 843.] *Vide Parliament*, (L 2.)

[If error in parliament is not transcribed in fourteen days, the defendant in error, on motion, shall be at liberty to take out execution, if it is not transcribed and certified in eight days. *Frost v. Dawes*, in *Sc. H.* 1720, *Bunb.* 69.]

[But the court will not direct the master to include interest in the costs to be taxed on *non-prossing* a writ of error, returnable in parliament for want of transcribing. 2 *T. R.* 58.]

So, in error in *B. R.* upon judgment in *Ireland*, only the transcript was removed, because of the danger of the seas. 2 *Cro.* 535. *Yel.* 118. *Godb.* 247. 2 *Bul.* 162, 163. 2 *Rol.* 126. 274. [*Cowp.* 843.]

If error be in *B. R.* of a judgment in *C. B.*, tho' the judgment and the record, on which it is entered, be removed; yet the original shall not be removed. 1 *Rol.* 753. l. 7.

Nor, in error of a judgment in *Ireland*. 1 *Rol.* 753. l. 15.

Nor, is it necessary in error of a judgment in an inferior court. 1 *Rol.* 753. l. 10.

[On a writ of error, *C. B.* sends up the very record, but *B. R.* sends only a transcript to the *Exchequer-chamber*, and therefore the transcript must be brought back to *B. R.* to be amended by the original record. *Rutter v. Redstone*, *T.* 3 G. 2. *Str.* 837.]

But in error upon a judgment in an inferior court upon a *scire facias* against bail, the proceedings in the original action may be returned. *R. Ray.* 431.

And when, upon error, the original, imparlance, warrant of attorney, or other part of the record is not returned, the plaintiff in error may allege diminution, and have a *certiorari* for the part not returned. 1 *Sal.* 267.

[If exception is taken to the omission of a word in a writ, plaintiff in error must bring it before the court by *certiorari*. *Dobson v. Dobson*, *P.* 7 G. 2. *B. R. H.* 19.]

[Tho' it appear on the return to a *certiorari* that no bill was filed in the court of King's Bench against the defendant, (in a suit there by bill,) in the term of which the declaration is intitled, but that a bill was filed against him by the plaintiff in the following vacation, it is not erroneous, if it also appear that the bill was filed of the preceding term. *Parrot v. Spraggon*, *Exch. Ch. H.* 36 Geo. 3. 2 *H. Bl.* 608.]

And diminution may be alleged in error upon a judgment in *Wales*, in a county palatine, before justices of oyer and terminer, as well as upon a judgment in *Westminster-hall*. 1 *Sid.* 40. 139. 147.

So, if a different original, &c. is returned, the defendant may allege diminution, and return a true original. *R.* 2 *Cro.* 130. *R. Cro. Car.* 91.

So, if want of an original, &c. be assigned for error, the defendant in error may allege diminution, and have a *certiorari*. 1 *Sal.* 267.

Or, may by rule compel the plaintiff to do it. *Ibid.*



But, if neither the plaintiff or defendant does it, but pleads *in nullo est erratum*, judgment shall be affirmed. 1 Sal. 267. Sho. 76.

If a *certiorari* is awarded upon diminution alleged, the defendant in error may enter a rule with the secondary for a return of the writ; and if it be not returned at the day, the benefit of it will be lost. *Vide* Intr. 4. 1 Sal. 267.

But diminution cannot be alleged in error upon a judgment in an inferior court. 1 Sid. 40. R. 1 Sal. 266.

Or, upon a judgment in Ireland. *Vide* Intr. 4. R. cont. Sho. 214.

Nor, after *in nullo est erratum* pleaded. 1 Sid. 139. Cro. El. 84. R. Mo. 700. 1 Sal. 269. 2 Cro. 141.

[The court may take notice that the record is imperfect, and award a *certiorari* for their own satisfaction before errors assigned. *Bellew v. Scott*, T. 7 G. Str. 440.]

[The court may award *certiorari* to bring the original before them *ad informand. conscient. cur.*, tho' no diminution is alleged. *Franklyn v. Reeves*, P. 8 G. 2. B. R. H. 118.]

And after *in nullo*, &c. pleaded, the court, *ad informandum* in matter of fact, and for affirmance of the judgment, may award a *certiorari*. 1 Sal. 269. Sho. 214.

So, in all cases the court may award a *certiorari* for any part of the record not returned, or mistaken; for tho' the party is estopped by plea of *in nullo est erratum*, the court shall not be. R. 1 Sal. 270.

[If an erroneous writ of privilege is assigned for error, it must be brought before the court by *certiorari*; the recital in the declaration is not sufficient. *Drew v. Rose*, T. 11 G. 2. Ld. Raym. 1398.]

[If to a *certiorari* return is made that there is no such writ remaining in the office, and on a second *certiorari* return is made, that on searching the writs there is such a writ, the second return shall be taken to be true. *Shipman v. Lethieullier*, P. 13 G. Ld. Raym. 1476.]

[A second *certiorari* shall not be granted to reverse a judgment. *Mirryfield v. Berrey*, T. 13 G. Str. 765. *Bowers v. Mann*, M. 2 G. 2. Str. 819.]

[After *in nullo est erratum* pleaded, and argued, and allowed to be a confession of the errors, the court on affidavit may award *certiorari* for affirmance of judgment. *Berkley v. Howard*, T. 5 G. 2. Str. 907.]

[Errors cannot be verified by a *certiorari* tested before the writ of error. *Bowers v. Mann*, M. 2 G. 2. Str. 819. Ld. Raym. 1554.]

[The return is good, tho' the name of office is omitted, if it says, *as to me within is directed*. *Sullivan v. Seagrave*, P. 12 G. Str. 695.]

If there is a material variance between the writ of entry and the record certified, the record is not removed thereby: as, if it varies in the style of the court. R. 1 Rol. 754. l. 50. R. Sho. 145.

If it varies in the judges of the court. R. 2 Cro. 254.

Or, says *in curia nostra*, &c. where the judgment was in the time of the predecessor. R. Dy. 105. b. 1 Rol. 754. l. 15. 45. Sho. 186. 3. R. Carth. 158.

So, if it varies in the name of any party, his abode, or addition. 1 Rol. 754. l. 5. R. 1 Sid. 104. 193. R. Dy. 173. b. 1 Sal. 264.

Or, mentions more or fewer parties. R. 1 Rol. 753. l. 45. R. 1 Sid. 269.

Or, a different sum for damages, &c. 1 Rol. 754. l. 40.

Or,

Or, different particulars recovered. 3 Co. 2. a.

Or, different parishes where the lands lie. 2 Jon. 171.

So, if the writ be directed to *A.* of a judgment *coram vobis*, and the record is *placita coram B.*; and afterwards there is an entry that *B.* died, and *A.* was made chief justice. *R. Sho.* 26.

If error is sued, and the record returned before judgment given. *Semb.* 1 Lev. 137.

So, if the writ of error mentions a suit by bill, where it was by writ of privilege, or by original. *R. Sal.* 660.

But if the writ of error does not mention some things so fully as the record, the writ shall not abate for it; as, if it does not mention the party's addition. *Per Twissd.* 1 Sid. 104. *Per two J.* Dy. 356. b.

[If the writ is *inter A. nuper de Westm. in com. Midd.*, and the record is only *nuper de Westm.*; if *Middlesex* is in the margin it is well enough. *Ingolby v. Martin*, T. 6 G. Str. 316.]

If it is of a judgment in *Wales*, or in an inferior court, in a *quod ei deforceat protestando*, &c. and it omits the *protestando*. *R. 1 Sid.* 139.

If error of a judgment in *quare impedit* says *quia in recordo et reddit. judicii coram vobis*, &c. where the judgment was before justices of assise. Dy. 77. a.

Or, error is to a sheriff, without naming his name, of a judgment *coram vobis*, where it was before a former sheriff. *R. Mod. Ca.* 61.

If a writ of error omits the title of the judge, or that the suit was by writ, &c. *Dub. Godb.* 248.

If a writ of error has a material variance, it abates, and the plaintiff shall have a new writ.

And the plaintiff may, by motion, quash his own writ for expedition. (*Vide* 5 Mod. 67.)

So, if the plaintiff does not assign errors, and take out a *scire facias* in the term, when the record is removed, it is a discontinuance. *F. N. B.* 20. G. *Vide post.* (3 B 14.)

So, if the plaintiff or defendant in error dies, the writ abates. *Vide Abatement*, (H 33.)

So, the writ abates, if it does not mention the assise to be *capt.* &c. *et post adjorn.*, tho' the record is removed by it. *R. Tel.* 3.

But the plaintiff cannot quash his writ of error upon a foreign suggestion: as, for want of all the parties, &c. 5 Mod. 67.

If error abates, or is discontinued, after the record itself is removed, there shall be a new writ *qua coram vobis residet*. *R. 1 Rol.* 753. l. 40. *R. Tel.* 6.

[As, if the judgment be against *two*, and a writ of error be brought *ad damnum* of *one*, and be abated for that variance, then *coram vobis* is the only proper writ. 2 Ld. Raym. 1403. Str. 606.]

So, if error is brought for error in fact, &c. upon a judgment in the same court. *Vide ante*, (3 B 1.)

So, if a writ of error is quashed, where the writ was by one, when all the defendants ought to have joined. *R. 2 Mod. Ca.* 317. 381.

But if the record is not removed, there shall not be a new writ *que coram vobis*, &c.: as, if a writ of error is brought before judgment given. *R. 1 Rol.* 754. l. 20. *Vide ante*, (3 B 7.)

So, if a writ of error is quashed for a material variance. *Tel.* 6. *Vide supra.*

So,



So, if only the transcript of the record was removed. *R. 1 Rol. 755. l. 10. D. 3 Co. 15. b. Vide supra.*

Yet, if error of a judgment in Ireland abates, there shall be a new writ *quæ coram vobis*, tho' only the transcript was removed. *R. 1 Rol. 755. l. 5.*

[Defendant cannot have leave to transcribe the record (tho' plaintiff has not done it) to *non prof.* the writ, and have the benefit of the recognizance. *Anon. M. 17 G. 2. Wils. 35.*]

[Rule to transcribe may be served on plaintiff himself. *Barnes, 410.*]

[A *non. prof.* signed for want of transcribing the record, shall be set aside, if final judgment is not entered. *Barnes, 195.*]

### (3 B 14.) Assignment of Errors.

(3 B 14.) *When it shall be.* When the record is removed, the plaintiff in the same term ought to assign his errors. *F. N. B. 20. G. Lut. 354.*

And after errors assigned, he shall have a *scire facias ad audiendum errores*, returnable in the same or in the next term. *F. N. B. 20. G.*

And if he does not assign errors, and take out a *scire facias* in the same term, the writ of error is discontinued, and the plaintiff put to a new writ. *F. N. B. 20. G.*

Or, the defendant may have a *scire facias quare executionem non*, &c. and upon two *nichils* and judgment thereon, he shall have execution, tho' error is afterwards assigned. *Carth. 41.*

[If, after a writ of error allowed, defendant in error become bankrupt, his assignees cannot sue out a *sci. fa. quare*, &c. in their own names; but they must go on with the writ of error in the bankrupt's name till judgment. *1 T. R. 463.*]

[But, if plaintiff in error is dilatory, defendant must give a rule to transcribe; and if he will not, defendant may *non prof.* writ of error. *Goodwright v. Hugoson, H. 10 G. 2. B. R. H. 351.*]

[For there can be no *sci. fa. quare execut. non* till the transcript of the record below is returned. *Semb. Ibid.*]

So, if the plaintiff does not appear at the return of the writ of error, or assigns errors insufficiently, being his own default, the defendant may take out execution. *Yel. 7.*

So, if one plaintiff assigns error, he must do it in the name of all, except where the others are severed. *Mod. Ca. 40.*

So, errors must be assigned in term, and not in vacation; for the court cannot then take notice of them, tho' they are material. (*Vide Pr. Reg. 203.*)

So, they must be assigned upon the record. (*Vide Pr. Reg. 196.*)

So, if upon rule given, the plaintiff in error in *B. R.* does not assign errors, and certify the record within eight days, he will be nonsuited.

[Writ of error cannot be *non proffed* without a rule to assign errors. *Leith v. McFerlan, M. 6 G. 3. 3 B. M. 1772.*]

[If the attorney for the plaintiff in error from Ireland cannot be found, the court will make a rule, that if errors are not assigned within a certain time after notice is fixed up in the office, the defendant in error may sign a *non prof.* *Leeds v. Power, H. 7 G. Str. 417.*]

[If

[If neither plaintiff in error, nor his attorney, can be found, the court will order that rule to assign errors fixed up in King's Bench office shall be good notice. *Thompson v. Baker*, T. 8 G. 2. B. R. H. 130.]

So, if the defendant takes out a *scire facias quare execution. non*, &c. after *scire feci* returned, the plaintiff at the day of return may assign errors. Dy. 77. a.

(3 B. 15.) *How it shall be.*] The plaintiff may assign for error, an error in fact, or errors in law. F. N. B. 20. E.

[On error in fact assigned, plaintiff may conclude with an averment; for defendant may put it in issue if he pleases. *Sheepbanks v. Lucas*, M. 31 G. 2. 1 B. M. 410.]

But he cannot assign both; for this will be double. R. 1 Rol. 761. l. 35. D. 1 Sid. 147. 1 Lev. 76. 105.

[As error in fact and in law cannot be both assigned on one writ; so, after affirmance on error in law assigned, error *coram vobis*, and error in fact assigned, shall not be allowed. *Burleigh v. Harris*, P. 7 G. 2. Str. 975.]

Nor, can he assign several errors in fact. F. N. B. 20. E.

Yet he may assign several errors in law, and it will not be double. *Ibid.*

Nor, can he assign an error in fact, if it was not assigned before the *scire facias*. *Ibid.*

So, he cannot assign error in process after *in nullo est erratum* pleaded. R. Cro. El. 83.

Nor, error for want of an original; for the party cannot allege diminution. R. Cro. El. 84.

[If plaintiff in error means to take advantage of there being no bill, &c. he must assign it for error, take out *certiorari*, and get it returned. *Gradell v. Tyson*, M. 13 G. Ld. Raym. 1441.]

The plaintiff generally may appear by attorney, and assign his errors.

But if he be in execution, he must assign them in person. F. N. B. 21. A.

[Yet the court may give leave to a defendant, in execution, to assign errors by attorney. *Rex v. Stapleton*, T. 7 G. Str. 443.]

All the plaintiffs must join in assignment of errors, for an assignment by one is a discontinuance. R. 2 Cro. 94.

Tho' after a *scire facias ad audiendum errores*, they all join in the re-assignment. *Ibid.*

Tho' it be in a *quare impedit*, where the bishop is only nominal. *Ibid.*

The plaintiff must put in a bill, containing the several errors assigned. F. N. B. 20. G.

And it shall not be general *in omnibus erratum est*, but it must shew particularly *erratum est in hoc*, &c. *Ibid.*

Yet general error, that judgment was given for the plaintiff, where it ought to have been for the defendant, is well.

Error may be assigned in every part of the record. 1 Rol. 760. l. 45.

If the assignment of error concludes with an averment, *prout. cur. confid.* it will be well, tho' it is error in fact. *Semb.* 2 Lev. 73.

But



But if error in fact be assigned, notoriously false, the attorney may be fined. *Sal. 516.*

[If error be assigned on a mistake in form, the mistake may be amended in the court below pending the writ of error. *Doug. 114.*]

[And this in a penal action. *Ibid.*]

(3 B 16.) *What matters cannot be assigned.*] But the plaintiff cannot assign for error a matter contrary to the record. 2 Cro. 28. R. 1 Lev. 76. R. 1 Sal. 262. 1 Lev. 310. 2 Cro. 244.

Nor, a thing whereof he may have advantage by plea. R. 1 Rol. 762. l. 40.

Tho' judgment be by default. *Dub. 2 Cro. 547.*

Or, by complaint to the court of irregularity: as, that the original, &c. was not returned by him, who was sheriff. R. 1 Sal. 265.

Nor, a thing which was his own default; as, a defect in his plea. *Mo. 692.*

Nor, a thing which tends to his advantage, if it was not by the court's default. R. 5 Co. 39. b. 1 Rol. 760. l. 10. 13. R. Cro. Car. 437. R. 1 Vent. 60. 2 Sand. 42. 45.

[Error assigned, that defendant, an infant, appeared by attorney; plea, that defendant was of full age; demurrer, for that no place shewn where he was of full age. R. *venue* as to full age, or other personal quality, not necessary; they are triable where action brought. *Brett v. Minter. Str. 8.*]

[Error assigned, that A. who, on the first trial, was withdrawn in order for a view, was sworn to the second pannel, not allowed. *Blewett v. Bainard, M. 4 G. Str. 70.*]

[If the description of the judges of assise, A. and B. *just. &c. ad capiend. juxta formam*, &c. omitting the word *assisas*; yet, if it appears in other parts of the record that they were justices of assise, it cannot be assigned for error, for it would be contradicting the record. *Baker v. Thompson, M. 9 G. 2. B. R. H. 166.*]

[Defendant in ejectment cannot assign that, being an infant, he appeared by attorney. *Goodright v. Wright, H. 3 G. Str. 25.*]

[Nor bail, matter which lies properly in the mouth of the principal. *Wright v. Kitchingman, T. 5 G. Str. 197.*]

[Nor, matter which might have been pleaded to the *scire facias*. *Ibid.*]

[That the judgment is entred *quid videbitur* instead of *videtur*, is not error; for *videtur cur.* is no judgment, and is implied in the *ideo consideratum est*. *Bellew v. Scott, T. 7 G. Str. 440.*]

[That A. who was sworn as a juror returned on the principal pannel, was not returned by the sheriff; for it is contrary to the record. *Helbut v. Held, H. 12 G. Str. 684. 2 Ld. Raym. 1414.*]

[That there is no *venire* nor *habeas corpora*. *Ibid.*]

[That the defendant died before the day of *nisi prius*, if the record mentions that he appeared on that day. *Plomer v. Webb, M. 3 G. 2. 2 Ld. Raym. 1415.*]

[That the damages and costs given by the court on demurrer are not said to be given *ex assensu* of the plaintiff. *Semb. Tully v. Sparkes, P. 3 G. 2. Str. 867. Ld. Raym. 1570.*]

[If judgment be entred *ideo conf.* it is an abbreviation of *consideratur*, and as good as *conf. est*, for *consideratum est*. *Cowper v. Osborne, T. 4 G. 2. Str. 874.*]

[In *quare impedit* brought by the crown, the original writ was returnable at a general return, the *venire* at a day certain, not error, not discontinuance but miscontinuance, and helped by statute of jeofails, 32 H. 8. which extends to the crown in civil suits. *Rex v. Epif. Miden. T. 3 G. Str. 62.*]

[In error out of B. R. in Ireland, for affirmance of a judgment in C. B. there, want of warrants of attorney on the writ of error, assigned, but set aside. *Chartres v. Cusaick, H. 5 G. Str. 141.*]

[A judgment cannot be reversed by the recital of the writ, but the very process itself shall be brought before the court. *Ducifs. Hamilton v. Incledon, M. 6 G. Str. 225.*]

[If a peer is put in *misericordia*, &c. generally, it is not error. *Ibid.*]

[If the plaintiff is adjudged to be in *misericordia* instead of the defendant, it is not error. *Pullin v. Stokes, Exc. Ch. T. 34 Geo. 3. 2 H. Bl. 312.*]

[It is not a cause of error to enter a judgment of *misericordia* in a *qui-tam* action for a penalty. *Humble v. Bland, B. R. E. 35 Geo. 3. 6 T. R. 255.*]

[The death of plaintiff in ejectment. *Moore v. Goodright, P. 4 G. 2. Str. 899.*]

[That a writ of inquiry does not bear *teste* in the name of the person who is chief justice of C. B., for the court will not judicially take notice who are judges of C. B. *Skip v. Hooke, M. 11 G. 2. Str. 1080. Andr. 74. S. C. by the title of Hook v. Ship.*]

[That defendant filed warrant to defend by A. his attorney, and that on the judgment it appears he appeared and defended by B. his attorney; for it is contrary to the record. *Bradburn v. Taylor, P. 18 G. 2. Wilf. 85.*]

[Plaintiff in error to a *sci. fa. quare execut. non.* may not plead payment. *Elmes v. Martin, H. 10 G.* Nor that the damages recovered had been levied. *Parker v. Stanton, H. 12 G. Str. 679. 2 Ld. Raym. 1414.*]

[If issue was joined on such plea, and found for defendant in error, he might take out execution; but not *non. prof.* the writ of error till after a rule to assign errors. *Ibid.*]

(3 B 17.) *Scire facias ad audiend. Errores.*

If the defendant in error does not appear upon the return of the *scire facias*, another *scire facias* issues.

If he does not appear at the return of the second *scire facias*, the judgment shall be reversed; for two *nichils* amount to a garnishment. *Yel. 113. Vide post. (3 L 9.)*

[On *scire feci* returned, if the defendant does not appear and join in error, plaintiff may put it in paper without taking out a rule to join in error. *Thatcher v. Stephenson, H. 5 G. Str. 144.*]

[*Scire facias* in error need not lie four days in the office before the return, though *scire facias* against bail must. *Miller v. Terraway, T. 5 G. 3. 3 B. M. 1723. Gross v. Nash, T. 9 G. 3. 4 B. M. 2439.*]

If the defendant appears, the plaintiff must assign his errors, or by rule with the clerk shall have day for it till another term. *Yel. 7.*

And



And if he does not, the defendant may have a *scire facias quare executio non*, &c. and if the sheriff returns *nichil habet*, a second *scire facias* having fifteen days between the *teste* and return. *Cro. El.* 706.

If the sheriff returns *scire feci*, or otherwise, at the return of the second *scire facias*, the defendant may give a rule to assign his errors; and if the plaintiff does not assign them, the judgment shall be affirmed. *Vide Intr.* 4. 2 *Leo.* 107.

[There must be a rule on the *scire facias quare executio*, &c. before there can be a rule to assign errors. *Marshall v. Cope*, *M.* 5 G. 2. *Str.* 917.]

[If the defendant in error from *C. B.* into *B. R.* give an eight day rule to certify the record, the record may be certified in less time, tho' the rule expire in vacation; and a *scire facias quare executionem non* having been issued immediately upon the record being certified, returnable the first day of the following term, the defendant may serve the plaintiff in error on that day, with a rule to appear to the *scire facias*, and a rule to assign errors. *Sambridge v. Housley*, *B. R. T.* 27 *Geo.* 3. 2 *T. R.* 17.]

[It is irregular to rule the plaintiff in error to assign errors before the expiration of the rule to appear to the *scire facias*. *James v. Staples*, *B. R. T.* 35 *Geo.* 3. 6 *T. R.* 367.]

[If there are two defendants in error, and one only prays *scire facias quare*, &c. and plaintiff comes in and assigns his errors, it is not error tho' possibly he might have moved to quash it, but he has waived his objection. *Knox v. Costello*, *M.* 6 G. 3. 3 *B. M.* 1789.]

[If original plaintiff dies pending error, his executor may have *scire facias quare*, &c. out of *C. B.* before record transcribed; after, out of *B. R.*, and plaintiff in error may have *scire facias ad audiend.* out of *B. R.* against executor. *Barnes*, 432.]

[If upon the return of a *scire facias* plaintiff assigns his errors, all further proceedings shall be staid upon it; but where he stands out upon pleadings to the *sci. fa.* execution shall go, if it be adjudged against him. *Gardiner v. Claxton*, *M.* 7 G. *Str.* 390.]

If a defendant in error dies, a *scire facias* goes against his executor; and upon *scire feci* or two *nichils* returned, the plaintiff shall assign his errors; and, if it be erroneous, the judgment shall be reversed. *R. Tel.* 113.

In error upon a *quare impedit*, if the defendant takes out a *scire facias quare executio non*, &c. which is returned *scire feci*, at the day of the return, the plaintiff may assign his error, tho' the *scire facias* was general, and not *ad assignandum errores*. *R. Dy.* 77. a.

If the plaintiff in error was outlawed before error brought, and, after appearance by the defendant, he does not assign errors, the defendant may take out a *capias utlagatum*, and need not have a *scire facias*. *R. Cro. El.* 706.

If the plaintiff, outlawed, appears to assign errors, he shall be committed till he finds bail for the outlawry, and also for satisfaction of the party. *Cro. El.* 707.

If the defendant, in error upon a judgment for land, appears and is not the *tertenant*, a *scire facias* shall be awarded against the *tertenant*, before the judgment reversed or errors examined: as, in error upon a fine against the heir of the conusee. *Dy.* 321.

So, in error upon a common recovery. *R. 3 Mod.* 119.

[If on error from *Ireland B. R.* had affirmed their judgment on a collateral point, (that the *parol* might demur,) plaintiff, on defendant in error's coming of age, could not take out *scire facias ad audiend. errores in B. R.* in England; but the record must have been remitted to *Ireland. Fortescue A. v. Mason, T. 19 G. 2. Str. 1258.*]

[If plaintiff below brings error to reverse his own judgment, and does not proceed, the court will make a rule to assign errors in limited time, or his writ to be *non-pross'd*; for *scire facias* would here be improper. *Johnson v. Jebb, M. 6 G. 3. 3 B. M. 1772.*]

[*Scire facias* ought to be made returnable according to the nature of the original suit below; as, if the original suit was returnable on a day certain, and the *sci. fa.* on a general return or *vice versa*, the *sci. fa.* may be quashed on motion. *Ld. Raym. 1417. Str. 694.*]

(3 B 18.) Pleas to Errors assigned.

(3 B 18.) *In nullo est erratum.*] When the defendant appears, if the plaintiff assigns error in fact, the defendant may join issue upon the fact. 1 *Lev. 80.*

If he pleads *in nullo est erratum*, he admits the fact assigned for error. *R. Yel. 57. R. 2 Lev. 38.*

But if the fact assigned for error is no error, *in nullo est erratum* is a good plea, for it is in the nature of a demurrer, and refers the matter to the judgment of the court. *R. Yel. 58. R. 2 Cro. 521. 1 Lev. 311.*

As, if the error is that *A.* returned upon a panel, was afterwards sworn upon the *tales*; for it is contrary to the record. *R. 2 Cro. 28.*

That *A.* was returned in the panel and *B.* sworn. *Sho. 49.*

So, if the plaintiff assigns errors in law, the defendant may plead *in nullo est erratum.*

After *in nullo est erratum* pleaded, if the plaintiff discontinues, he shall have no new writ of error, as he may where he discontinues before plea. (*Vide Pr. Reg. 200.*)

If the defendant dies after *in nullo est erratum* pleaded, the court may reverse the judgment without a new writ of error; for the writ does not abate. *Sho. 186.*

After *in nullo est erratum*, assignment of a general error shall not be amended. 2 *Mod. Ca. 304.*

(3 B 19.) *Release of errors.*] So, the defendant may plead a release of errors, &c. *Sho. 50. Ass. Ent. 332.*

[A release of errors in the same instrument with the warrant of attorney, and dated in term in which judgment is entred, is good. *Landon v. Pickering, M. 18 G. 2. Str. 1215.*]

[A release of errors given after judgment, and an award of execution on a *scire facias*, extends to the award of execution; but not, had it been given after the judgment, and before the *scire facias* taken out. 3 *Atk. 297.*]

So, an heir in error against him, tho' he has nothing in the land. 1 *Rol. 766. l. 15.*

And if several sue and have judgment against them, and bring error, a release of one plaintiff is a bar. 3 *Mod. 135. 2 Rol. 412. l. 12. 2 Cro. 117.*

So, if there are several judgments against several defendants in trespass,



trespass, and they join in error, a release of one is a bar. 2 *Rol.* 411. l. 50.

But a release by one of the defendants in error is no plea against the others. *R.* 3 *Mod.* 109. 135. *R.* 6 *Co.* 25. b.

Tho' they were all sued jointly, and for a personal thing. *R.* 3 *Mod.* 109. *R.* 2 *Cro.* 117.

For he who released may be summoned and severed, w<sup>re</sup> summons and severance lie in the original action. 6 *Co.* 25. a.

So, where there is judgment against several for a thing in the realty, a release of errors by one is no bar against the others: as, upon a judgment in partition, *R.* *Cro.* *El.* 65.

A release of errors pleaded after the *essoign-day*, and before the *quarto die post*, must be *puis darrein continuance*. *R.* 2 *Cro.* 243.

[If a release of errors is pleaded, the judgment shall be *quod* the plaintiff in error *nil capiat per breve*, not that the judgment shall be reversed, when it is erroneous. *R.* *Sho.* 50. *Cunningham v. Houston*, *M.* 5 *G. Str.* 127. *Dent v. Lingwood*, *H.* 12 *G. Str.* 683.]

[Nor, will the court affirm the judgment, on the principle that the plea is a confession it was erroneous. *Cunningham v. Houston*, *M.* 5 *G. Str.* 127. *Dent v. Lingwood*, *H.* 12 *G. Str.* 683.]

So, if the release is mispleaded, or found against the defendant, the judgment shall not be reversed, except where error appears upon the record. *Semb.* 1 *Sal.* 268.

If error in fact is alleged, which does not appear by the record, nor is confessed by the party, the court *ex officio* award a *certiorari ad informand. conscientiam*. *Per three J.* *Holt cont.* 1 *Sal.* 268. *Mod. Ca.* 113. 206.

So, the defendant in error may plead, a fine after the land recovered and five years passed. *R.* 1 *Rol.* 766. l. 10.

So, a release by the demandant of his right in the land, tho' the defendant has nothing in the land. *Ibid.* l. 20.

Or, bastardy of the demandant, where it is material. *Ibid.* l. 17.

[The statute of limitations may be pleaded. *Street v. Hopkinson*, *M.* 10 *G. 2. Str.* 1055. *B. R. H.* 345.]

[But on error to reverse a common recovery, a terre-tenant can plead nothing to the *scire facias*, but a release of errors. *Hall v. Woodcock*, *T.* 30 & 31 *G. 2. 1 B. M.* 359.]

[It frequently happens, in the course of a cause, that the defendant among other things consents, by rule of court to bring no writ of error, which has so far the effect of a release of errors.]

[But a consent rule to confess a judgment, in an action on a former judgment, on which error was brought, with stay of execution till the writ of error determined, does not imply a consent to bring no writ of error on the second judgment. 2 *Bl.* 780.]

### (3 B 20.) Judgment in Error.

If the judgment, upon writ of error, be affirmed, the court, who affirm it, may also give judgment for costs for delay of execution. 2 *Sand.* 225. 4 *Mod.* 127.

And may award execution by *capias*, *feri facias*, or *elegit*, without a *scire facias*. *Cro. El.* 707. *Vide Execution*, (11.)

[By *st.* 3 *H. 7. c.* 10. enforced by 19 *H. 7. c.* 20. it is enacted, that when judgment shall be affirmed, or the writ discontinued, or the

the party nonsuited on a writ of error brought by a defendant or tenant, the person against whom it is sued out shall recover his costs and *damage* for his delay and wrongful vexation in the same, by discretion of the justices before whom such writ of error is sued.]

[The court of *Exchequer-chamber* will allow interest to a defendant in error under this statute on a judgment of *non pros*, as well as on a judgment of affirmance. *Sykes v. Harrison*, E. 37 Geo. 3. 1 Bos. & Pull. Rep. 29.]

For the future the interest allowed will be 5 *l.* per cent. instead of 4 *l.* *Ibid.* *Vide Costs, in Error* (B).

[The word *damage* in this statute means something different from costs. *Doug.* 753. *n.*]

[And where the action is for the recovery of a debt, the interest ought to be the measure of the *damage*. *Ibid.* *Vide Damages* (D).]

[In debt on a recognizance, bail in error in the *Exchequer-chamber* are not liable to pay interest on the judgment between the time of signing the judgment in *B. R.* and the affirmance of it in *Cam. Scacc.* but they are liable for interest due subsequent to the affirmance. 2 *T. R.* 157.]

[In debt on a judgment affirmed in error, the jury by way of damages may give interest on the sum recovered by the judgment from the time of signing it, where, by the practice of the court in which error is brought, such interest is not allowed in costs on the affirmance. 2 *T. R.* 78.]

[If judgment of *C. B.* be affirmed in *B. R.*, the latter may award execution. *Cowp.* 843.]

[But in a writ of error to the house of lords, if the judgment be affirmed, the transcript is remitted into *B. R.*, which awards execution. *Cowp.* 843.]

[So, formerly, in a writ of error from *B. R.* in *Ireland* to *B. R.* here, the transcript was sent back by *mittimus* to *B. R.* in *Ireland*, which issued the subsequent process. *Ibid.*]

[If judgment in *quare impedit*, with damages to the patron, be affirmed, the damages on the delay shall only be assessed at the rate of the interest of the original damages. *Bishop of London v. Mercers' Company*, H. 5 G. 2. *Str.* 925.]

[If on a *scire facias* against an executor, execution is awarded, and then the record goes on with a *consideratum est etiam*, and awards costs; judgment shall be reversed as to the costs, and affirmed for the rest. *Bellew v. Aylmer*, T. 5 G. *Str.* 188.]

[In an action for words, if the jury on writ of inquiry give 10 *s.* damages, and costs are taxed at 13 *l.* and judgment to recover them, judgment shall be reversed *in toto*. *Lamper v. Hatch*, P. 5 G. 2. *Str.* 934.]

[An *avowant* is not a plaintiff within 3 H. 7. c. 10. and is not entitled to costs or damages on the affirmance by a court of error of a judgment in his favour. *Doug.* 709. *n.*]

If the judgment, upon writ of error, be reversed, the court who reverse it shall give the same judgment generally as the inferior court at first ought to have given. 2 *Sand.* 256. 1 *Sal.* 401.

As, if a judgment in *B. R.* for the defendant in ejectment is reversed in parliament, judgment shall be there given that the plaintiff recover



recover his term. 4 *Mod.* 127, 8. *Ca. Parl.* 57. 1 *Sal.* 403. *Carth.* 180. *Skin.* 515.]

[Where judgment for the defendant in ejectment on a special verdict is reversed in the *Exchequer-chamber*, that court on motion will give final judgment for the plaintiff. *Mellor v. Moore*, *E.* 37 *Geo.* 3. 1 *Pos. & Pull. Rep.* 30.]

And if the parliament omits or refuses such judgment, *B. R.* cannot afterwards give it, for by the first judgment the court has executed its authority. *R.* 4 *Mod.* 127. *Ca. Parl.* 57. 1 *Sal.* 403.

So, if judgment in *C. B.* for the defendant in trespass is reversed in *B. R.* this court shall give judgment for the plaintiff. 2 *Cro.* 206. *R.* 1 *Sal.* 262. 401.

So, if judgment in *C. B.* that the writ abate is reversed in *B. R.* this court shall give the same judgment as *C. B.* ought to have given. 2 *Sand.* 256. 2 *Inst.* 23. 4 *Inst.* 72. *R.* 1 *H.* 7. 12. *a.*

So, if a judgment in *Wales* is reversed there. 2 *Sand.* 257. 1 *Vent.* 61.

[So, when a record is removed into *B. R.* from a county palatine by writ of error, and that writ is *non proffed*, the court of *B. R.* will award execution into any county in the kingdom, which could not have been issued in the court below beyond the limits of the county palatine. *Cooperthwaite v. Owen*, *B. R.* *E.* 30 *Geo.* 3. 3 *T. R.* 657.]

So, if the last judgment in account in an inferior court is reversed in *B. R.*, a *capias ad computandum* shall be sued out of *B. R.* *R.* *Cro.* *El.* 806.

So, if judgment in *Ireland* in ejectment for the defendant is reversed in *B. R.* they shall give judgment for the plaintiff. *Cro. Car.* 511. *Vide Ireland* (G).

So, if a judgment in the *hustings* is reversed in error before commissioners assigned. *R.* 2 *Sand.* 256.

Or, judgment in an inferior court is reversed in error in *B. R.* *R.* *Sho.* 400.

[If there is judgment against two tenants (*A.* and *B.*) in dower, for dower, and for damages and costs, and they two bring error, and *A.* dies, and his heir and *B.* bring new writ of error, and judgment is affirmed; execution for damages and costs must be awarded against both plaintiffs in error; and there must be a writ of inquiry to compute damages from the judgment to the affirmance: and if otherwise, on error brought here on judgment in error in *Ireland*, *B. R.* will affirm as to the dower, and reverse as to the damages, and command *B. R.* in *Ireland* to award writ of inquiry, and to do as by law, *Ge. Kent v. Kent*, *P.* 7 *G.* 2. *Str.* 971. *B. R. H.* 50.]

But if judgment in *B. R.* is reversed in the *Exchequer-chamber*, the record shall be remanded by the *st.* 27 *El.* for the *Exchequer* has no authority but to affirm or reverse the judgment of *B. R.* *Cont.* if it is upon a special verdict. 1 *Sal.* 403.

And therefore, if there is judgment in trespass, upon a demurrer, for the defendant in *B. R.* which is reversed in the *Exchequer-chamber*, the record shall be remanded, and *B. R.* shall award a writ of inquiry, and shall give final judgment thereon. *R.* 2 *Cro.* 206. *Yel.* 26. 4 *Mod.* 125. *Sal.* 403.

So, the record shall be remanded where the plaintiff in error is nonsuited or discontinues. 2 *And.* 123. So,

So, if judgment in *C. B.* for the plaintiff is reversed in *B. R.* in error by the defendant, there shall be judgment for the reversal only. *R. 1 Sal. 262.*

[If a judgment in *C. P.* for the plaintiff is reversed in *B. R.* in error by the defendant, and a *venire facias de novo* is awarded, the *venire* must be returnable in *B. R.* *Bent v. Baker, B. R. H. 29 Geo. 3. 3 T. R. 27.]*

If judgment is reversed for error, the whole shall be reversed: and therefore where the declaration is upon several counts and judgment for the plaintiff, it cannot be reversed for part, if there is error only in one count, and stand for the residue. *R. 1 Sal. 24. R. Carth. 235.*

So, it shall not be reversed *quoad* one defendant and remain against the others who are charged with him: as, if there are three defendants, and one is an infant, it shall not be reversed *quoad* the infant only. *R. Sti. 121. 125. Al. 74.*

So, if one is dead. *1 Rol. 775. l. 12.*

So, if it is reversed for a fault in one particular of the writ, it shall be reversed for the whole. *R. 1 Rol. 2. 1 Rol. 775. l. 5. Cro. Car. 471.*

But a judgment given upon the common law as to part, and upon a statute as to other part, may be reversed for so much as was founded upon the statute, if it is erroneous, and shall stand for the residue. *1 Sal. 24.*

[So, when the parts of a judgment are separated; it may be affirmed as to part, and reversed as to the rest. *Lill. Ent. 233. Str. 189. 808. 4 Burr. 2022. 3 T. R. 435.]*

[But on a writ of error where one count appears bad, and the verdict is entred generally on all the counts, the court must reverse the judgment *in toto*, since they cannot see on which of the counts the damages were given. But this is not applicable to the case where the damages are assised severally on the separate counts. By *Buller J. Hancock v. Haywood, B. R. M. 30 Geo. 3. 3 T. R. 435.]*

So, judgment in an information *qui tam, &c.* may be reversed as to the informer, and stand for the king. *R. Mo. 565.*

[If judgment for common informer gives damages for detention and costs *de increment.* the judgment for the penalty may be affirmed, and for the damages and costs reversed. *Frederick v. Lookup, H. 7 G. 3. 4 B. M. 2018. Cuming v. Sibley, M. 10 G. 3. 4 B. M. 2489.]*

So, a fine may be reversed for part, and stand for the residue. *R. Cro. El. 469. R. Jon. 3. R. Skin. 343.*

So, a fine of land of *ancient demesne*, and other land, if it is reversed for the land of *ancient demesne* in a writ of deceit, shall stand for the residue. *R. 1 Rol. 775. l. 45. Vide Ancient Demesne, (E 2.)*

So, where there are distinct judgments, one may be reversed and not the other; as, a judgment *quod computet*, and afterwards a final judgment; if this is reversed, the judgment *quod computet* shall stand. *1 Rol. 776. l. 40.*

So, if error is brought upon the principal judgment, and also upon the judgment in *scire facias*, and the last judgment is reversed, the first shall stand. *1 Rol. 776. l. 45.*

If several damages are given, it shall be reversed for one count, and stand for another and costs. *R. 2 Cro. 343.*



If judgment is reversed in error, the party shall be restored to all he has lost.

And a writ of restitution shall be awarded to inquire what profits the plaintiff, who recovered, has taken *colore judicii predicti*. and for the damages found by such inquisition the defendant shall have execution. *R. 2 Cro. 698.*

And it is sufficient to say all profits taken *colore judicii* without saying since execution; for the plaintiff might have entred and taken the profits before execution sued. *R. 2 Cro. 698.*

And the writ of restitution shall not be avoided by bringing the value, for which the goods were sold, into court, or paying it to the defendant, for perhaps they were sold under the value. *4 Mod. 161.*

But all profits *a tempore judicii* will be bad. *R. 2 Cro. 698.*

So, where the money appears upon record to be levied and paid to the party, the defendant shall have restitution without a *scire facias*. *R. Sal. 588.*

But there shall be no writ of restitution against a stranger to the record, without a *scire facias*. *R. Sho. 261.*

As, if a judgment upon an indictment for barratry is reversed after the money levied and paid to the collector, a writ of restitution shall not be awarded against the collector. *R. Sal. 587.*

If the plaintiff after a recovery in ejectment is disseised, or makes a feoffment, and then the judgment is reversed, a writ of restitution shall not be awarded against the disseisor or feoffee. *Sal. 587.*

If the money is levied by the sheriff, and not paid to the plaintiff, a writ of restitution shall not be awarded against the sheriff without a *scire facias*. *Sal. 588.*

[If infancy be assigned, whereof the court doubts, a feigned issue shall go; and if found for plaintiff in error, judgment will be reversed on return of the *posse*, on motion, without argument in the paper. *Ogburn v. Berrington, M. 5 G. Str. 127.*]

[If plaintiff in error assigns infancy in defendant, and appearance by attorney, takes out *scire facias ad audiend.* and on *scire feci* returned, enters the default; on producing the record, judgment shall be reversed, without making it a *concilium*, or putting it in the paper. *Walmsley v. Roson, T. 17 G. 2. Str. 1210.*]

[The judgment on demurrer for duplicity of errors assigned, shall be an entry, *quod affirmetur*. *Jeffrey v. Wood, T. 7 G. Str. 439.*]

[If the statute of limitations is pleaded, the judgment shall be, that the plaintiffs be barred; although defendant had prayed that judgment be affirmed; for the court is not bound by the prayer of an improper judgment. *Street v. Hopkinson, M. 10 G. 2. Str. 1055. B. R. H. 345.*]

[If error is not brought in the same court, they cannot award a *venire facias de novo*. *Ibid.*]

[If error is brought against the judgment against testator, and award of execution against executors, the first may be affirmed, and the other reversed. *Ibid.*]

[If writ of error is quashed, the court gives leave to defendant in error to take out execution. *Crow v. Murdock, M. 12 G. 2. Andr. 287.*]

## (3 C) Proceeding in Escheat.

**I**N escheat the plaintiff must count, that the land was held of him, or his ancestor, and the tenant died without heir. *Rast. Ent. Escheat, pl. 1, 2. Vide Escheat.*

That the tenant was outlawed, or hanged for felony. *Rast. Escheat, pl. 6. F. N. B. 144. H.*

And the writ shall say *suspensus per collum*, tho' the tenant died after judgment before execution. *F. N. B. 144. H.*

*Pleas.]* In bar the tenant may traverse the tenure. *4 Co. 11. a. Rast. Escheat, pl. 2.*

Or, plead that the land descended to himself or another. *Rast. Escheat, pl. 3. 5.*

But feisin of services alleged in the count is not traversable. *4 Co. 11. a.*

## (3 D) Proceeding in False Judgment.

**A** Writ of false judgment lies where an erroneous judgment is given in any court, not of record, in which the suitors are judges. *F. N. B. 18. a.*

*False judgment* lies for misprision in a customary claim, tho' it is not claimed by the common law. *R. Mo. 854.*

Upon a judgment in a court of record, there shall not be a writ of false judgment, but a writ of error. *Vide ante, (3 B 1. &c.)*

If there are no suitors, by whom the plaint may be certified, there shall not be *false judgment*: as, in a copyhold court, in which, upon an erroneous proceeding, the copyholder must sue to his lord by petition. *F. N. B. 18. H.*

A writ of false judgment upon a judgment in the sheriff's court, is in the nature of a *recordari*. *Ibid. A. B.*

Upon a judgment in another court, not of record, it is in the nature of an *accedas ad curiam*. *Ibid. D.*

And it may be sued by any one against whom false judgment is given, his heir, executor, or administrator.

Or, by tenant there by *resceit*. *F. N. B. 19. G. H.*

Or, by any one who has damage, tho' the other defendants do not join, as they ought to do in error. *R. Mo. 854.*

And against the party to the judgment and the *tertenant*. *F. N. B. 18 C.*

Or, against the *tertenant* only, without naming him who was party to the judgment. *Ibid. I.*

When the whole record is certified, and not before, the plaintiff shall assign his errors. *F. N. B. 18. I.*

And shall have a *scire facias ad audiendum errores*, as in error. *Ibid. F. G.*

Or, if the defendant has day by the roll, the plaintiff may assign errors without a *scire facias* against him. *Ibid. F.*

If the defendant makes default after appearance, a *grand cape*, &c. shall issue against him. *F. N. B. 19. B.*

And if he cannot save his default, or makes a second default, t' e judgment shall be reversed. *Ibid.*



If a writ of false judgment abates, or the plaintiff is nonsuited, the defendant shall have a *scire facias quare execution. non.* *F. N. B.* 18. *F. G.*

The writ of false judgment ought to be served in court. 6 *H.* 7. 16. *a.*

And if the lord refuses to hold his court, a *disfringas tenere curiam* goes against him. *Ibid.*

The writ, being served, shall be a *superfedeas* to all proceeding there. 6 *H.* 7. 15. *b.*

### (3 E) Proceeding in *Formedon*,

#### (3 E 1.) Process.

*F*ormedon lies in discender, remainder, or reverter.

When it lies or not, and the nature of the writ, *vide F. N. B.* 211. *L.* 212, &c.

The process in *formedon* is summons, *grand* and *petit cape*; as, in dower. (*Vide Com. Att.* 217. *Edit.* 1695.) *Vide ante*, (2 Y 1.)

At the return of the summons the tenant or his attorney may cast an effoin, which shall be adjourned to the 15th day after.

And every defendant may cast a several effoin, for the *st. W.* 1. 43. does not extend to an effoin before appearance. *R. Hob.* 8. *Vide ante*, (2 Y 1.)

If the tenant does not appear at the return of the summons, or day to which the effoin is adjourned, a *grand cape* issues.

And by the *st.* 32 *H.* 8. 21. and 16 *Car.* 6. it seems that the *grand cape* and summons respectively have return upon the 9th return after the *teste* inclusive.

At the return of the *grand cape* the tenant may save his default by waging his law of *non summons*, &c. *Vide ante*, (2 Y 1.)

#### (3 E 2.) Count.

(3 E 2.) *In formedon in discender.*] If the tenant appears upon the summons, or a day is given by effoin, or if he appears at the return of the *grand cape*, and the demandant, upon waging his law of *non summons*, releases the default, then the demandant shall count.

[The demandant claimed under a devise, to which was annexed in the will a condition to pay a sum of money: the count set forth only the devise, omitting the condition, and held to be no objection. *Brice v. Smith*, *C. P. E.* 10 *Geo.* 2. *Willes*, *Rep.* 1.]

In a *formedon in discender*, if husband and wife were both seised in tail, the issue must demand as heir to both; if one was in tail, the other for life; he must make himself heir to him in tail only. *Reg.* 239. *a.*

The demandant must make himself heir to him who was last seised by force of the entail. 8 *Co.* 88. *b.* *Dy.* 216. *a.* *F. N. B.* 212. *F.* 216. *C. Reg.* 238. *b.*

And must mention every one in his pedigree, who was seised, or had a right descended to him by force of the entail. 8 *Co.* 88. *b.* *F. N. B.* 212. *F.*

And every one who was seised by force of the entail ought to be named son and heir, or brother and heir, &c. *Ibid.*

But

But if an heir, who survived his ancestor, died before he was actually seised, it is sufficient to name him *son*, without saying *heir*. 8 Co. 88. b. F. N. B. 212. F.

Yet if he is named *son* and also *heir*, it does not prejudice. 8 Co. 88. b. but is a safer way. F. N. B. 212. F.

So, the demandant must shew him who was last seised to be heir to the donee. 8 Co. 88. b.

And it is not sufficient that he is named *son*, if he is not also *heir*. *Ibid.*

So, if the demandant claims as cousin and heir, he must shew how cousin. F. N. B. 216. C.

In a *formedon* by husband and wife, the descent must be alleged to the wife only. *Hob. 1. Vide supra.*

But if a son dies in the life-time of his ancestor, he need not be named in the pedigree. F. N. B. 212. F. 8 Co. 88. b. *Cro. Car.* 435.

So, if a son survives, and is seised and dies without issue, his brother need not shew that he died without issue, but it is sufficient to name himself *son* and *heir*. F. N. B. 216. C. *Reg.* 238. 9.

So, it is sufficient, if it is not said by express words that the ancestor is dead; for *son* and *heir* supposes it. *Reg.* 243. a.

(3 E 3) In remainder or reverter.] In *formedon* in remainder the demandant ought to mention all *mesne* remainders. 8 Co. 88. a.

A *formedon* in remainder must say that the prior donee died without issue. *Reg.* 239.

So, in *formedon* in reverter, as heir, he must mention his pedigree from the donor. 8 Co. 88. a.

And in *formedon* in reverter, he must allege the *esplees* in the donor and in the donee. F. N. B. 220. C.

If the tenant in tail discontinued, the *formedon* shall say, *remansit jus*, if not *quod tenementa remanserunt*. 8 Co. 86. a.

But if the remainder is executed, the demandant shall have a *formedon in disconder*, without mentioning the precedent remainders. 8 Co. 88. a. *Reg.* 243. b. 244. a.

So, in *formedon* in remainder, or reverter, the demandant need not name the issues of the donee; but it is sufficient to say, *eo quod* the donee died without issue. *Dy.* 216. a. 8 Co. 88. a.

And in *formedon* in remainder or reverter by husband and wife, the reverter may be alleged to the wife only, or to both. *R. Hob. 1.*

### (3 E 4.) Pleas.

After count the tenant may imparl.

And after imparlance (at least after a special imparlance) may demand a view. *Lut.* 857. *Vide ante*, (2 Y 3.)

[The tenant may demand a view either before or after the demandant has counted. *Davis v. Lees*, C. P. T. 16 Geo. 2. *Willes*, 344.]

[But he is not entitled to a view where it is clear that he knows what lands are demanded. *Ibid.*]

[It is no bar to a view to counterplead that the tenant is in actual possession



possession of the lands demanded, without adding "and of no other lands in the same vill," &c. *Willes*, 344.]

And after view may cast an effoign. *Vide ante*, (2 Y 3.)

At the day given by effoign the demandant counts *de novo*, and the tenant may imparl.

At the day by imparlance the tenant must plead or vouch.

He may plead in abatement, as in other real actions. *Vide Abatement*.

He may plead in bar the general issue, *ne donas pas*. *Lut*, 851. b.

Or, a special plea; as, a common recovery. *Noy*, 1.

Gift after disseisin, and a recovery by the disseisee subsequent to the gift.

An exchange by the ancestor of the demandant with the ancestor of the tenant for these lands, and that the demandant has the lands given in exchange. (*Vide Co. Lit.* 384. b.)

An estate prior to the gift, and after the gift a remitter to the prior estate.

That the donor was seised after the gift, and made an estate to the tenant, &c. in fee.

Warranty by way of rebutter. (*Vide Co. Lit.* 384. b. 385. a.)

So, in formedon in descender, a fine with proclamations. (*Vide Co. Lit.* 372.)

Or, a feoffment with warranty and assets. (*Vide Co. Lit.* 374, 375, 384. b.)

So, in formedon in remainder or reverter, a collateral warranty. (*Vide Co. Lit.* 372.)

Or, a fine and non-claim for five years after title accrued. (*Vide Co. Lit.* 372. b.)

Or, a fine with warranty, which descended upon the demandant. *Lut*, 852. b.

If the formedon is of a moiety, tho' it shews the uses of the other moiety, the defendant need not plead but to the moiety demanded. *Sav.* 86.

### (3 E 5.) Voucher.

If the tenant vouches, a summons *ad warrantizandum* issues against the vouchee, returnable at the ninth return after. (*Vide Com. Att.* 217. *Edit.* 1695.)

And if *nichil* is returned, an *alias*, *pluries*, and then a *sequat. sub suo periculo*, and at the return of the *sequat.* the vouchee may be effoigned.

Then the demandant counts against the vouchee, who may imparl, plead, and vouch over, &c.

### (3 F) Proceeding in Partition.

#### (3 F 1.) The Process.

**W**HEN partition lies, between whom and how it shall be made, *vide Parcener*, (C 1, &c.)

The process in partition is summons, attachment, and distress infinite. *F. N. B.* 62. *M.* 1 *Brownt.* 156.

At the return of the summons each defendant may cast an effoign. *Brownt.* 156.

Or,

Or, if he does not, then at the return of the *pone*. *Com. Att.* 168.

If the defendant does not appear upon the *pone*, a *distringas* shall issue, upon which he shall be amerced to five pounds, which shall be doubled *toties quoties*. *Comp. Att.* 168.

If one defendant casts an effoign, the other may have another effoign; for the *ſ. W.* 1. 43. does not extend to an action for division of land. *R. Hob.* 8.

A writ of partition must be against the tenant of the freehold, *Co. Lit.* 167. *a.* *Vide Parcener*, (C 6.)

But it is sufficient that the writ is general, tho' it is by joint-tenants or tenants in common. *R. Cro. El.* 743. 759.

### (3 F 2.) Declaration.

When the defendant appears, the plaintiff declares against him.

[By *ſ. 8 & 9 W.* 3. c. 31. *ſ. 1.* after process of *pone* or attachment returned on a writ of partition, affidavit being made by any credible person of due notice given of the said writ of partition to the tenant, &c. and a copy thereof left with the occupier, &c. at least forty days before the day of the return of the said *pone* or attachment, if the tenant, &c. do not, within fifteen days after the return of such writ of *pone*, &c. cause an appearance to be entered in the court where the process is returnable, then in default of appearance, the court may proceed to examine the demandant's title and quantity of his part to purpart, and award a writ of partition accordingly. *Vide 2 Bl.* 1134.]

Declaration by one parcener or joint-tenant against the others, must shew how they are parceners or joint-tenants. *Cro. El.* 64. *Vide ante*, (C 34.)

But not where they are tenants in common; for they claim by several titles, and one is not confusant with the other's title. *R. Cro. El.* 64.

So, if they are parceners, &c. a declaration which shews that it was the inheritance of the common ancestor in tail, is sufficient, without saying how the estate-tail commenced. *R. Dy.* 79. *b.*

But, if the declaration says that the plaintiff and defendant were seised in fee, where it is found that the defendant has only in tail, the writ abates. *R. Cro. El.* 760.

### (3 F 3.) Plea.

To the declaration the defendant may plead *non tenent inſimul*.

But by the *ſ. 8 & 9 W.* 3. 31. plea in abatement shall not be admitted in partition.

And a writ of partition shall not abate by the death of defendant.

So, the defendant cannot plead another writ of partition depending brought by him against the plaintiff. *R. 1 Brownl.* 158.

Nor, *non demifit*; for this amounts to *non tenent inſimul*. *R. 1 Brownl.* 157.

### (3 F 4.) Judgment.

After confession of the action or issue tried for the plaintiff there shall be judgment *quod partitio fiat*. *Co. Lit.* 167. *b.*

And



And thereon a writ shall issue to the sheriff to make partition, *Co. Lit.* 167. b.

Upon this writ the sheriff ought to attend with the jury in person, *Lit. sec.* 248.

But now, by the *st.* 8 & 9 *W.* 3. 31. if the sheriff is sick, &c. the under-sheriff with two justices of the peace may make partition:

And they are obliged to attend, on pain of 5 *l.* and shall have fees, &c.

The sheriff, after notice to the parties, in their presence, *si interesse voluerint*, must by the oath of the jury divide the tenements into equal parts, with regard to the value, and deliver one part to each parcener in severalty. *Co. Lit.* 167. b.

So, he who officiates as under-sheriff with two justices, shall do under the *st.* 8 & 9 *W.* 3. *R. per C. B. M.* 6 *Geo.*

And if the manor to be divided lies intermixed with other lands, so that the jury do not know the limits, quantity, &c. of the tenements to be divided, and the owner of the intermixt lands will not shew the certainty of his land, yet the jury ought to make partition as well as they can. *Dy.* 266. a.

After partition made, it must be returned to the court, under the seals of the sheriff and twelve jurors. *Lit. sec.* 249.

After return of the partition by the sheriff, there shall be final judgment *quod partitio prædicta stabilis imperpetuum teneat.* *Co. Lit.* 168. a. [2 *Bl.* 1159.]

So, by the *st.* 8 & 9 *W.* 3. 31. if no tenant enters his appearance within fifteen days after the return of the attachment, upon affidavit of notice to the tenant, and copy thereof left with the tenant of the land 40 days before the return, (if he be not demandant,) the plaintiff may declare, and the court examine his title, &c. and give judgment by default with a writ of partition to set out his part in severalty:

And after such writ executed upon eight days' notice to the tenant of the land, and returned, judgment final shall be given, which shall conclude all persons after notice, tho' not named in the proceeding, and tho' the title of the tenant be not truly set forth.

Provided if any within a year after judgment, or if infant, covert, nonsane, or out of the realm, within a year after inability removed, by motion shew a probable bar, or that the plaintiff had not title to so much, the court may admit him to plead, &c. or, if he shews an inequality of partition, the court may award a new partition.

### (3 G) Proceeding in *Perambulatione facienda*.

**A** Writ *de perambulatione facienda* lies, when two lords are in doubt of the limits of their lordships, *vills*, &c. and by consent appear in *Chancery*, and agree that a perambulation be made between them; their consent shall be inrolled in *Chancery*, and thereupon a writ *de perambulatione facienda* shall be directed to the sheriff to make perambulation, *assumpt. secum 12 militibus*, &c. *per met. & devis.* &c. *F. N. B.* 133. *D.* 134. C.

Or, the king may grant a commission to others than the sheriff to make perambulation. *F. N. B.* 134. A.

And if the parties cannot appear in person in *Chancery*, a *dedimus potestatem*

*poteftatem* may issue to take their consent, which shall be certified, and thereupon a commission or writ shall be awarded. *F. N. B.* 134. C.

So, it may be awarded to make perambulation of two or three counties. *Ibid. B.*

So, to make perambulation of a forest. *Vide Chase, (G 1.)*

The return upon such writ or commission ought to ascertain the division by metes and bounds.

And perambulation made binds all parties to it and their heirs, if the parties have a fee. *F. N. B.* 134. A.

But perambulation by consent of the tenant for life does not bind him in reversion. *Ibid. B.*

Proceeding in *pone*, *vide post.* (3 K 6.)

### (3 H) Proceeding in Prohibition.

**P**rohibition is an action founded upon an attachment for a contempt, where the defendant proceeds after a writ of prohibition served upon him.

[Leave to declare in prohibition only granted when the court inclines to prohibit; not when it inclines to the contrary. 1 *Bl.* 81.]

[If on shewing cause the rule is made absolute, and plaintiff directed to declare, yet defendant may refuse to accept it, and apply to stay proceedings, and submit; and the court will stay proceedings thereupon, without costs. *Gegge v. Jones, H.* 14 G. 2. *Str.* 1149.]

And the plaintiff must sue *qui tam*, &c. because a contempt to the king is supposed. 12 *Co.* 61. *Vide Prohibition (I).*

If several writs of prohibition are sued against divers persons in the same suit, he must declare against them severally. *F. N. B.* 40. I.

So, if the same writ is served in several counties, and they proceed severally. *Ibid.*

So, several cannot join in prohibition where the complaint is several. *R. Cro. Car.* 162.

So, the plaintiff must allege a *venue*, where the prohibition was served, and the proceeding in contempt was, otherwise it will be error, tho' there was judgment upon a writ of inquiry and damages found. *R.* 1 *Vent.* 348. 350. *Raym.* 387. 2 *Jon.* 128.

[In prohibition, the contempt is but form, and the jury need not give any verdict about it. *Statford v. Neale, M.* 8 G. *Str.* 482.]

[If the issue lies on plaintiff, who does not appear at trial, he must be called and nonsuited; and if defendant puts in his record, enters into his proof as a verdict and judgment, it is irregular, and shall be set aside. *Gardner v. Davis, P.* 24 G. 2. 1 *Wils.* 300.]

[If a *modus* be not proved as laid by the plaintiff in a suit in prohibition, there must be a verdict for the defendant; but if any *modus* be found, tho' different from that laid, that is a ground for the court to refuse a consultation. *Brock v. Richardson, B. R. M.* 27 *Geo.* 3. 1 *T. R.* 427.]



(3 I) Proceeding in *Quare Impedit*.

## (3 I 1.) The Process.

**A**LL writs of advowson of a church, viz. right of advowson, *quare impedit*, and assise of *darrein presentment*, by a common person, shall be in C. B. Reg. 29, 30.

But a *quare impedit* by the king may be in B. R. or C. B. F. N. B. 32. E.

The process in *quare impedit* is summons, attachment and distress. 1 Brownl. 158. 2 Inst. 126.

And by the common law it was distress infinite. 2 Inst. 124.

But now, by the st. 52 H. 3. 12. Marl. if the defendant does not appear, nor cast an essoin on the first distress, or before, there shall be judgment for the plaintiff, and a writ to the bishop. 2 Inst. 124. Dy. 353. b. 1 Brownl. 158. 2 H. 4. 1. b.

Tho' upon the summons or *pone* the defendant was not summoned, but *nihil* returned. 1 Brownl. 158. 2 Inst. 124.

By the stat. Marl. the sheriff ought to make summons by good summoners, and return their names upon the original. 1 Brownl. 158.

And if the sheriff does not do it, *disceit* lies against him. 1 Brownl. 158. Dy. 353. b.

The summons shall be served upon the defendant, or at the church door. 1 Brownl. 158. 2 Mod. 265.

And if he be not actually summoned, there shall not be judgment upon default at the distress. R. 1 Mod. 248. 2 Mod. 264.

If there are two defendants, and one does not appear, &c. upon the first distress, the plaintiff shall have judgment and a writ to the bishop, tho' the other defendant appears, and perhaps shall have a writ to the bishop also. 2 Inst. 124, 5. R. Bendl. pl. 136.

And if all the defendants make default upon the distress, the plaintiff shall have judgment against all; for all are supposed disturbers. R. Mo. 81.

But upon default after continuance, there shall be a *disfringas* instead of a *petit cape*. 2 H. 4. 1. b.

But before a writ to the bishop, the plaintiff ought to make title, and there shall be process to inquire of four points. R. Mo. 81. Vide post. (3 I 11.) Shall make title. Bend. pl. 136. 207.

At the return of the summons or *pone*, the defendant may have the common essoin. 2 Inst. 125. 1 Brownl. 159. Vide ante, (2 Y 1.)

Or, an essoin *de malo lecti*. Semb. 2 Inst. 124.

And if there are several defendants, one may be essoined after another. 1 Brownl. 159.

But, the defendant shall not have an essoin *de servitio regis*, in *terra sancti*, or *ultra mare*. 2 Inst. 125. 1 Brownl. 160.

Nor, shall have protection, nor his age. 1 Brownl. 160.

So, by the st. 12 Ed. 2. st. 2. after default and re-summons the defendant shall not have an essoin. R. Cro. Car. 341.

If the defendant casts an essoin, the plaintiff ought to adjourn it for fifteen days, otherwise he shall be nonsuited. 1 Brownl. 159. Dal. 81, 2.

And

And at the day given by the adjournment the defendant need not appear, nor before the return of the *distringas*. 1 *Brownl.* 159.

By the common law, and now by the *st. Art. sup. Chart.* 15. in summonses and attachments there ought to be 15 days exclusive at least between the *teste* and return, in which time, at 20 miles *per diem*, any one may come from the extreme part of *England*. 2 *Inst.* 567.

By the *st. Marl.* 52 H. 3. 12. in *darrein presentment*, or *quare impedit*, there ought to be only 15 or 21 days before the return.

Or, a longer day may be given by consent of parties. 2 *Inst.* 124.

But such consent ought to appear upon record. *Ibid.*

The summons ought to be tested the same day it issues, that there may be no prejudice in respect of *lapse*. *Reg.* 30. a. *Bro. Qu. Imp.* 151.

(3 I 2.) Original.

An original in *quare impedit* may be sued *de ecclesia*, which always imports a rectory or parsonage. *F. N. B.* 32. H.

So, it may be by common law, or at least by the *st. W.* 2. 5. *de capellis, prabendis, vicariis, hospital., priorat., abbat. et aliis domibus, quæ sunt de advocacionibus aliorum.* 2 *Inst.* 363. 2 *Roll.* 98.

And therefore of an *archdeaconry*. *R.* 1 *Leo.* 205. 1 *And.* 241.

The writ ought to name the advowson truly as it is, *viz. ecclesia, vicar., &c.* *F. N. B.* 32. H. 33. *F. G.*

Yet, if it be in the disjunctive, *ad ecclesiam sive hospital.*, it is good. *R. Cro. El.* 791.

Yet, the writ may be general and the count special; as, if a *quare impedit* be brought by him who has only a moiety of the advowson, or the advowson *medietatis ecclesie*, the writ may be general, *presentare ad ecclesiam*, and the plaintiff shall count upon the special matter. *F. N. B.* 33. A. 5 *Co.* 102. b. 10 *Co.* 135.

So, if the plaintiff has only the nomination, collation, &c. and not the right of presentation, the writ shall say *presentare*, and the plaintiff shall count specially. *F. N. B.* 33. B. C. D. E. and if it be *nominare*, it abates. 1 *Brownl.* 159.

So, the writ may say generally, *quæ ad nostram spectat. donationem*, and the count declare by what title. *R. Cro. El.* 241. *R.* 3 *Lev.* 377. 1 *Leo.* 227.

But if there be a distinct patron and incumbent of one moiety or part of a church, and another patron and incumbent of the other moiety or part, the writ is good, if it is special *presentare ad medietat.*, &c. *ecclesia.* *R.* 10 *Co.* 135. b.

And *ad rector. medietat.*, or *medietat. rector.*, is of the same import. 4 *Co.* 75.

In what county it shall be brought, *vide Action*, (N 1, &c.)

If it abates by death, it may be brought by *journies accompts.* 1 *Brownl.* 158.

So, summons and severance lies, if one plaintiff will not sue. *Ibid.*

So, the plaintiff may have several *quare impedit*s against every defendant. *Vide Abatement*, (H 24.)

(3 I 3.) Declaration in *Quare Impedit*.

(3 I 3.) *For and against whom.*] If one defendant appears before the



the others, the plaintiff may declare against him *simul cum*, &c. 1 *Brownl.* 159.

A *quare impedit* shall be brought by the king, in right of his crown, or upon a title by *lapse*.

Or, by a common person.

Several, who have the same title, may join. *Mo.* 184.

A man who has the nomination, and another who has the presentation, may join, if a stranger presents. *Dy.* 48. *a. in marg.*

Or, have several *quare impedit*s, *Mo.* 49. *Dal.* 48.

An executor or administrator may have a *quare impedit* upon an avoidance in the lifetime of the testator, &c. *R. Sav.* 95. *Lut.* 1. *Sav.* 118. 1 *Leo.* 205. 1 *And.* 241.

[But this is where the advowson is *presentative*; for, where it is *donative*, the turn goes to the heir and not to the executor, &c. 2 *Wilf.* 150.]

If a grant of the next avoidance be to two, and one releases to the other, the releasee alone may have a *quare impedit*. *R. Mo.* 467.

[If *A.* and *B.*, coparceners of an advowson, do not agree to present on a vacancy, *A.* the eldest, (or her assigns,) may present to the first turn, and *B.*, or her assigns, to the next. *Barker v. Lomax*, *C. P. H.* 26 *Geo.* 2. *Willes*, 659. 2 *H. Bl.* 412. *S. C.*]

[And if, when *A.* and *B.* do not agree, *C.* (a stranger) implead *A.* only by *quare impedit* on a vacancy, and recover, it is a bar to a *quare impedit* brought by *B.* against *C.* for that turn, tho' not for the next turn. *Ibid.*]

[In pleading a right in coparceners to present to an advowson by turns, it is good to state that such right arose, because they did not agree to present. *Thrale v. Barker*, *C. P. E.* 30 *Geo.* 3. 1 *H. Bl.* 376.]

A *quare impedit* is usually sued against the patron who presents, the incumbent who was presented, and the bishop. 1 *Brownl.* 159.

But the writ does not abate, if the bishop is omitted; and therefore it will be well to omit him, if the church is full. *Hob.* 320.

Yet the bishop, if he is omitted, may present by lapse, except when a *ne admittas* is sued by the plaintiff within six months. *Reg.* 31. *a. Co. Lit.* 344. *b. Hob.* 320.

*Semb.* that the bishop may present by lapse tho' a *ne admittas* be delivered within six months; but he cannot admit the clerk of the party, or of any other presented within six months. *F. N. B.* 48. *L.*

So, the writ may be against the patron alone, omitting the incumbent; but then the plaintiff shall not have a writ to the bishop to remove him, if he was admitted *pendente lite*. *Co. Lit.* 344. *b. F. N. B.* 35. *C.*

So, in a writ of right of advowson, the incumbent shall not be named. *Hob.* 319.

Nor, shall be removed, if the plaintiff recovers. *Ibid.* *Sav.* 109.

So, it may be against the incumbent alone, where the patron is not disturbed, nor has prejudice by the suit: as, in *quare impedit* upon an avoidance by simony of the incumbent. *Semb.* *Lut.* 1089. *R.* 3 *Lev.* 16. 206.

So, in *quare impedit* by him who has the nomination to a church in the presentation of an abbot, which comes to the king, and he presents a clerk, without any nomination, the *quare impedit* shall be against the incumbent.

incumbent alone; for the king cannot be a disturber. *R. Dy. 48. a.*

So, where the incumbent is collated by lapse, or is the only disturber. *1 Leo. 45. R. 2 Leo. 58. Sav. 108.*

So, in every case, where the interest or estate of the patron is not defeated by the judgment in the *quare impedit*. *R. 7 Co. 26. a.*

And it is safest not to make more defendants than necessary. *Hob. 320.*

If the patron is not named a defendant, when he ought, if it be not pleaded in abatement it shall not be error. *R. 2 Cro. 651.*

So, where the king is patron, it shall be sued against the presentee only. *Keil. 53. a.*

(3 I 4.) *Must shew a title to the advowson.*] The plaintiff in *quare impedit* must allege a title to the advowson in some one from whom he claims by descent. *Hob. 102.*

For a presentment, without a title to present, is not sufficient. *Vau. 57.*

And, generally, he ought to allege a seisin in fee. *Vide ante, (E 19, &c.)*

But, that he was seised generally, shall be intended in fee. *8 H. 5. 4. b.*

So, seisin for life is sufficient. *Semb. 8 H. 5. 4. b.*

Or, by purchase.

Or, by grant of the next avoidance. *8 H. 5. 4. b. Lut. 1.*

Or, by grant of an estate for life, for years, or other particular estate. *Semb. 5 Co. 98. a.*

Or, he may allege a title to the advowson in himself. *Hob. 102.*

And a title to the advowson, as well as presentment, ought to be alleged in the case of the king, as well as of a common person. *Vau. 57.*

So, the king ought to allege in what right he is seised. *1 Leo. 227.*

If the plaintiff claims by a gift in tail, he must allege a title to the advowson in the donor, and derive his title under the donee. *Hut. 31.*

So, if the plaintiff claims a right to present against common right, he must shew the commencement of it: as, if he alleges presentations by turns, he must shew how this commenced, by prescription, composition, or otherwise. *Dy. 299. 3 Leo. 163, 4.*

Yet if *A.* was seised of a manor to which an advowson, viz. to present twice, belongs, &c. it is sufficient; for this shews a prescription. *R. Dy. 299. a.*

So, the plaintiff must shew whether the advowson be *appendant*, or in *gross*. *Semb. Lut. 1. Vau. 7, 8.*

But if the king intitles himself to a presentation by a simoniacal contract, it is sufficient to allege a presentment by such an one, *cui de jure pertinuit*, without shewing what title he had to the advowson; for the king is a stranger to it. *Semb. Lut. 1093.*

So, if the plaintiff alleges that he was seised of the advowson, *scilicet*, to present every first turn, it will be good. *R. Mo. 867.*

So, the plaintiff must shew a title in himself before the avoidance; and therefore if the acceptance of a plurality, by which the church is void, be alleged at a day before the grant of the next avoidance, by which the plaintiff claims, it will be bad. *R. after verdict for the plaintiff. Dy. 129. b. Bend. pl. 79.*

If



If there are several plaintiffs, and they vary in title, the writ abates. *R. Mo. 184.*

If tenants in common make composition to present by turns, the plaintiff in his count must mention the composition before it is executed. *Dy. 29. a.*

So, in every case where the plaintiff shews a right to present by turn, he ought regularly to shew how such right commenced, by prescription, composition, or otherwise. *Semb. Dy. 259. b. 299. b.*

And it may commence between parceners, joint-tenants, and tenants in common, by record, or by deed. *R. 1 Sal. 43.*

But after every tenant in common has presented in his turn, the composition is executed, and it need not be shewn. *Dy. 29. a. 1 Sal. 43.*

So, a composition by parceners need not be shewn; for it may be without deed. *Dy. 29. a. 1 Sal. 44.*

So, where the plaintiff claims a turn to an advowson appendant, he need not shew the commencement of the presentation by turns, whether it was by prescription, composition, or otherwise; for the appendancy imports a prescription. *Dy. 299.*

And the plaintiff may claim the entire advowson when it is his turn. *R. 1 Brownl. 165.*

[The crown has a prerogative right to present on the promotion of an incumbent to a bishopric; but where this happens in the case of a right in patrons to present by turns, it does not make a turn. *3 Wilf. 232.*]

[Where an act of parliament unites three churches, and gives the first presentation to the patron of the church of which the living was of the highest value, without taking any notice of the others, and it appears on the face of the declaration that a certain order of presentation has taken place under the act of parliament which has been acquiesced in, that is sufficient ground for presuming that the order set forth is the true order, according to the meaning of the act of parliament. *3 Wilf. 233.*]

So, in *quare impedit* by a grantee of the next avoidance, he must shew that it is the next avoidance. *Semb. Dy. 129. b.*

(3 I 5.) *Must allege a presentment.*] The plaintiff in *quare impedit* ought always to allege a presentment by himself, or by his ancestor, or some other under whom he claims. *Vau. 17. 57.*

Tho' the advowson be vested in the patron by act of parliament. *Semb. 3 Lew. 436. Cont. 21 Ed. 4. 3. b.*

And, regularly, a presentment ought to be alleged to have been by him who has the inheritance. *5 Co. 97. b.*

And it may be alleged to have been by him from whom the plaintiff purchased. *2 Inst. 356.*

So, if a presentment be alleged by a tenant for life, for years, or other particular tenant, it is sufficient for him in reversion. *5 Co. 98. a.*

So, if the plaintiff shews a grant of the next avoidance, and alleges a presentment by a grantee, it is sufficient for him who claims under the grantor; for he presented in right of the grantor. *R. 5 Co. 97. b. Cro. El. 518. Mo. 456. Semb. Dy. 106. a.*

So, in *quare impedit* a purchaser may allege a presentment by the vendor. *2 Inst. 356.*

So,

So, in *quare impedit* by a tenant for life, or years, it is sufficient that the plaintiff alleges seisin in the lessor, the demise, and a presentment by the lessee himself. *Dub. Hob. 285. R. 1 Leo. 230.*

The plaintiff may allege presentments by the grantor and the grantee of a particular estate, and it will not be double. *5 Co. 98. a. Cro. El. 518.*

If the plaintiff alleges a presentment. without a precedent title, he must say that it was *tempore pacis*. *1 Mod. 230.*

But he need not, if a precedent title is alleged. *Ibid.*

If a presentment be alleged by a common person, he must say that the clerk was thereon instituted and inducted. *Bend. pl. 297.*

If by the king, or by him who entitles himself by the king, *that he was instituted*, is sufficient. *Ibid.*

The last presentment regularly shall be mentioned, and therefore if the bishop presents by *lapse*, upon the next avoidance, the patron in *quare impedit* shall make mention of that. *3. Leo. 18. Dal. 75.*

But if there be an usurpation upon the king, a grantee of the next avoidance need not mention that, but only the last presentation by the king. *3 Leo. 18. Hob. 140. R. Dal. 75.*

[The crown as well as a subject must allege a presentation; and a *commendam retinere* is not sufficient. *Rex v. Bishop of Landaff, H. 8 G. 2. Str. 1006.*]

[But the want of it is cured by verdict. *Ibid.*]

(3 I 6.) *And disturbance.*] The plaintiff in *quare impedit* ought to allege a disturbance.

And if it be by an executor or administrator upon an avoidance in the life of the testator, a disturbance in the life of the testator is sufficient. *R. Sav. 95. Lut. 2.*

But he shall not say in *retardatione executionis testamenti*. *R. Sav. 95. R. 1 Leo. 205.*

### (3 I 7.) Pleas in *Quare Impedit*.

(3 I 7.) *In abatement. Misnomer, &c.*) To a declaration in *quare impedit* the defendants may imparl.

And afterwards may join in plea, or plead severally. *Bro. Qu. Imp. 157. 165.*

The defendants shall plead in abatement, or to the action.

An ordinary cannot plead in abatement, or cast an essoin, without making himself a disturber. *Hob. 200.*

In abatement the defendant may plead that the plaintiff or defendant is misnamed, or has a false addition to his name. *Bend. pl. 109.*

Variance between the count and writ. *Sal. 559.*

That there are two churches, and neither without addition, &c. or, that the church is misnamed. *Vide Abatement, (H 19. 23.)*

So, the incumbent may plead in abatement that such an one is not named a defendant, when he ought to be. *7 Co. 25. b. Hob. 316. Vide ante, (3 I 3.)*

But the bishop cannot plead in abatement that the patron is not named. *Hob. 317.*

So, he may plead another *quare impedit* depending for the same disturbance. *R. 1 Brownl. 163. Vide Abatement, (H 24.)*



So, tho' it is for another disturbance for the same avoidance. *R. Hob. 137.*

Or, adds another defendant. *R. Hob. 138.*

So, he may plead in abatement *darrein presentment*. *Vide Abatement, (H 26.)*

(3 I 8.) *Plenary.*] So, he may plead *plenarty*, before the writ purchased, of the presentment of the plaintiff himself. *Th. D. l. 11. c. 42. f. 20.*

Tho' he does not say that the *plenarty* was for six months. *Th. D. l. 11. c. 42. f. 20. R.* by common law; for by institution and induction, or by institution only, against a common person, the church is full, and the plaintiff shall lose his presentation *hâc vice* for ever. *R. 6 Co. 49. a.*

So, he may plead *plenarty* for six months before the purchase of the writ of the presentment of the defendant himself. *Th. D. l. 11. c. 42. f. 22.*

Or, of the presentment of a stranger. *Co. Ent. 498. b.*

By the common law, *plenarty* before the writ for any time was a good plea. *2 Inst. 360.*

But by the *st. W. 2. 5.* it must be a *plenarty* for six months.

And it ought to be six months before the first writ, if another writ be sued by *Journeys Accompts.* *Th. D. l. 11. c. 42. f. 8.*

But, generally, *plenarty* is no plea against the king. *2 Inst. 361.*

Tho' he claims in right of his ward, &c. and not *in jure corona.* *2 Inst. 361. R. 1 Leo. 226.*

Yet if the defendant alleges a right of advowson in himself, he may plead *plenarty* for six months against the king. *Th. D. l. 11. c. 42. f. 7. 17. Dub. f. 3.*

So, by the law, *plenarty* shall be a good plea against the queen. *2 Inst. 361.*

So, *plenarty*, upon a collation by a bishop by wrong, is no plea. *R. 1 And. 243. Sav. 118.*

So, tho' the bishop collated after a *lapse.* *Dub. 1 And. 243.*

If the defendant pleads *plenarty*, he must shew of whose presentment. *Th. D. l. 11. c. 42. f. 2.*

And at what time. *Ibid.*

So, regularly, if the defendant pleads *plenarty* of the presentment of an ecclesiastical person, he ought to shew the right of patronage in him. *Ibid. f. 4, 5.*

So, if he pleads *plenarty* of the presentment of himself by such an one. *R. 1 Brownl. 162.*

But a lay-patron may plead *plenarty* of his own presentment, without shewing a right to the patronage in him. *Th. D. l. 11. c. 42. f. 4.*

*Plenary* shall not be intended, if it is not pleaded. *Jon. 332.*

(3 I 9.) *In bar.*] In bar of a *quare impedit*, the bishop, to shew he is not a disturber, may plead that he claims nothing but as ordinary. *Co. Ent. 498. d. Hob. 198. 38 Ed. 3. 2. Keil. 43. a.*

The ordinary must disclaim or admit himself a disturber. *Hob. 320. Vide ante, (3 I 7.)*

If he refuses a clerk without cause, he is a disturber. *1 Leo. 230.*

[If the bishop pleads that the king made *A.* dean of, &c. whereby he became possessed of the church in question, he must shew that the church is a member of the deanery. *Rex v. Archbishop of Armagh*, T. 3 G. 2. Str. 837.]

The clerk may plead that he claims nothing but as *persona impersonata. ex presentatione* of such an one.

Upon such plea by the bishop, the plaintiff may have judgment against him with a writ to the bishop, but *cessat executio* till the other pleas are determined. *Vau. 6. Hob. 320. Keil. 43. a. Vide post. (3 l 12.)*

If a *cessat executio* is not entred, it is only form. *R. 1 Rol. 363.*

And if there be not a *cessat executio*, it is error, if execution be before the other pleas are determined. *Ibid.*

So, every other defendant may plead *quod non impedit. Win. Ent. 709. Vau. 58.*

But, if the bishop disclaims, and the plaintiff does not accept his disclaimer, but will maintain him a disturber, and it is found against the plaintiff, he shall not have a writ to remove a clerk collated *pendente lite. Hob. 320.*

If one defendant pleads *non impedit*, and it is found against him, there shall be a writ to the bishop with a *cessat executio* till the plea between the others is determined. *1 Brownl. 159.*

So, the plaintiff upon such plea may have a writ to the bishop, or by replication maintain the disturbance in order to have damages. *Vau. 58.*

So, the defendant may plead in bar a release.

So, the defendant may plead that he is parson *imparsoner*, and traverse his resignation.

If the incumbent pleads that he is *persona impersonata*, he ought to say of whose presentation. *Hob. 320.*

So, the defendant may plead in bar a presentation upon title, and traverse.

But if the incumbent pleads a presentation of such an one, he cannot make title except to the same patron by whom he was presented. *Jon. 5. Hob. 321.*

And therefore, if he pleads himself to be *persona impersonata* of the presentment of such an one, the plaintiff may reply that he was not presented by him. *R. Jon. 5.*

But it will be more formal to say that he is not *persona impersonata*, or to shew by whom he was presented, and then traverse the presentment alleged. *Hob. 321.*

Yet the other way is sufficient on a general demurrer. *Hob. 321.*

So, by common law the incumbent or bishop shall not plead to the right of patronage; for every one ought to plead apt matter, and he has nothing in the patronage. *7 Co. 26. a. Hob. 318. Jon. 5.*

Yet, by the *st. 25 Ed. 3. 7.* to avoid feint pleading in the patron, the archbishop, bishop, &c. and possessor, may counterplead the title of the king.

And therefore every incumbent instituted and inducted may plead to the right of advowson. *7 Co. 26. a. Hob. 319.*

So, an incumbent by collation. *Hob. 319.*

So, if he be instituted; for by institution the church is full against



a common person; and the *ft. 25 Ed. 3. 7.* by equity extends to common persons. *7 Co. 26. a. Dy. 1. b. in marg.*

Otherwise, if he was only presented. *R. Dy. 1. b.*

Or, in the case of the king, was only instituted. *Hob. 319.*

Or, if after institution he resigns, or is created a bishop, pending the writ. *Dy. 1. b. in marg. Hob. 319.*

But the incumbent shall not only counterplead the king's title, but shall also make title to himself. *Hob. 319. Vide infra.*

And must shew himself possessor. *R. Dy. 293. a.*

So, by the *ft. 25 Ed. 3. 7.* an archbishop, or bishop, who collates by *lapse*, may make title to the patronage in a *quare impedit* brought by the king. *Hob. 318.*

So, in a *quare impedit* by a common person, who is not the rightful patron, where the bishop presents by *lapse*. *Hob. 319.*

But an ordinary, who has not collated by *lapse*, cannot plead to the right, since the *ft. 25 Ed. 3.* any more than by the common law. *Ibid. Jon. 5.*

In *quare impedit* the defendant is actor, and may have a writ to the bishop, if judgment be for him, as well as the plaintiff. *Vau. 7.*

And when the defendant is actor, and requires a writ to the bishop, he must make a title in himself, as well as the plaintiff. *Ibid.*

And therefore he must allege a title to the advowson. *Vau. 8. Vide ante, (3 I 4.)*

A presentation in himself, or another under whom he claims. *Vau. 7. Vide ante, (3 I 5.)*

But where the defendant has presented, and his presentee is instituted and inducted, so that a writ to the bishop for him is not necessary, he is not then regarded as an actor. *Vau. 7.*

And therefore, if the defendant controverts the title alleged by the plaintiff, and does not stand upon his own title, he may allege a title *pro formâ*, and that his clerk is inducted, without alleging a presentment in himself. *R. Vau. 8.*

So, if the defendant demurs to the plaintiff's count, which is adjudged insufficient, the defendant shall have a writ to the bishop, without making title. *Dy. 24. b.*

So, in a *quare impedit* by the king, if the defendant shews a lease by the king's ancestor to *A.* and that during his possession *B.* presented him, it is sufficient, without shewing a title in *B.*, for he shews the estate out of the king. *R. 1 Leo. 45.*

If the defendant traverses the title alleged by the plaintiff in his count, the traverse must be of a matter not only inconsistent with the defendant's title, but which also destroys the plaintiff's title, if it be found against him. *Vau. 8.*

As, if the plaintiff alleges seisin of an advowson in gross and a presentation in himself, and the defendant alleges a seisin of it as appendant, he ought not to traverse the seisin in gross, tho' it be inconsistent with the defendant's title; for if he presented, tho' by usurpation, he has a title, whether the advowson be appendant or in gross. *R. Vau. 9, 10. Semb. Dy. 78. b. 1 Leo. 154.*

So, he ought not to traverse the seisin of the advowson. *Vau. 12.*

So, if he alleges seisin of the advowson as appendant, and a presentment, without saying that he presented to it as appendant, he cannot traverse the appendancy. *R. 1 And. 270. Vau. 15. But,*

But, if the plaintiff alleges seisin of the advowson as appendant, and a presentment to it as appendant, the defendant may traverse the appendancy or the presentment, for one or the other destroys the plaintiff's title, if it be found against him. *R. Vau. 15. R. 1 Leo. 154.*

So, if the plaintiff alleges seisin of it, as appendant, and a presentment by the king by *lapse*, and the defendant says that the king was seised in gross, and presented, he ought to traverse the appendancy. *Vau. 13.*

So, if the defendant alleges appendancy to other lands, &c. *Vau. 12.*

So, if the plaintiff alleges seisin in gross, and the defendant claims as appendant, he ought to traverse that it is in gross. *Keil. 51. b. Semb. Keil. 91. a. Tho' there R.* That he may traverse the seisin in gross or the presentment

If the plaintiff alleges a vacancy by the death, resignation, or deprivation of the former incumbent, and the defendant alleges an avoidance by the other means; as, by a simoniacal contract, &c. he must traverse the avoidance by death, &c. and not the seisin, appendancy, &c. *Vau. 16.*

So, if the plaintiff alleges a vacancy by death, and the defendant alleges an avoidance by plurality, by which it belongs to the king by *lapse*, he ought to traverse the avoidance by death. *Semb. Sav. 78.*

[On *quare impedit* by the king, for the next turn of a living void by promotion; if defendant confesses and avoids by pleading that the crown presented *A.* who is since dead, and himself now presented, and parson *imparsonce*, he need not traverse that the church is vacant by the promotion; if he does, it may be passed over, and issue taken on the avoidance. *Rex v. Archbishop of Armagh, T. 3 G. 2. Str. 837.*]

So, if the defendant by his plea shews a title subsequent to the plaintiff's title, he need not traverse it; for he confesses and avoids. *Vide ante, (G 1 3.)*

As, if the defendant alleges a seisin and presentment subsequent to the presentment alleged by the plaintiff. *Vau, 16.*

If the defendant alleges a seisin and presentment by the king, and the plaintiff by his replication alleges a grant by the king to him, and a presentment by the grantee, and upon his death a presentment of the king by *lapse*, &c. this avoids the presentment by the king. *R. Jen. 12.*

[Subscribing the articles need not be averred in the plea, nor in the declaration. *Rex v. Armagh, T. 3 G. 2. Str. 837.*]

### (3 I 10.) Replication.

If the plaintiff replies to the defendant's title, it is not sufficient to destroy the defendant's title, without maintaining his own title. *Vau. 60.*

Tho' the king be plaintiff. *R. Vau. 61.*

But where the king's title appears, (being found by office or other matter of record,) there the king may relinquish his title, being established by record, and traverse the defendant's title. *Vau. 62.*



If a bishop pleads *nothing but as ordinary*, and dies, another defendant may suggest his death on the roll, and pray that the plaintiff may reply, and if he be nonsuited, it shall be peremptory. *R. Sal. 559.*

(3 I 11.) Judgment in *Quare Impedit.*

In a *quare impedit* by the king, the attorney-general may enter a *nolle prosequi*, upon which there shall be judgment, *quod* defendants *eat sine die.* *Townsh. Jud. 177, 8.*

So, if there be judgment against the king upon a verdict or demurrer. *Ibid. 179.*

If the plaintiff is nonsuited, it is peremptory, and the defendant shall have a writ to the bishop. *1 Brownl. 161.*

And if any defendant bars the plaintiff, his action fails. *Ibid.*

In *quare impedit* by the king or a common person, if the ordinary claims nothing but as ordinary, there shall be judgment against him with a *cessat executio quousq.*, &c. *Hob. 198. Vide ante, (3 I 9.)*

If the plaintiff does not accept his disclaimer, but maintains him to be a disturber, and he is found so, there shall be judgment, and the ordinary will be subject to answer damages. *Hob. 320. Vide Damages, (A 3.)*

If it is found against the plaintiff, he shall be barred, and cannot have judgment or a writ to the bishop. *Hob. 320.*

Tho' the bishop collated by *lapse, pendente lite*, and so the clerk collated shall not be removed. *Ibid.*

If the patron and incumbent confess the action, or *nil dicunt*, &c. there shall be judgment for the plaintiff, and a writ to the bishop.

So, if judgment be given against them upon a demurrer.

If a verdict in *quare impedit* be found for the plaintiff, the jury ought to inquire *ex officio* of four points, *viz.* whether the church be full; 2d, Of whose presentation; 3d, the value of the church; 4th, How long vacant. *Keil. 57. b.*

And this is since the *st. W. 2. 5.* not by the common law. *Hob. 318.*

So, there shall be a writ of inquiry upon a judgment by default, or upon demurrer, to inquire of those four points. *Dy. 241. b.*

Or, after a verdict, if the jury omit it. *Townsh. Jud. 191. Dy. 135. a.*

And till this is executed, the writ to the bishop stays. *1 Bro. Ent. 327.*

But an inquisition, which finds the church full of the presentation of a stranger, does not hurt. *Dy. 77. a.*

After a verdict before justices of assise, by the *st. W. 2. 30. St. 12 Ed. 2. 4. 14 Ed. 3. 16.* the justices may give judgment immediately, and award a writ to the bishop. *Dy. 76. b. 2 Inst. 424. Dy. 135. a. 260. a. Hob. 327.*

Or, it may be given in *C. B. 2 Inst. 424. Kel. 57. b. Dy. 135. a.*

And error may be to the judges of assise, or to the judges of *C. B. Dy. 77. a.*

If judgment be given for the plaintiff to recover his presentation, execution shall be by a writ to the bishop. *Vide post. (3 I 12.)*

If it be given for damages, as it may by the *st. W. 2. 5.* execution shall be by *fi. fa.* or *elegit.* 1 *Brownl.* 158.

But not by *capias ad satisfaciend.* *Ibid.*

If in a *quare impedit* between common persons a title appears for the king, judgment shall be given for the king, and a writ to the bishop for the king's clerk. *F. N. B. 38. E. Bend. pl. 301. R. 1 And. 53.*

So, in a *quare impedit* by the king, if the issue be whether the king is seised of the advowson of *B.*, and it is found that he is seised of two turns, and the bishop of the other turn, and it appears to be the king's turn, there shall be judgment for him. *R. 1 Brownl. 164. Hob. 118.*

But if a title for the king appears by the defendant's plea, there shall not be a writ for the king's clerk, without the plaintiff's confession of his title upon record. *R. Hob. 126. 2 Cro. 216.*

Judgment by the common law was only for recovery of the presentation, and a writ to the bishop. *5 Co. 58. b.*

By the *st. W. 2. 5.* the plaintiff shall also recover damages. *Ibid.*

But since the statute, the plaintiff may waive the benefit of it, and take his judgment at common law. *R. 5 Co. 59. a.*

When damages or costs are allowed in *quare impedit*, *vide Costs*, (A 2.)—*Damages*, (A 2, 3.)

### (3 I 12.) Writ to the Bishop.

After judgment in *quare impedit*, the plaintiff or defendant for whom the judgment is given, shall have a writ to the bishop to admit his clerk, if he be not before instituted and inducted. *F. N. B. 38. B. Vide ante*, (3 I 9.)

And it shall be directed to the same bishop who is defendant. *Ibid. 1 Brownl. 159.*

Or, if he be the patron to the metropolitan. *Dy 353. b.*

For, it shall be to one or the other of the plaintiff's election. *Vide Certificate*, (I 3.)

Or, if the bishop is absent or out of the realm, to the guardian of the spiritualities. *Dy. 350. a. 77. a.*

If the archbishop of *Canterbury* is plaintiff, it shall be to the archbishop of *York.* *Per Holt, Sho. 329.*

It may be to the archbishop upon a judgment in *quare impedit* in *Wales*; for it is within his province. *R. Jon. 332.*

But the defendant shall not have a writ to the bishop, if the *quare impedit* abates for form or false *Latin.* *F. N. B. 38. H.*

So, if the patron makes default to the *disfringas*, he shall not have it, tho' it abates by the incumbent's plea. *Ibid. Semb. cont. Bend. pl. 136. 207.*

So, if a *quare impedit* abates for form, *misnomer*, or insufficiency. *F. N. B. 38. M. R. 7 Co. 27. b.*

If the sheriff returns *quod quer. non invenit pleg.* upon which the plaintiff finds pledges in *C. B.* and has another writ, and the sheriff returns *tarde*, if the defendant appears, and the plaintiff makes default, the defendant shall not have a writ to the bishop, because the *quare impedit* was never served upon him. *F. N. B. 38. O.*



So, the defendant shall not have a writ to the bishop where he claims as parson *imparsonee*. *F. N. B.* 38. *L.*

Where there is another *quare impedit* depending for the same church against him. *Ibid.* *R.*

So, if the plaintiff is nonsuited, the defendant shall not have a writ to the bishop before title made. *Ibid.* *K.* *Raft. in Qu. Imp. Evsq.* 2.

Otherwise where the defendant has judgment upon a demurrer to the declaration. *Dy.* 24. *b.*

So, the plaintiff shall not have a writ to the bishop before he has counted, tho' all make default but the bishop. *F. N. B.* 38. *I.*

So, the king shall not have a writ to the bishop upon default till title made. *Sal.* 559.

But the plaintiff shall have a writ to the bishop without making title, if the defendant makes default upon the *disfringas*. *F. N. B.* 38. *N.* *Semb. cont.* 1 *Brownl.* 158. *Vide ante*, (311.)

If a writ is awarded to the bishop, he shall admit the clerk of the party, and remove all who were admitted *pendente lite*. *Hob.* 320. *R.* 3 *Lea.* 138. *R. Sav.* 89. *Hut.* 24.

Tho' admitted upon the presentation of a stranger to the writ. *Hob.* 320.

Or, upon a presentment by the king. *Cont. Dy.* 260. *a.* 364. *a.* But it is there said that this opinion was not law. *R.* by three *J.* that the presentee of the king or a stranger *pendente lite* shall not be removed without a *scire facias*. 2 *Cro.* 93.

If the plaintiff is outlawed after judgment, and the king presents by reason of the outlawry, and then the outlawry is reversed, the plaintiff shall have execution upon the first judgment, and by writ to the bishop shall remove the king's presentee. *R.* by three *J.* *Periam cont.* *Sav.* 89.

If the ordinary does nothing upon the first writ, there shall be an *alias* directed to the bishop, which may be returnable, and upon this an attachment. *Reg.* 42. *a.* 80. *F. N. B.* 38. *C.* *Dy.* 254. *b.* 350. *a.*

And the ordinary returns the writ *quod admisit*. *Townsf. Jud.* 192.

Or, he may return *quod non est idonea persona*, shewing how. *Semb. Dy.* 254. *b.* *Br. Jud.* 9.

That the clerk did not request to be admitted. *R. Keil.* 71. *b.*

But, if the incumbent of whom the church is full, be not a party to the writ, he shall never be removed. *Co. Lit.* 344. *b.*

If the bishop refuses admittance upon a writ to him, an *alias pluries* and attachment lies against him. *F. N. B.* 38. *C.* 47. *C.*

And there was a fine of 10*l.* for a bad return upon the first writ, and an *alias* under the penalty of 100*l.* 3 *Lea.* 139.

Or, the party may have a *quare non admisit*, and recover his damages. *F. N. B.* 47. *C.* 21 *H.* 7. 8. *b.*

A *quare non admisit* shall be sued in the county where the refusal was. *F. N. B.* 47. *F.*

And out of *C. B.* in term, where the recovery was. *Ibid.* *C.*

So, it may be sued by the king in *B. R.* tho' the recovery was in *C. B.* *Ibid.* *D.*

Or, by a common person, if the record was removed there by error. *Ibid.* *E.* 59

So, it may be sued out of *Chancery*, in term-time or vacation. *F. N. B. 47. C.*

And it lies if the bishop refuses, tho' he afterwards admits the clerk. *Ibid. L.*

But the plaintiff shall not have his clerk admitted upon a *quare non admisit*; for it is only to recover damages. *Ibid. G.*

And the bishop may plead that the church is full of the presentment of such an one, not party to the recovery. *Ibid. K.*

### (3 K) Pleading in Replevin,

#### (3 K 1.) Process.

(3 K 1.) *By writ* [F a man tortiously takes the person or goods and of replevin.] chattels of another, and detains them, a replevin lies, upon which the sheriff shall be commanded upon pledges to make deliverance of the same person or goods.

By the common law, the person of a man was replevied by a writ *de hom. replegiando*. *Reg. 77. b.*

So, by the common law, there was a replevin of cattle or goods by writ to the sheriff. *Reg. 18. a. F. N. B. 68. D.*

And replevin should be brought by him who has the property, absolute or qualified, in the goods. *Vide Replevin (B).*

And against him who took or commanded the taking, or both. *2 Rol. 431. l. 5.*

If the sheriff himself took them, it shall be against him by his proper name. *Reg. 81. b.*

If the writ of replevin be for divers sorts of cattle, it shall be *quare averia sua, &c.* *F. N. B. 68. D.*

If only for one beast, it shall be *quare equum suum, or bovem suum, &c.* *Ibid.*

If a live beast and a dead chattel are in the same writ, the beast shall be named first. *Reg. 81. b.*

For what things and when a replevin lies, *vide Replevin, (A, &c.)*

A writ of replevin is in the nature of a *justicies*. *2 Inst. 140.*

If the sheriff does not return, or does nothing upon the writ of *hom. repleg.* or the writ of replevin, the plaintiff shall have an *alias hom. repleg.* *F. N. B. 68. E.*

Or, an *alias* replevin. *Ibid.*

And the *alias* usually has this clause, *vel causam nobis significes.* *Ibid.*

But such clause may be omitted in the *alias*. *Ibid.*

If the sheriff does nothing upon the *alias*, the plaintiff may have a *pluries hom. repleg.* which recites the *alias* and contempt upon it, and commands that the sheriff make replevin, or that he himself be present to answer to the contempt. *2 H. 7. 5. b.*

So, he may have a *pluries* replevin. *F. N. B. 68. E.*

And, if he thinks fit, he may have a writ of replevin, *alias* and *pluries* all at the same time. *Ibid.*

If the sheriff makes replevin upon the *pluries*, he does not return the writ; but if he does not make replevin, he ought to return the cause. *2 H. 7. 5. b.*

If



If upon the *alias* the sheriff returns *property claimed*, a writ *de proprietate probanda* issues. Dy. 173. a. *Vide post.* (3 K 11.)

If the sheriff does nothing upon the replevin, *alias*, and *pluries*, an attachment will lie against him, directed to the coroners, commanding them that they attach the sheriff to answer for his contempt, and in the *interim* make replevin. Reg. 81.

So, if nothing be done upon the *hom. repleg.*, *alias*, and *pluries*. Reg. 78. a.

To the replevin, *alias*, or *pluries*, the sheriff may return, *no cattle taken*. Kit. 263. a. R. cont. Sal. 581.

Or, *that the cattle are esloigned*. Kit. 262. Sal. 581.

Or, *dead*. 32 H. 6. 27. b.

Or, *that no one shewed him the cattle*. Sal. 581.

And thereupon the plaintiff may have a *capias in withernam*, so many of the defendant's cattle. Reg. 82. b. F. N. B. 68. G. Dy. 189. a.

So, if upon a *hom. repleg.* it be returned, *that he is esloigned*, there shall be a *capias in withernam* the defendant. Reg. 79. F. N. B. 68. C.

[If *A.* brings *homine replegiando* for his wife, then *alias*, then *pluries*, to which defendant appears, and then *capias in withernam* issues: it is irregular, and process thereon shall be staid. *Saunders v. Fortescue*, H. 23 G. 2. 1 Wils. 256.]

If the defendant appears at the return, he shall be committed, without a *capias in withernam*, till he produces the person, and shall not be admitted to plead. R. Skin. 61, 62.

[Defendant may be bailed on *capias in withernam*, but plaintiff must first declare, and defendant plead *non cepit*; and the bail is for defendant to appear, and if judgment against him, to render his body, and be in custody till he render the person, &c. *Barnes*, 59.]

[If after defendant's appearance, and before declaration, the wife dies, the court will not on motion stay proceedings, but plaintiff shall declare, and defendant take what advantage he can by pleading. *Saunders v. Fortescue*, H. 23 G. 2. 1 Wils. 256.]

*Withernam* lies upon a replevin by plaint. 9 Ed. 4. 48. b.

If a bailiff, upon a replevin by plaint, returns, *that he could not have a view, to make deliverance*, the sheriff shall inquire by inquest, and if it be found that he could not have it, the sheriff shall award a *withernam*. 1 Brownl. 167.

And a *capias in withernam* lies against the defendant, tho' a peer. 11 H. 4. 15. b.

It is only *mesne* process, not an execution. Sal. 582.

The *capias in withernam* recites the return upon the replevin, or *hom. repleg.* F. N. B. 69. B.

If upon a *capias in withernam*, or *hom. repleg.* the sheriff returns *non est invent.*, there shall be a *capias in withernam* for the goods of the defendant. F. N. B. 68. C. 11 H. 4. 15. b.

If, upon a *capias in withernam* the sheriff returns *nulla bona que capi possunt*, the plaintiff shall have a *capias* and process to outlawry. F. N. B. 74. D.

If upon a *capias in withernam*, or *hom. repleg.*, or in replevin, he returns *cepi*, &c. the person or cattle taken, they are irreplevisable. R. Ray. 475. 7 H. 4. 27.

But,

But, the parties may appear upon the *withernam*, and count, &c. *R. Dy. 189. a. R. Noy, 50. Vide ante, (B 5.)*

If upon the *capias in withernam* the defendant pleads *non cepit*, he may be bailed. *R. Sal. 581. Skin. 337.*

And he is not estopped by the return of *elongat.* to say, *quod non cepit.* *R. Sal. 581. Skin. 61. 76. 337.*

And if the return of *elongat.* be false, after judgment against the sheriff for the false return, the defendant shall be bailed. *Ray. 475.*

If on replevin made by the sheriff upon a plaint in the county-court, the bailiff returns that the cattle are *espoigned*, the sheriff must inquire of it, and if it be so found, the sheriff may award a *withernam* in the county. *F. N. B. 69. C. 74. C. 1 Brownl. 167.*

And, if he refuses to do it, there shall be a writ out of *Chancery* directed to him to award a *withernam.* *F. N. B. 69. C.*

And if he does not obey, there shall be an *alias, pluries*, and attachment. *Ibid.*

So, *withernam* lies in *second deliverance.* *1 Brownl. 167.*

If the sheriff refuses a *withernam*, an attachment lies against him, and a *distringas* directed to the coroners. *Ibid.*

If a *nihil* be returned upon the *withernam*, an *alias* and *pluries* go, and so *in infinitum.* *Ibid.*

After a *withernam* awarded, if the defendant pays all damages to the plaintiff, he shall have restitution awarded. *R. Cro. El. 162. 7 H. 4. 27. Ow. 46.*

But it is no good return for the sheriff upon a replevin *quod mandav. ballivo qui nul. dedit respons.*, or *no deliverance made*; for by the *st. West. 1. 17.* the sheriff ought immediately to enter the franchise and make deliverance. *F. N. B. 68. F.*

*That the cattle are inclosed in a park, fortrefs, &c.* *8 H. 4. 19. a.*

(3 K 2.) *By plaint.*] By the *st. of Marl. 52 H. 3. 21. si averia capiuntur, &c. vicecomes, post querimoniam sibi factam, ea deliberare possit, si extra libertates, &c. et si infra, &c.*

And upon this statute after plaint to the sheriff, he by *parol* or precept may by his bailiff replevy them. *2 Inst. 139. F. N. B. 69. E. Per Lit. 9 Ed. 4. 48. b.*

And it is not necessary for him to stay till the county-court before he makes plaint, if the plaint is afterwards entred there. *2 Inst. 139. Co. Lit. 145. b. 9 Ed. 4. 48. b.*

And the sheriff ought upon plaint to make deliverance of the cattle, tho' he himself took them. *2 Inst. 139.*

And the plaint shall be, *qua* A. B. (naming the sheriff's proper name,) *cepit.* *Ibid.*

So, he may make deliverance, tho' the goods or cattle are above the value of 40 s. *Ibid.*

Tho' after the taking they are conveyed into a franchise. *2 Inst. 140.*

So, if they are taken in a franchise, and upon a precept the bailiff of the liberty refuses, or neglects, to deliver them, the sheriff may enter the franchise and replevy. *Ibid.*

So, he may upon a writ of replevin. *Ibid.*

And therefore, upon a writ of replevin, it is not a good return that the bailiff of the franchise *nullum dedit responsum*, or the like matter. *Reg. 82. F. N. B. 68. F.*

So,



So, the sheriff may take such power for his assistance as he pleases.  
3 *H.* 7. 1.

By the *st. W.* 1. 17. if the cattle are drove to a castle or fortress, and there detained *contra vad. et pleg.*, after demand the sheriff shall make deliverance. 2 *Inst.* 192.

So, if they are drove into a house, park, or other place fortified, 2 *Inst.* 193.

And the sheriff, or his bailiff, may take the *posse comitatus* with him to make replevin. *Ibid.*

And no person, ecclesiastical or temporal, above the age of fifteen and under seventy, is exempt, but must assist him. 2 *Inst.* 194.

And therefore the sheriff cannot return that the cattle are elloigned into a castle, &c. *Ibid.* 8 *H.* 4. 19. a.

But, the sheriff must not use force, before a demand of the deliverance. 2 *Inst.* 193.

Nor, can he break into the house or close, if there is a door or gate open. 2 *Rol.* 552. l. 35.

Otherwise, if the owner at the door, &c. by force hinders his entry, 2 *Rol.* 565. l. 37.

(3 K 3.) *By custom.*] By custom in the county of Northampton, in the absence of the sheriff's bailiff the *frankpledge* may make replevin. 2 *Inst.* 139.

By the custom of *London*, upon security for return of the goods or the value, the sheriff sends an officer to appraise the goods, if he can, and to deliver them to the plaintiff. *Priv. Lon.* 170.

By custom a replevin may be granted by the hundred-court. *Dub. Sal.* 580.

But, a custom that goods taken in *London* shall not be replevied by the king's writ but only in *London*, is not good. *Dy.* 245. b.

And therefore a return of such a custom was disallowed. *Dy.* 246. a.

So, a custom, that a replevin may be granted in or out of court, is not good; for it cannot be but in court. *R. Sal.* 580.

(3 K 4.) *By writ of second deliverance.*] If the plaintiff is nonsuited in replevin, and his cattle are afterwards taken again for the same cause, he may have a writ of second deliverance for his cattle or goods, *F. N. B.* 72. D.

Whether the nonsuit is after, or before avowry. *Ibid.*

And this writ of second deliverance is a judicial, and not an original writ, which was granted by the *st. W.* 2. 13 *Ed.* 1. 2. 2 *Inst.* 341.

And this writ issues out of the record upon which the nonsuit was. *Ibid.*

And it must be conformable to the first record. *Ibid.*

And therefore, if *withernam* was awarded upon an effoignment of the cattle after nonsuit, the *second deliverance* shall not be of the cattle taken by the *withernam*, but of the first cattle. *Ibid.*

So, it must be tested upon the same day upon which the *return. habendo* was returnable upon the former writ. 2 *Rol.* 97.

If the plaintiff declares in *second deliverance*, the defendant avows or makes consuance like as in replevin. *Co. Ent.* 585.

And the *second deliverance* will be a *superfedeas* to the *return. habendo* upon the first writ, but not to the inquiry of damages; for these are given by the *st.* 21 *H.* 8. 19. for costs on the first writ. *R.* 1 *Sal.* 95. 2 *Inst.* 341. [lt

[It is not taken away by 11 G. 2. and is not a *superfedeas* to writ of inquiry of damages on *stat. 17 C. 2.* but after writ of second deliverance defendant cannot proceed on *retorno habend.* Barnes, 427.]

(3 K 5.) Pledges, when found.

When a bond, *vide Replevin (D).*

By the *st. W. 2. 13 Ed. 1. 2.* the sheriff, before deliverance made of the goods, ought to take pledges *ad prosequend. et pro retorno habendo*, (if return be awarded,) otherwise he shall answer the price of the goods. *Co. Lit. 145. b. Vide ante, (C 16.)*

And therefore, if upon a writ of replevin the sheriff does not take pledges, it will be error. *R. Cro. Car. 594.*

And for his default an action upon the case lies against the sheriff. *R. Cro. Car. 446.*

Or, against the bailiff of the franchise. *2 Inst. 340.*

[The high and under-sheriff, and replevin clerk, are all answerable to the defendant in replevin for the sufficiency of the pledges *de retorno habendo.* *2 Bl. 1220.*]

And by the *st. W. 2. 2. si ballivus non habet, unde reddat, respondeat superior.* *2 Inst. 340.*

So, in *homine replegiando* the plaintiff shall find pledges to prosecute with effect, and to deliver the person and his goods. *5 H. 7. 3. a.*

So, if the sheriff takes insufficient pledges, he shall answer as well as if he takes none. *\* 2 Inst. 340.*

And therefore if the plaintiff is nonsuited, &c. and upon the *retorno habendo* the sheriff returns *elongata*, the defendant shall have a writ for the cattle or goods of the pledges. *Ibid.*

And if upon the writ against the pledges the sheriff returns *nichil*, there shall be a *scire facias* against the sheriff *quod reddat tot. averia vel catalla, &c.* *Ibid. Hut. 77. Off. Br. 243.*

Money deposited in lieu of pledges is not sufficient. *R. Cro. Car. 446. Jon. 378.*

Yet, one pledge is good, if he is sufficient, for it is at the peril of the sheriff that he takes one or more pledges. *Cro. Car. 446.*

And if the writ is removed by *recordari*, when the sheriff had not taken pledges, the court may take pledges at any time before judgment, to avoid error. *R. Mar. 46. Noy, 156.*

But upon a replevin by plaint, pledges are not necessary. *Cro. Car. 594.* for the omission is not error. *R. Jon. 439.*

And if the plaintiff is nonsuited, and the sheriff returns *elongata*, the defendant shall not have a writ for the cattle of the pledges, because the pledges do not appear to the court. *2 Inst. 340.*

Yet, if they are found upon a replevin by plaint, a *scire facias* lies against them, if return is not made. *R. 3 Mod. 57. R. in C. B. Hil. 3 Geo. inter ——— and Sheers. Vide post. (3 L 17.)*

(3 K 6.) Replevin, how removed.

(3 K 6.) *By pone.*] If the replevin be in the county by writ, it may be removed by *pone* into *C. B.* or *B. R.* *F. N. B. 69. M.*

And may be removed by the plaintiff without cause. *Ibid.*

And by the defendant with cause, but not without cause. *F. N. B. 70. A.*

But



But the replevin remains before the sheriff, till removed by *pone* or other writ; for the *replevin*, *alias*, and *pluries*, are all *vicontiel*. 2 H. 7. 5. b.

And therefore, if the sheriff returns upon a *pluries*, that he has made deliverance, *B. R.* or *C. B.* cannot proceed upon it; for the parties have no day in court by the writ. *Ibid.*

If a plaint is removed by *pone* or *recordari* into *B. R.* or *C. B.* the plaintiff must declare there *de novo*, otherwise the defendant shall sue out a writ *de retorno habendo*. *F. N. B.* 71. A.

And nothing shall be removed but the plaint, tho' issue is joined. *Ibid.*

And the plaint may be removed, tho' the plaintiff has discontinued there. *Ibid.*

(3 K 7.) *By certiorari.*] If the replevin is in a court of record, that may hold plea in replevin, it may be removed by *certiorari*. 3 Mod. 56.

And it cannot be removed out of a court of record except by *certiorari*. *Per King, C. J. Hil. 3 Geo.*

Tho' the plaint was begun in the county, hundred, &c. and afterwards removed into a court of record. *Per King, Ibid.*

After removal the plaintiff may declare *de novo* in *B. R.* or *C. B.* when the plaint removed is transmitted there by *mittimus*. *Bro. R.* 419.

(3 K 8.) *By recordari.*] As to a *recordari* in ancient demesne, vide *Ancient Demesne*, (G 5.)

If the replevin be in the county by plaint, it may be removed into *C. B.* or *B. R.* by *recordari*. *F. N. B.* 70. B.

And this by the plaintiff without cause in the writ, and by the defendant with cause. *Ibid.*

If the sheriff returns the *recordari*, *tardè*, the party shall have an *alias recordari*. *Ibid.*

And tho' the *recordari* is tested before the plaint entred, yet it is good. *F. N. B.* 71. D. *Bro. Recordari*, 9. 1 R. 3. 4.

And false *Latin* in a *recordari* does not vitiate it; for the proceeding shall not be upon that, but upon the plaint removed. *Dal.* 33.

But if the *recordari* varies from the plaint in the names of the parties, in the things comprised, &c. the plaint shall not be removed. *Dal.* 1. 33.

[The *recordari* in replevin is filed by filazer, in other actions by prothonotary. *Barnes*, 222.]

(3 K 9.) *By accedas ad curiam.*] If the plaint be in the court of another lord, it may be removed into *B. R.* or *C. B.* by *recordari* to the sheriff, commanding him *quod accedas ad curiam et in plena curia ill. recordari facias*, &c. *F. N. B.* 70. B.

As, if it be in a hundred-court, wapentake, tithing, &c. *Ibid.*

But it cannot be removed by an *accedas ad curiam* which bears date before the plaint entred. *F. N. B.* 71. D.

Nor, two plaints by one *recordari*. *Bro. Recordari*, 11. 3 H. 7. 14. a.

Nor,

Nor, if there is a material variance between the plaint and *recordari* in the name of the court, or of the parties. *Dal.* 33.

Nor, shall it be removed out of a court, which is not the king's court, without cause, neither by the plaintiff nor by the defendant. *Reg.* 85. *b.* 2 *Inst.* 339.

(3 K 10.) Declaration in Replevin.

The declaration in replevin may be laid in the county where the cattle or goods were taken.

Or, in the county into which they are drove after the taking. *F. N. B.* 69. *I.*

Or, in both. *Cont. Ibid.*

The declaration must be several by every one, who has several property; for two persons, who have not a joint interest, cannot join in replevin. *Co. Lit.* 145. *b.* 3 *H.* 4. 16. *a.*

[Tho' husband and wife jointly cannot maintain replevin for taking the goods of husband and wife; yet if defendant avows, it shall be intended that the taking was before the coverture, and that they had then a joint property. *Bourne v. Mattaire*, P. 8 G. 2. *Str.* 1015. *B. R. H.* 119.]

[And in that case the taking must be laid *ad damn. ipsor.* *Ibid.*]

The declaration in replevin ought to mention the place in which the taking was. 1 *Sid.* 9. *Barnes*, 353. *Willes*, 475.

[The taking need not be laid in the place where the taking originally was; any other place where the cattle were in defendant's custody is good. *Walton v. Kerfop*, M. 8 G. 3. 2 *Wils.* 354.]

And, if it is omitted, the defendant may demur to the declaration. *Bullythorp v. Turner*, *Willes*, 475. *R. Cro. El.* 896. *Mo.* 678. *Hob.* 16. *D. Ray.* 34.

So, if there is a blank for the place. *R.* 35 *H.* 6. 40. *Hob.* 16.

Tho' the name of the *vill*, in which, is mentioned. *Cro. El.* 896. *Hob.* 16. *Mo.* 678.

So, it ought to mention the *vill* in which the place is. 1 *Sid.* 10.

So, if it mentions several cattle taken in *A.* and *B.*, for all the cattle cannot be in both places; but the declaration must say how many are in one, and how many in the other place. *R. Lit.* 37.

If it mentions a place in *A.* and by replication avers that the same place was in *B.* it will be a departure. *R.* 1 *Sid.* 10.

If the defendant avows in another place, he must traverse the place in the declaration. *R. upon a general demurrer.* *Lut.* 1150. 9 *H.* 6. 39. *b.*

But the omission of the place or *vill* will be aided, if the defendant does not demur for that. *R.* 1 *Sid.* 9. 20. *Willes*, 475.

It must be conformable to the original; and therefore, if the original is *pro averiis*, and the declaration *pro equo*, it is error. *R. Cro. El.* 330.

Or, if the original is in the *detinet*, and the declaration in the *detinuit.* *Lut.* 1150. *Vide ante*, (C 13.—3 K 1.)

It must mention the cattle, or goods, demanded with such certainty, that the sheriff may make deliverance of them.

[Fourteen skimmers and ladles, and three pots and covers, is sufficient certainty. *Bourne v. Mattaire*, P. 8 G. 2. *Str.* 1015. *B. R. H.* 119.]

And



And therefore, if it is for 100 sheep, *matrices et services*, without saying how many of each sort, it is bad. *R. Al. 33. Cart. 218. Vide ante, (C 21.)*

It must mention the species of cattle; as, sheep, cows, &c. *Cart. 218.*

And the value. *Per Ellis. Ibid.*

If the cattle taken are returned, the declaration shall say *quare cepit, &c. et ea detinuit contra vad. et pleg. quousque, &c.* 1 *Sand. 347.*

If they are not returned, it shall be, *quare cepit, &c. et adhuc detinet contra vad. et pleg. omitting quousque, &c.* *Raft. Ent. 560. Co. Ent. 610. b.*

So, if only part are returned, it shall say as to that *detinuit quousque*, and for the residue *adhuc detinet.* *Co. Ent. 611. b. 613. a.*

If the declaration is in the *detinet*, the plaintiff shall recover the value of the cattle, damages for the taking, and costs. *F. N. B. 69. L.*

But he cannot recover the cattle in *specie*, but only the value. *Dal. 84.*

If the defendant appears upon the *withernam*, the plaintiff shall count upon the writ of *withernam.* *Dy. 189. a. Co. Ent. 611. b. 613. a.*

And thereon pledges may be found for delivery of the cattle taken upon the *withernam*, and also for the cattle esloigned. *Co. Ent. 611. b. 613. a.*

And the delivery shall be pledged before avowry. *Per Dy. Dal. 65.*

If the declaration is only for part of the cattle, the defendant may avow for them and the others, and pray a writ to the sheriff immediately for the others, if replevin was made of them. 1 *H. 7. 12. b.*

### (3 K 11.) Pleas in Replevin.

(3 K 11.) *In abatement.*] To replevin the defendant may plead in abatement, or in bar.

In abatement, *quod cepit in alio comitatu.* *Th. Br. 65.*

*Quod cepit in alio loco*, with a traverse of the place in which, &c. *Aft. Ent. 474. Mod. Cu. 102. Vide ante, (3 K 10.)*

[*Cepit in alio loco*, is a plea in bar, not in abatement; though it pray judgment of the declaration, no affidavit is necessary, nor need it be pleaded in four days after declaration delivered. *Barney, 353. Willes, 475.*

To which the plaintiff may join in issue upon the traverse. *Aft. 475.*

Or, reply that the place is known by one name or the other.

*Quod locus in quo, &c. est in al. vill.* *R. 2 H. 6. 14. a.*

So, in abatement, the defendant may plead property in him, and not in the plaintiff. *Co. Ent. 314. b.*

So, if there are several cattle, the defendant may plead that the property of part is in him.

So, the defendant may say that the property is in a stranger, and not in the plaintiff. *Clift. Ent. 654. 39 H. 6. 35. a. R. Cro. El. 475. 9 H. 6. 39. b.*

Or, in the plaintiff and a stranger. *Co. Lit. 145. b. Adm. 9 H. 6. 39. b.*

If

If the defendant claims property before the sheriff, he may return it upon the *alias replevin*, and thereon a writ *de proprietate probanda* issues; for the property cannot be tried but by writ. *Co. Lit.* 145. b. 1 *Brownl.* 167.

And this writ issues out of *Chancery*, or out of *B. R.* or *C. B.* *Dy.* 173. a.

When it issues out of *Chancery*, it is an original, and goes upon the sheriff's return to the *alias replevin*. *Ibid.*

When it issues out of *B. R.* or *C. B.* it is judicial, and granted to the party upon the sheriff's return. *Dy.* 173. a.

And is only an inquest of office, upon which, if it is found for the plaintiff, the sheriff must make deliverance to him. *Co. Lit.* 145. b. 7 *H. 4.* 45. b.

If it be found for the defendant, the sheriff does not proceed. *Co. Lit.* 145. b. *Dy.* 173. a.

Yet, the plaintiff may afterwards proceed in *C. B.* upon the writ of replevin, and the property shall be tried there. *Co. Lit.* 145. b.

Tho' the sheriff returns upon the writ the claim of property. *Ibid.* 7 *H. 4.* 46. a.

If a man claims property *in curia. com.* it must be in person, and not by bailiff, or servant. *Co. Lit.* 145. b.

But in *C. B.* he may claim by bailiff. 1 *Leo.* 90.

So, in abatement, the defendant may plead bailment to him by the plaintiff, for which detinue lies, and not replevin.

(3 K 12.) *In bar.*] In bar the defendant may plead the general issue, *non cepit*. 1 *Bro. Ent.* 312.

So, if the taking was in another place, he may plead *non cepit*, tho' he shall have no return. *Per North*, 2 *Mod.* 199.

And if there are many defendants, one may plead *non cepit*. *Lut.* 1131.

Or, *non cepit* to part.

If the defendant appears after *withernam* awarded, he may plead *non cepit*; for he is not concluded by the sheriff's return of *elongavit*. *R. 4 Mod.* 183. *Sal.* 581.

But he cannot plead *non cepit infra sex annos*; for this does not answer to the detainer. 1 *Sid.* 81, 2.

So, the defendant may plead *property* in bar, as well as in abatement. 2 *Rol.* 64. *R. 2 Lev.* 92. 2 *H. 6.* 14. a. *Adm.* 1 *Leo.* 42. *R. 3 Keb.* 219. 232. *R. Sho.* 401. *R. Mod. Ca.* 81. 1 *Sal.* 5. 94.

And tho' he pleads *property* to all the cattle in the count, yet upon evidence he may prove a less number. 1 *Leo.* 43.

So, he may claim property, tho' the sheriff returns *elongata*. *Sal.* 581.

So, the defendant may make confuſance, for that the property is in another. *R. 1 Lev.* 90.

So, he may plead *property in a stranger* in bar. *R. 1 Sal.* 5.

So, if he pleads *property*, and traverses the property of the plaintiff, issue ought to be joined thereon, for a traverse of property in the defendant is not material. *R. Skin.* 65. *Dub. but held well after verdict for the plaintiff.* *Winch.* 26.

So, the defendant may plead a release from the plaintiff.

A release, after the last continuance. *Lut.* 1142.



So, the plaintiff in bar of the avowry may plead a release from the defendants, or one of them. *Lut.* 1143.

Or, a release from him, in whose right the defendant avows, or makes consufance. *Lut.* 1143.

So, the defendant may plead a plea in justification, without making avowry, or consufance. *R.* 3 *Lev.* 205. *Lev. Ent.* 152.

But then he cannot have a return of the thing taken. 3 *Lev.* 205. 1 *Rol.* 319. l. 20.

And, if by matter *ex post facto* he cannot have the thing taken, he must justify. 1 *Rol.* 314. l. 35.

Or, if he had no interest at the time of the distress. 1 *Rol.* 320. l. 5. 318. l. 45. 2 *Cro.* 436.

### (3 K 13.) Avowry.

[3 K 13.] *When necessary.*] But if the defendant had lawful cause for the taking, the most proper and usual course is to make avowry or consufance, which is in the nature of a bar. *Mod. Ca.* 102.

An avowry imports a justification of the taking in his own right.

Or, in right of his wife. 2 *Sand.* 195.

And in all cases, where the defendant expects a return of the cattle or goods taken, he must make an avowry or consufance *pro retorno habendo*. *Mod. Ca.* 103.

And therefore, if the defendant pleads a taking in another place, he must make an avowry *pro retorno habendo*; for the plaintiff, having alleged the property of the cattle in himself, shall not lose them without cause. 39 *H.* 6. 35. 1 *Sal.* 93, 94.

[When defendant avows at a different place to have a return, he must traverse the place in the count; but when he does not insist on a return, he may plead *non cepit*, and prove the taking at another place. *Johnson v. Wollyer*, *H.* 8 *G.* *Str.* 507.]

So, if he demurs for want of a place alleged. *R.* 35 *H.* 6. 40.

So, if he pleads property in a stranger. *R.* 2 *Rol.* 64. *Cont.* 1 *Sal.* 94.

So, in all cases where he pleads in abatement matter collateral to the action. 1 *Sal.* 94.

And the title of the avowry or consufance to have a return cannot be traversed. *R.* 1 *Sal.* 93, 94. *R.* 1 *Vent.* 127. *Carth.* 139. *Willes*, 475.

But, if the defendant pleads property in himself, as he thereby directly falsifies the supposed property in the plaintiff, he may have a return without avowry. *Semb.* 39 *H.* 6. 35. *R.* 2 *Cro.* 519. 2 *Rol.* 65. *R.* 2 *Lev.* 92. *D. Mod. Ca.* 103.

So, if he pleads property in a stranger in bar. *R.* 2 *Lev.* 92. *Dub. Sh.* 401. *D. Mod. Ca.* 103. 1 *Sal.* 94.

[Defendant may have leave to withdraw his avowry, and avow property in a stranger. *Barnes*, 348.]

So, if the plaintiff is nonsuited before declaration, whereby avowry is prevented, the defendant shall make a suggestion what cattle, &c. were taken, and have a writ *pro retorno*, if the sheriff *constare poterit allegationem fore veram*. *R.* 2 *Cro.* 519. *Ray.* 33. 2 *Rol.* 65.

So, if the plaintiff declares for a less number of cattle or goods, he shall make such suggestion for the cattle, &c. omitted. *Ray.* 34. So,

So, if the plaint is removed by *recordari*, and the plaintiff does not declare in *C. B.* *Ray.* 34.

If a man, who takes a distress, has no interest, he cannot avow in his own name: as, if the supervisor of a common distrains according to custom upon a surcharge of the common, he cannot avow in his own name. *1 Rol.* 318. *l.* 45.

But he may avow, tho' his interest is determined after the distress before the replevin. *1 Rol.* 319. *l.* 20.

[If plaintiff dies after declaration, and before avowry, there can be no writ *de retorno habendo*, but defendant may distrain again. *Cutfield v. Corney*, *M.* 32 G. 2. *2 Wilf.* 83.]

(3 K 14.) *Conusance.*] Conusance imports a justification of the taking in another right.

And therefore one defendant may avow, and the other make conusance in his right.

And if one avows and the others make conusance, without saying as bailiffs of the other, and entire damages are given, it will be error. *R. Tel.* 108.

If the defendant makes conusance as bailiff or servant, he need not shew his authority. *4 Mod.* 378.

If he makes it as bailiff to the king, a patent need not be alleged. *Bro. Bailiff*, 1.

Or, as bailiff to a corporation, he need not allege a deed. *R. 3 Lev.* 107.

Nor, say *per eorum preceptum.* *Ibid.*

Or, shew how incorporated. *Ibid.*

And it is not traversable, generally, whether he was bailiff or not. *R. Cro. El.* 14.

It is not traversable, where he justifies in trespass or replevin, as bailiff, in a close which is the freehold of a stranger. *1 Sal.* 107.

But where he took contrary to the will of his master, upon such inducement it may be traversed. *R. 3 Lev.* 20.

So, it may be traversed, that he took as bailiff to another, and not to *A.* *R. 1 Leo.* 50. *R. 2 Leo.* 216. 196.

That he took of his own wrong, *absque hoc* that he took as bailiff, for this is material where the taking is of cattle. *R. 1 Sal.* 107.

If one defendant pleads *non cepit*, the other may make conusance in his right, for he shall not lose his advantage by the other's plea. *1 Rol.* 320. *l.* 25.

If the defendant says *bene advocat*, &c. for *bene cognovit*, it is form only. *2 Cro.* 372.

If he says *bene cognovit captionem in predicto loco*, without saying *tempore quo*, &c. it will be well. *R. 2 Mod.* 4.

If he does not describe how many acres the *locus in quo* contains in his avowry, it will be well. *R. Lut.* 1232.

Avowry or conusance ought to make a good title *in omnibus*, for it is founded upon the right. *Cartb.* 74.

For it is in the nature of a count, and must contain sufficient matter to have a return. *7 Co.* 25. a.



And therefore, if he avows for homage, he must make a title to homage.

If the replevin is, *bona et averia cepit*, and the defendant *advocat*, or *cognovit captionem honorum et averiorum*, but his justification goes only to the cattle, without speaking of the goods, it will be bad. *R. 5 Mod. 77.*

So, if the replevin is *bona et catalla et averia cepit*, and he makes avowry or consufance of the cattle only, it will be bad. *R. 4 Mod. 402.*

If the avowry or consufance is bad, the defendant shall have no return, tho' the replevin is also bad, and the declaration therein quashed for defect. *R. Sho. 99.*

But two defendants cannot make several avowries for the same thing, each in his own right, for each cannot have judgment severally for the same thing. *5 Co. 19. a.*

So, the avowry need not be for the same thing for which the taking was; for if a man distrains for one cause, he may afterwards avow for any other cause for which the taking was justifiable. *3 Co. 26. a. 2 Leo. 196.*

So, an avowry for rent, if it appears that part is not arrear, will be good for so much as is due, upon demurrer. *1 Sand. 287. Vide ante, (C 32.)*

Otherwise, if he avows for an entire rent, and it appears that he has title only to two parts. *1 Sand. 286. R. Mo. 281.*

Or, if he avows for 30*l.* part of the rent for half a year, without shewing that the residue was satisfied. *R. 4 Mod. 402.*

Or, if he avows *pro cert. leta*, and for a fine for not presenting, where it appears that the fine was excessive. *11 Co. 45.*

So, avowry for rent-arrear *tempore captionis* is sufficient, without saying *adhuc aretro existen.* *R. Dal. 72.*

So, if the avowry is for rent due at *M.*, and the distress is alleged before *M.* and judgment for the avowant, it may be amended after error for it. *R. Sal. 580.*

But, if it is not amended, it will be error, where he takes judgment for the whole rent till *M.* *Ibid.*

If the avowry or consufance is by attorney, when he was an infant, the plaintiff may plead it in abatement. *R. 1 Sal. 93.*

(3 K 15.) *Avowry for rent and services.*] The most usual avowry is upon distress made for rent or services.

The defendant in such avowry must allege in certain what lands are held of him, or of his lord, and by what tenure. *3 Lev. 142.*

For rent. *Win. Ent. 823. or 934. 937. 940. edit. 1680.*

For homage. *Win. 829. (or 973. edit. 1680.)*

Fealty. (*Vide Win. 965.*)

Suit of court. (*Vide Win. 986.*)

Heriot-service. *Vide post. (3 K 28.)*

And if he alleges tenure by services of different natures or qualities, tho' he holds by some of the services, the tenure may be traversed. *9 Co. 33. a. R. Cro. El. 799.*

If he alleges tenure by homage, he must intitle himself to it. *R. Win. Ent. 859. (or 973.)*

But

But since the *ſt.* 21 *H.* 8. 19. he need not allege any certain tenant.

1 *Leo.* 301.

So, he muſt allege ſeiſin of the ſervices, where the commencement of them does not appear by deed, &c. *Vide poſt.* (3 *K.* 17, 18.)

And he muſt allege ſeiſin by the hands of ſome certain perſon. *D.* 6 *Co.* 59. *b.*

And this ſince the *ſt.* 21 *H.* 8. 19. which enables an avowry for lands ſubject to rent, as well as before. *Co. Lit.* 268. *b.* 9 *Co.* 36. *a.*

And he muſt allege ſeiſin by the hands of him who has the freehold at leaſt. 6 *Co.* 57, 8. 1 *Rol.* 314. *D.*

But ſeiſin in law is ſufficient. 4 *Co.* 9. *a.* 10. 1 *Rol.* 314. *B.* *Vide Seiſin (E).*

So, it is ſufficient to allege ſeiſin of rent where he avows for homage, without ſaying *de quibus ſervitiis fuit ſeiſitus*. *R. Win. Rep.* 31. *Win. Ent.* 859. (or 973.) *cont.*

And therefore ſeiſin of homage is ſufficient for all other ſervices. 4 *Co.* 8. *b.*

ſeiſin of any ſuperior ſervice is ſufficient for all inferior ſervices. *Ibid.* 1 *Rol.* 315. *G.*

ſeiſin of an annual ſervice is ſufficient for all caſual ſervices. 4 *Co.* 8, 9.

Tho' not for another annual ſervice. 4 *Co.* 9. *a.*

So, ſeiſin by recovery, or by voluntary payment without coercion, is ſufficient. 4 *Co.* 9. *b.* 11. *b.*

So, ſeiſin need not be alleged within forty years, tho' by the *ſt.* 32 *H.* 8. 2. avowry ſhall not allege ſeiſin of any rent, &c. above forty (in *Cay's ſtatutes* it is fifty) years, &c. for this ſhall come from the other ſide, by plea in bar to the avowry. *Dy.* 315. *b.* *R.* 9 *Co.* 65. *a.* *D.* 9 *Co.* 36. *a.*

So, ſeiſin by diſſeiſor, or feoffor after feoffment, is ſufficient. 6 *Co.* 58. *a.* 1 *Rol.* 314. *l.* 50.

By the common law the defendant muſt avow on a perſon certain. *Co. Lit.* 269. *b.*

And it ſhould be upon his very tenant, generally, *viz.* his tenant in right and in fee. 9 *Co.* 21. *a.*

And therefore, if the tenant was diſſeiſed, before acceptance of the ſervices of the diſſeiſor or a deſcent to his heir, the lord muſt avow upon the diſſeiſee, otherwiſe, upon ſhewing the matter, the avowry ſhall abate. *Co. Lit.* 268. *a.*

So, if the donee was diſſeiſed or made a diſcontinuance, the donor muſt avow upon the donee, otherwiſe he ſhews the reversion out of him, and his avowry ſhall abate. *Co. Lit.* 269. *a.* 3 *Co.* 30. *b.*

If tenant in fee makes a feoffment, the feoffee after the death of the feoffor, or acceptance of the ſervices of him, ſhall compel the lord to avow upon him. *Co. Lit.* 269. *b.*

But during the life of the feoffor, and before acceptance of the ſervices of the feoffee, the lord might have avowed upon the feoffor or feoffee at his election. *Ibid.*

At common law, if there was a leſſee for life or donee in tail with remainder over, the lord might have ſhewn it, and avowed upon the leſſee or donee, as his very tenant *in forma prædict.* *Co. Lit.* 269. *a.* 20 *H.* 6. 9. *b.*

If the lord had a particular eſtate, he might have avowed upon the  
3 B 3 tenant



tenant *in forma predicta*, without naming him his very tenant, which imports himself to have a fee. *Co. Lit.* 269. *a.*

If a feignory, &c. came to a guardian in *Chivalry*, he might have avowed upon the special matter, as within his fee and feignory. *Co. Lit.* 269. *b.*

But now, by the *st.* 21 *H.* 8. 19. the lord may avow, or others make consuance upon the lands holden of him, without naming any person certain.

Yet he may avow at common law, if he pleases. *Co. Lit.* 268. *b.* 269. *b.* 9 *Co.* 36. *a.* 23. *b.*

And if he avows upon land, without avowing upon any person in certain, it is good by the statute, tho' he names a certain person for tenant, &c. which the statute does not require. *R.* 1 *Leo.* 301. *Semb. Mo.* 870.

So, if cattle are driven out of the lord's view, and taken, upon pursuit, in other land, the lord may avow by the *st.* 21 *H.* 8. 19. *R.* 9 *Co.* 22. *a.*

So, if the defendant avows for rent, *eo quod* D. holds of him by fealty and rent, which estate the plaintiff has, it is not material or traversable, for by the statute he may avow upon the land, and *which estate the plaintiff has* signifies nothing. *R. Mo.* 883.

[An avowry for an increased rent under a demise, for every acre of the land which should be converted into tillage, is supported by the evidence of a lease for a term of years, with a covenant to pay the increased rent for every acre which should be so converted, during a part of the term, *ex. gr.* for the three last years under this statute. *Roulston v. Clarke*, *C. P. M.* 36 *Geo.* 3. 2 *H. Bl.* 563.]

[In replevin the defendant avowed, &c. and stated in his avowry that by lease and release he, in consideration of an annuity therein mentioned, conveyed certain premises containing the place where, &c. to the plaintiff in fee, subject to a rent-charge, payable to the defendant during her life, with power of distress for non-payment of the annuity; and that by virtue of the lease and release, and by force of the statute, &c. the plaintiff became seised in fee, &c. and then she justified, &c. as a distress for non-payment of the annuity. Pleas in bar, 1<sup>st</sup>, that the plaintiff never was seised, &c. in fee; 2<sup>dly</sup>, (admitting that the defendant did by the lease bargain and sell, &c. to the plaintiff for a year,) that at the time of making the bargain and sale the defendant was seised, &c. only for her life, the reversion in fee then belonging to another, traversing that the defendant was seised of the reversion in fee. On demurrer both pleas were holden bad; the first because it denied what was before admitted, and because it traversed only a consequence of law; the second, because it admitted that the defendant had an estate sufficient to justify the distress. *Grillo v. Maunell*, *C. P. M.* 16 *Geo.* 2. *Willes*, 378.]

[A party may distrain for rent and avow for fealty. By *Ld. Kenyon* *C. J.* *Gwinnet v. Philips*, *B. R. E.* 30 *Geo.* 3. 3 *T. R.* 645.]

(3 *K* 16.) *Bar to it.*] To avowry for rent and services the plaintiff in bar may disclaim. 9 *Co.* 34. *b.*

So, he may disclaim generally, and thereon shall have judgment; but the lord may have a writ of right upon the disclaimer. *Mod. Int.* 306.

Or,

Or, confess the avowry. *Mod. Int.* 319.

Or plead, *out of his fee*, generally. *R.* 28 *H.* 6. 10.

So, he may plead *out of his fee*, without disclaiming, which will be perilous. 9 *Co.* 34. *b.* 28 *H.* 6. 10. 21 *H.* 7. 20. *a.*

Or, he may plead generally *nul tenure*. *Clift.* 638. *R. cont. and a repleader awarded.* 2 *Cro.* 127.

Or, he may confess the tenure in part, and traverse the tenure *modo et forma*. *R.* 9 *Co.* 33. *a.* 36. *a.* *Lut.* 1212.

And, if it is found for the plaintiff, he shall have judgment, tho' the avowry was for rent, the tenure by which was confessed. *R.* 9 *Co.* 36. *a.* *R. Cro. El.* 799.

If he alleges tenure for part of the land, he may allege that this and other land is held by such services, and traverse that only part is so held. 9 *Co.* 35. *b.*

So, he may confess the tenure and traverse the seisin. 9 *Co.* 33. *a.*

But the plaintiff cannot traverse the seisin of services generally. 9 *Co.* 34. *b.* 22 *H.* 6. 3. *Fitzb. Avowry*, 15.

For, if the lord had not seisin of the services, the plaintiff ought to confess the tenure and traverse the seisin. 9 *Co.* 33. *b.*

So, since the *stat.* 32 *H.* 8. 2. he may plead, *never seised within forty* (in the statute, according to *Cay*, it is fifty) *years*. 8 *Co.* 64. *b.* *Mod. Int.* 322.

If he was seised only for part of the services, he may plead that the tenure was by part, but never seised for the residue within forty years. 9 *Co.* 34. 5.

So, he cannot plead tenure of a stranger, and traverse the tenure. 9 *Co.* 35. *a.* *R.* 10 *H.* 6. 6. *b.* for he must disclaim, or plead, *out of his fee*. 10 *H.* 6. 6. 7.

But this plea is not good, if the avowry is for casual service; as, fealty, &c. *R.* 3 *Lev.* 21.

So, if the tenancy is granted by fine, &c. to the king, the lord cannot avow generally for rent-service. *R.* 1 *And.* 160.

So now, since the *stat.* 21 *H.* 8. 19. the plaintiff in replevin in bar, to avowry for rent may plead, *nothing in arrear*. *R.* *Ray.* 254, &c.

Tho' he does not make any title to the land. *Ray.* 258.

Tho' he is only lessee for years, or a stranger. *Ray.* 254.

[Pleading that *A.* having been lawfully possessed, &c. as tenant at will to *B.*, is a sufficient averment that *A.* was tenant at will. *Eaton v. Southby*, *C.P. T.* 10 & 11 *Geo.* 2. *Willes*, 131. 7 *Mod.* (8vo. edit.) 251. *S. C.*]

[In a bar to an avowry for rent, pleading that corn which had been cut was left on the ground until it was fit in a course of husbandry to be carried, is sufficient, without saying how long it remained there, the reasonableness of the time being a question of fact for the jury, and not a question of law for the court. *Ibid.*]

[On avowry for rent and issue thereon, plaintiff cannot give evidence to set off a mutual debt; but by way of special plea to avowry, he may plead mutual debt of more than the rent. *Barnes*, 450.]

[To an avowry for rent the tenant may plead the payment of a ground-rent to the original landlord. *Sapsford v. Fletcher*, *B. R. H.* 32 *Geo.* 3. 4 *T. R.* 511.]

So, he may plead all pleas, which he had by the common law, except disclaimer. 2 *Cro.* 127. *Co. L.* 268. *b.*



As, he may plead, *out of his fee.* 2 Cro. 127. Mod. Int. 303.

Or, traverse the tenure. 2 Cro. 127. D. that he shall plead no plea, but a disclaimer, or *out of his fee.* Mo. 870.

So, the plaintiff may plead in bar to an avowry, *de son tort*, with a traverse that *locus in quo*, &c. is parcel of the tenements alleged to be held. *Rast. Ent.* 556. b.

But by the common law before 21 H. 8. a stranger to the avowry, viz. he upon whom the avowry was not made, could not disclaim.

Nor, could plead, *out of his fee*, or any thing tantamount. 22 H. 6. 2. b.

Nor, *nothing in arrear.* Ibid.

Nor, *levy by distress*, and so *nothing in arrear.* 22 H. 6. 3. a.

But, in these cases he ought to pray in aid of the very tenant, and then disclaim or plead these pleas. 22 H. 6. 2. b.

So, plaintiff to an avowry for rent upon him as very tenant cannot say *nient seisie*, for this amounts to a disclaimer, and therefore he must disclaim. 21 H. 7. 20. a.

[If on avowry for non-payment of rent, a plea in bar is *de injur. sua propria absque hoc quod prad. R. cepit*, &c. *Non cepit* is no good traverse, he should pursue his title, and *de injur. sua propria* is enough. *Hornblower v. Grimes*, H. 6 G. 2. Fort. 362.]

[The plea of *de injuriâ suâ propriâ* to a cognizance for rent, is bad on a special demurrer. *Jones v. Kitchin*, C. P. T. 37 Geo. 3. 1 Bos. & Pull. Rep. 76.]

[The defendant pleaded *cepit in alio loco*, and avowed taking the goods in the place in question, whither they had been fraudulently conveyed within thirty days, &c. from the demised premises, as a distress for rent; the plaintiff in his plea in bar traversed the avowry, and took no notice of the plea; which was holden ill on demurrer, the avowry being in the nature of a suggestion to entitle the party to a return of the distress, and not traversable. *Bullythorpe v. Turner*, C. P. E. 17 Geo. 2. Willes, 475. Barnes, 353. S. C.]

(3 K 17.) *For relief*, &c.] The defendant avows for relief like as for other services. 3 Lev. 142. *Vide ante*, (3 K 15.)

And he need not make mention of the relief in his avowry; but of the tenure only; for the relief is incident to it. R. 3 Lev. 145.

And if it be severed by release, &c. it must be shewn on the other side. Ibid.

(3 K 18.) *For a rent-charge.*] If the avowry be for a rent-charge, the avowant must shew his title to the rent: as, by a grant to him in fee.

Or, in tail, or for life. Co. Ent. 590.

By devise to him, or his wife. 2 Sand. 195.

By grant or devise to such an one, under whom the defendant derives his title

By grant or devise to such an one, to whom the defendant is executor or administrator, and avow for arrears in his life. Win. Ent. 1015.

So, he ought to shew that *locus in quo*, &c. is parcel of the land charged, for to say *quod est et tempore quo*, &c. *fuit* is not sufficient; for this imports no more than it was so at the distress. R. 2 Vent. 150. 4 Mod. 150.

But

But the avowant need not allege seisin of the rent, where the commencement appears by deed. 8 Co. 65. a.

As, if he avows for a rent-charge. *Ibid.*

Or, for rent reserved upon a gift in tail. 1 Rol. 314. l. 10.

Or, upon a demise for life or years.

Or, for a rent in fee, reserved by deed, upon a conveyance in fee.

R. 8 Co. 65.

So, if the rent is reserved by act of parliament. R. Cro. Car. 81.

In bar to an avowry for a rent-charge the plaintiff may say *quod non concessit*.

He may demand *oyer* of the grant and demur.

He may say that the grantor was seised in tail, &c. and traverse the seisin in fee.

That the rent was extinguished by a fine. *Win. Ent.* 821. (or 935. edit. 1680.)

That he made a legal tender.

(3 K 19.) *For rent upon a reservation.*] If the avowry is for rent upon a reservation, he must shew that he, or A. from whom the reversion descended, or was assigned, was seised, and made a lease to the plaintiff for years, or at will. 2 Saund. 310. *Tho. Ent.* 264. *Clift.* 640.

So, he may say that he holds by copy or demise.

Or, that part is copyhold, part freehold, which he demised. *Clift.* 640.

*That A. seised, leased to the plaintiff, the reversion descended to parceners, and one assigned his part to the defendant, who avows for his part of the rent.*

*That A. being seised, demised to him who leased to the plaintiff for a less term; for it is not sufficient to shew the commencement of the term to the plaintiff, without shewing a good title in himself, by which he could make a good lease to the plaintiff.* R. Sal. 562.

[If defendant avows for rent, and shews that A. *habens titulum* demised to him, and he to plaintiff, it is ill; for he should shew the commencement of the particular estate. *Reynolds v. Thorpe*, P. 1 G. 2. *Sir.* 796.]

*That he, being seised in fee, made a gift in tail to B. rendering rent; for tho' the gift is in tail, he may avow upon the reservation.* 1 Rol. 314. l. 10.

And he need not shew seisin of the rent, where he avows upon a reservation; for it is sufficient that he has the reversion. *Ibid.* *Vide ante*, (3 K 18.)

[If lessee for years assigns his whole term, and there is no clause of distress, he cannot distrain for rent. — *v. Cooper*, P. 8 G. 3. 3 *Wils.* 375.]

(3 K 20.) *Bar to it.*] In bar to an avowry for rent reserved, the plaintiff may plead as in bar to debt for rent: as, *nihil in tenementis*. *Vide ante*, (2 W 48.)

[*Nil habuit in tenementis* is no plea, (even for a stranger,) since 11 G. 2. c. 19. *Sullivan v. Stradling*, H. 4 G. 3. 2 *Wils.* 208.]

*Non demisit.* *Clift.* 641. 2 *Sand.* 312.

*Nothing in arrear.* [*Cowp.* 589.]

*Nothing in arrear* for part of the rent, and tender of the residue. *Clift.* 646.

*That*



*That the avowant afterwards used or sold the cattle or goods distrained.* *Lut.* 1423.

After issue joined upon a plea in bar to an avowry, the court will not suffer the plea to be withdrawn, and the avowry confessed, without consent, for the avowant will lose his costs. *Skin.* 594.

[Suspension of the rent by eviction or expulsion. 1 *Roll. Abr.* 938. *Cowp.* 243.]

[But where the bar states merely a trespass, and no eviction or expulsion; it is no suspension of the rent, and consequently bad on demurrer. *Hunt v. Cope*, B. R. H. 15 Geo. 3. *Cowp.* 242.]

(3 K 21.) *For damage feasant.*] If the defendant avows, or makes confession for *damage feasant*, he must shew that the place where, &c. is his freehold, or the freehold of B. under whom he makes confession. *Lut.* 1140. *Vide post.* (3 M 26.)

And if he says that he himself or B. was seised, he must say of what estate in fee, tail, or for life. *R. Lut.* 1232.

[In replevin for taking cattle in *Holloway* road, avowry for taking them in the place where, &c.; for that he took them *damage feasant* in *Four-acre Close*, and drove them along the road to pound them, is good. *Mattravers v. Fosset*, T. 12 G. 3. 3 *Wils.* 295.]

[One tenant in common cannot avow *alone* for taking cattle *damage feasant*; but he ought also to make cognizance as bailiff of his companion. *Sir W. Jones*, 253. 1 *Roll. Abr.* 220. pl. 14. *Culley v. Spearman*, C. P. H. 35 Geo. 3. 2 H. Bl. 366. *Willis v. Fletcher*, Cro. Eliz. 530.]

(3 K 22.) *Bar. His freehold.*] To this avowry the plaintiff may say in bar, that it is his freehold. *Vide post.* (3 M 34.)

Or, *the freehold of A., and by his licence he put his cattle there.* 1 Co. 64. a. *Vide post.* (3 M 34.)

Or, a special title by devise, fine, demise, &c.

(3 K 23.) *Tender of amends.*] So, the plaintiff may say in bar, *tender of amends.*

If the defendant pleads that he was seised of three acres *in loco in quo*, &c. it is sufficient, without saying how many acres the *locus in quo*, &c. had. *R. upon special demurrer.* *Lut.* 1232.

(3 K 24.) *Bar by common.*] In bar of an avowry for *damage feasant*, the plaintiff may say that he is entitled to common in the place where, &c. and this, common appendant or appurtenant.

Common by reason of *vicinage*.

[In pleading a common of pasture, it is not necessary to allege in express terms whether it be common appendant, appurtenant, or in gross; but the court will judge of it from the nature of the right claimed. *Musgrave v. Cave*, C. P. H. 15 Geo. 2. *Willes*, 319.]

[If a commoner having right of common for one beast, put on two, the lord can distrain only the one put on last, unless they were both turned on together; and it must be shewn in a plea (justifying the taking as a surcharge) whether they were put on together or separately, and, if the latter, which was put on first. *Ellis v. Rowles*, C. P. M. 24 Geo. 2. *Willes*, 638.]

And he must shew in what *vill* the land lies to which he claims common. *R. 2 Cro. 238.*

*That his lessor is entitled to common for him and his tenants. Co. Ent. 573. b.*

If the plaintiff prescribes for common, he must make a good title to the common. And for common appendant or appurtenant, he must shew a seisin in fee of the land to which he claims common, and then allege that he and all *quorum statum*, &c. Time whereof, &c. have had common in such place, &c. *1 Sand. 346. Co. Lit. 113. b.*

If he claims common in *gross*, he need not allege seisin of the land, but only that he and all his ancestors have had, time whereof, &c. common in such place, &c. *1 Sand. 346.*

If a copyholder claims common in another manor, he must allege seisin in his lord, and that he for himself and his customary tenants has common in such place, &c. (*Vide 2 Sand. 326.*)

If he claims common in a waste of the same manor, he must allege it by way of custom. *Co. Lit. 113. b. Vide Copyhold, (K 6.)*

And he need not shew what estate the copyholders have in their customary tenements. *R. 2 Sand. 326.*

If the plaintiff is a lessee for years, he must allege a seisin in his lessor, who has the fee, and prescribe in him and all those *quorum statum*, &c. and then derive the term to himself, &c.; for if he alleges a prescription in himself, it is bad. *R. Cro. Car. 599.*

So, he must allege a prescription for common, *time whereof*, &c. where it is contrary to common right: as, for common appurtenant, or by reason of *vicinage*, and it is not sufficient to say that all *habuerunt et habere consueverunt*, without more. *R. Latch, 161.*

If he prescribes for common appendant, he ought to claim it only for cattle *levant and couchant*. *R. Lut. 1359. R. 1 Sid. 313.*

But, if he prescribes for common appendant to a house or cottage, it will be well, for this comprises any land. *R. 1 Sal. 169. Semb. 1 Brownl. 198.*

[In pleading a right to enter a common to dig for and carry away sand and gravel for the repairs of a messuage, it is necessary to allege that the messuage was out of repair; that the party entered for the purpose of digging for and carrying away sand and gravel for the necessary repairs of the messuage, and that the materials were used for that purpose. *Peppin v. Shakespear, B. R. T. 36 Geo. 3. 6 T. R. 748.*]

And for cattle *levant and couchant* is sufficient, without other certainty. *R. 1 Brownl. 198.*

So, he must allege *user* of the common according to his prescription: as, if he claims common for cattle *levant and couchant*, he must shew that the cattle put there were *levant and couchant*. *1 Sand. 28. R. H. 10 An. in C. B.*

But the omission shall be aided after verdict. *1 Lev. 196. R. 1 Sand. 227. R. 2 Cro. 44.*

And after a general demurrer. *R. cont. 1 Lev. 196.*

And if he claims common appurtenant for a certain number of cattle, without saying *levant and couchant*, he need not shew that they were so. *R. 2 Cro. 27.*

If



If the plaintiff claims common for all *commonable* cattle, he must shew that the cattle put there were so. *Semb. Lut. 1470.*

If he claims common, from the time of cutting and carrying away the corn, till the land is sown again, he must shew that the cattle were put there within that time. *R. 2 Cro. 637. Vide Pl. Com. 33. b.*

And he must say that no part of the land was sown again. *2 Cro. 637.*

[A prescription for common of pasture for a certain number of sheep on *A.* every year, at all times of the year, is well laid, tho' the evidence which proves the right of common proves also that the tenant of a certain farm has a right to have the sheep folded at night on his farm, after they have fed on the common during the day. *Brook v. Willet, C. P. M. 34 G. 3. 2 H. Bl. 224.*]

*Replication.*] To a prescription for common the defendant may reply *de son tort*, with a traverse of the prescription.

[If the common claimed by the plaintiff in his plea in bar to the avowry, be in common fields belonging to different owners, the defendant may reply a custom for any one of these owners to inclose his own field, and thereby discharge it from the right of common of the others. *Vide 2 Wilf. 269. 274.*]

[And it is a legal consequence which wants no proof, that by inclosing, the party excludes himself from any right of common in the uninclosed lands. *Ibid.*]

Or, with a traverse of the *levancy* and *couchancy*; for this goes to the *gist* of the justification. *R. Win. Ent. 972. Per Holt, Mod. Ca. 115. Semb. 1 Sal. 169.*

Yet the foddering of the cattle in his yard is evidence of their being *levant and couchant*. *1 Sal. 169.*

[*A.* being possessed of a quantity of land in a common field, and having a right of common over the whole field, and *B.* having also a right of common over the whole field, they enter into an agreement, for their mutual convenience and advantage, not to exercise their respective rights for a certain term of years, and each party covenants to that effect. If during the term the cattle of *B.* come upon the land of *A.*, he may distrain them *damage feasant*; and may in his replication (in answer to a plea pleaded by *B.* of his right of common, in bar of the cognizance of *A.*) set forth the special circumstances of the agreement and covenants. *Whiteman v. King, C. P. M. 32 Geo. 3. 2 H. Bl. 4.*]

(3 K 25.) *Bar by way.*] So, in bar of an avowry for *damage feasant*, the plaintiff may prescribe for a way. *Vide Chimin, (D 2.)*

And he must shew what way he claims in certain: as, whether it be for horses, *carucis*, &c. *Vide Chimin, (D 2.)*

And the *terminus a quo* and *ad quem*, &c. *Vide Chimin, (D 2.)*

*Replication.*] To this bar the defendant may reply *de son tort*, and traverse the prescription.

Or, acknowledge the way, and say that the trespass was *extra viam*. *Tho. Ent. 297.*

If

If the defendant traverses the prescription, the plaintiff shall join issue upon the traverse.

If he pleads *extra viam*, the plaintiff may rejoin to it *non culp.* *Tho. Ent.* 297.

[A plea in bar of an avowry for taking cattle *damage feasant*, that the cattle escaped from a public highway into the *locus in quo*, through the defect of fences, must shew that they were *passing on the highway* when they escaped: it is not sufficient to state that being on the highway they escaped. *Dovaston v. Payne*, C. P. T. 35 Geo. 3. 2 H. Bl. 527.]

(3 K 26.) *By force of a warrant or commission, &c.*] So, the defendant may make avowry by authority of the commissioners of sewers. *Co. Ent.* 293. *a.* *Hern.* 643. *Bro. R.* 417. *Vide post.* (3 M 23.)

By the *st.* 23 H. 8. 5. the defendant may avow generally that he took by authority of the commissioners of sewers for an assessment by such commission. *Co. Lit.* 283. *a.*

But, if the defendant waives the short pleading allowed by the statute, and shews the special matter, he must plead all things sufficiently, otherwise it will be bad. *Sti.* 12. *Lut.* 1180.

So, he may avow by virtue of a warrant to distrain for the poor's rate, pursuant to the *st.* 43 El. *Lut.* 1179.

Or, by authority of the *st.* 15 Car. 2. for regulation of the militia. *Clift.* 636.

So, by force of a warrant upon a conviction for fraud in the excise. *Lev. Ent.* 152.

[A warrant of distress granted by two justices under *stat.* 9 Geo. 2. c. 23. which refers to *stat.* 12 Car. 2. c. 14. *f.* 45. on a conviction for selling spirituous liquors without a licence, need not be under the seals of the justices; it is sufficient if it be under their hands. *Padfield v. Cabell*, C. P. E. 16 Geo. 2. *Willes*, 411.]

(3 K 27.) *For an amerciament.*] So, the defendant may make avowry for an amerciament: as, for not appearing at a *leet*. *Win. Ent.* 873. (or 986. edit. 1680.) *R.* 3 *Leo.* 14. *Mo.* 89. *Bend. pl.* 227.

For departing, when sworn upon the homage, before verdict given. *Co. Ent.* 570. *b.*

For refusing to be constable. *Co. Ent.* 572. *a.* 5 *Mod.* 124.

So, for an amerciament for stopping a way, or other offence presented. *Co. Ent.* 573. *a.*

Or, for taking inmates.

In an avowry for an amerciament, the defendant must shew the *leet* or court were imposed, to be duly held. *R. Cro. El.* 245.

And before whom. *R.* 1 *Brownl.* 198. *Semb.* 5 *Mod.* 96.

And over whom it has jurisdiction. *R. Skin.* 393.

That he had special notice of his election to the office for the refusal whereof it was imposed. *R.* 5 *Mod.* 130.

So, that there was good cause for the amerciament: as, that it was for an offence within the *leet*. *R. Hob.* 129.

And in replevin it is not sufficient to say that he was presented for such an offence, but he must aver directly that such offence was committed. 1 *Sal.* 107. *Sho.* 61. *R. Cro. El.* 885, 6. 3 *Leo.* 8. *R. Carth.* 74. *R. F.* g. 46. 108. Otherwise



Otherwise in trespass. *R. 1 Sal. 107. Sho. 61. Carth. 74. Skin. 587.*

And *licet fuit cul.* is not a sufficient averment. *F. g. 109.*

[If defendant avows in replevin; as, bailiff for an amerciament, he must aver that defendant was guilty, for here he is an actor; tho' in trespass it is not necessary, for there the conviction justifies the officer. *Stephens v. Haughton, M. 3 G. 2. Str. 847.*]

[The amerciament must be by the court, not by the jury, and there must be an afferment. *Ibid.*]

So, he must shew an amerciament at a sum certain; for without that, an afferment is not sufficient. *R. Hob. 129.*

So, he must shew that the amerciament was afferred by afferors. *R. 3 Lev. 19. Adm. Mo. 89.*

And he must shew the names of the afferors. *R. Kel. 66. a.*

So, the names of the suitors before whom presented. *R. 3 Leo. 8.*

Or, ascertained by the jury. *Semb. F. g. 109.*

So, he must shew the precept. *1 Sal. 108. Sho. 62. 3 Mod. 137. R. Mo. 573. 604. Semb. cont. Carth. 74. Acc. Skin. 587.*

And where made. *R. 1 Brownl. 198.*

But if the amerciament is general, *ideo in misericordia*, and afterwards afferred, it is sufficient. *R. 1 Sal. 56.*

Or, if it is afferred at a sum certain. *Per Holt, Sho. 62.*

(3 K 28.) *For customs.*] So, he may make avowry for a customary demand: as, for a fine due by custom upon an alienation. *2 Vent. 132.*

So, for a fine imposed by the leet, &c. for a contempt.

So, for a toll due by custom.

So, for a heriot due by custom. *Co. Ent. 6. 13. a. Lut. 1310.*

*Vide Copyhold, (K 23.)*

Or, for heriot-service. *8 Co. 103.*

So, for breach of a bye-law. *Win. Ent. 900. (or 1014. edit. 1680.)*

[If defendant makes conusance that he distrained for a forfeiture incurred by breach of a bye-law, he must set forth the bye-law. *Gerrish v. Rodman, H. 11 G. 3 3 Wilf. 155.*]

But if the avowry is for a thing due against common right, a custom must be alleged to distrain for it. *R. 1 Sal. 175. Vide Distress, (A 1.)*

Yet where the avowry shews that the duty is due, it is sufficient, without alleging performance of that which was the consideration for the duty: as, if it says that a burrough, in consideration of maintaining the port, shall have toll, &c. it need not allege that the port was in repair, for it is sufficient that they are bound to repair it. *R. 1 Sal. 249.*

#### (3 K 29.) Judgment in Replevin.

(3 K 29.) *For the plaintiff.*] If there be judgment for the plaintiff for want of a replication to the bar to the avowry, or upon a demurrer, a writ of inquiry of damages shall be awarded.

So, if the defendant, *relictâ verificatione, cognovit actionem*, or there is judgment against him by *nihil dicit*, &c.

Or, at the request of the plaintiff, by the assent of the defendant, the justices may assess the damages without a writ of inquiry.

If the judgment is upon a verdict, the jury usually assess the damages. 2 Sand. 315.

Or, the jury after verdict may be dismissed, and damages assessed by the justices with the defendant's consent.

So, if the jury do not assess damages, the plaintiff may make a suggestion upon the roll that the cattle are still detained, whereupon a writ shall go to inquire of the value of the cattle and the damages, upon which the plaintiff shall have judgment for both.

[A judgment "that the defendants have a return of the cattle, and recover their damages and costs assessed by the jury," is good, either as a judgment at common law, tho' the return be not adjudged *irreplevisable*, or as a judgment under the *stat. 21 H. 8. c. 19.* which entitles the defendants to damages and costs. *Gamon v. Jones, B. R. H. 32 Geo. 3. 4 T. R. 509.*]

If there is judgment for the plaintiff in *replevin qu. adhuc detinet* by default after appearance, there shall be a special writ of inquiry for the value of the cattle, or goods, and damages. *F. N. B. 69. L. Co. Ent. 611. a.*

But where the taking was lawful, the damages shall be only for the detainer: as, in *replevin* by the lord for the goods of his *villain*, or for goods taken *damage feasant*, and detained after amends tendred. *F. N. B. 69. F. G.*

(3 K 30.) *For the defendant.*] If there is judgment for the defendant upon a demurrer or verdict, or the plaintiff is nonsuited, the defendant shall have *return irreplevisable*. *Vide post. (3 K 31.)*

The defendant shall have return, tho' he pleads *non cepit* after a *wilbernam* awarded. *Sal. 581.*

Or, claims property. *Sal. 581.*

If the plaintiff is nonsuited, when the defendant avows for rent, the justices may assess damages without a writ of inquiry. 3 *Lep. 213.*

And by the *st. 17 Car. 2. 7.* on distress for rent on the lands chargeable, if the plaintiff in *replevin*, by plaint or writ depending in any court at *Westminster*, be nonsuited before issue, the defendant may make suggestion in nature of an avowry or conusance to shew cause of distress, and the court shall award a writ to inquire, &c. what arrear, and the value of the distress, of the execution of which 15 days' notice shall be given to the plaintiff or his attorney.

By the same statute, on return of the inquisition the defendant shall have judgment to recover the rent-arrear, if the goods distrained amount to it; otherwise, to the value of the distress, with full costs, for which he may have execution by *feri facias, elegit, &c.* 1 Sand. 195.

By the same statute, if the plaintiff be nonsuited after avowry, or conusance, and issue joined, or a verdict be for the defendant, the jury who were to try the issue shall inquire what arrear, and the value of the distress, and the defendant shall have judgment and execution *ut supra.*

So, by the same statute, if judgment be for the defendant upon demurrer, the court shall award a writ to inquire the value of the distress, and on return the defendant shall have judgment for the arrears mentioned in the avowry or conusance, if the distress amount to that value, otherwise to the value of the distress, and his full costs and execution *ut supra.*

If



If the avowry is for rent-charge, as well as for rent-service, the jury shall inquire what rent was in arrear, and the value of the cattle distrained. *Adm. 1 Lev. 255.*

So, if the avowry is for the poor's rate, or other duty, the jury shall inquire how much is due. *Semb. 5 Mod. 76.*

But if the jury omit inquiring what rent is in arrear, it cannot be supplied by a writ of inquiry; for it must be by the same jury who try the issue. *R. 1 Lev. 255. 1 Sal. 205.*

Yet, if the plaintiff is nonsuited, it may be supplied by a writ of inquiry. *Semb. 5 Mod. 76. R. 5 Mod. 77.*

It may be supplied by a writ of inquiry, where the avowry was for the poor's rate, and the plaintiff nonsuited. *Sal. 205.*

[So, where at the trial the jury omits to assess the damages. *2 Bl. 291. 3 Wils. 442.*]

So, if the jury find the value of the distress, and not what rent in arrear, by which he cannot have judgment upon the verdict, yet if he thinks fit he shall have judgment at common law. *R. Ray. 170. 1 Sid. 380.*

[If the jury find a verdict for him, and damages to the amount of the rent claimed in the cognizance, without finding either the amount of the rent in arrear or the value of the cattle distrained, and judgment be entered for the damages assessed, the court will permit the defendant to amend his judgment, and to enter his judgment *pro retorno habendo*, after a writ of error brought. *3 T. R. 349.*]

[If the plaintiff is nonsuited for want of plea in bar, the avowant may sue the sureties on the bond, and need not execute a writ of inquiry for the damages. *Waterman v. Yea, M. 30 Geo. 2. 2 Wils. 41.*]

[If plaintiff is nonsuited for want of declaration, and *retorno habend.* awarded, and then plaintiff sues out writ of second deliverance, yet afterwards avowant may execute writ of inquiry of damages; for tho' writ of second deliverance is *superfedeas* to *retorno habend.* yet it is not to writ of inquiry. *Cooper v. Sherbrooke, P. 33 Geo. 2. 2 Wils. 116.*]

[If goods distrained are not replevied, but by consent of attornies remain in distrainer's hands, without writ of *re. fa. lo.* or appearance; after verdict for plaintiff the court will set aside all proceedings. *Barnes, 451.*]

### (3 K 31.) Execution.

After judgment for the defendant, by the common law, a writ of *retorno habendo* was awarded, which was irrepleviable.

Where the judgment was upon a demurrer or after verdict. *14 H. 7. 6. b.*

But if the judgment was upon a nonsuit before verdict, he shall have *return*, but not irrepleviable. *Ibid. 34 H. 6. 5. a.*

If upon a writ *pro retorno habendo* the sheriff cannot find the cattle, there shall be a *capias in withernam* upon the return of *elongata*. *2 Leo. 174.*

So, if after *withernam* in process the defendant in *homine replegiando* found bail and pleaded, and there is judgment against him and he is surrendered, he shall be detained upon the first *capias in withernam*. *R. Sal. 582.*

Or,

Or, if he does not surrender himself, another *capias in withernam* shall issue against him. *R. Sal. 582.*

But, after *withernam* upon a *retorno habendo*, if the defendant tenders in court the damages assessed by the jury, and also a fine for his contempt, the proceedings upon the *withernam* shall be staid. *R. 2 Leo. 174.*

So, after judgment for *return irreplevisable*, if the owner of the cattle or goods tenders all that is due upon the judgment, and it is accepted, there shall be a writ of *delivery* for the goods. *2 Inst. 107.*

So, if he tenders the whole upon the judgment, which is ascertained by the avowry, and is refused, he shall have *detinue*. *Ibid.*

[In replevin in county-court, removed by *recordari*, and verdict for avowant, and inquiry as to the value, pursuant to *st. 17 G. 2. c. 7.* the avowant shall not have the replevin-bond delivered to him to sue the parties; but must either have judgment and execution for the sum settled by the jury pursuant to that statute, or he must take the ancient remedy, which is, to have writ to *de retorno habendo*; and if sheriff returns *averia elongata*, then a writ to have *return* of the beasts of the pledges; and if that returned *nihil*, then *sc. fa.* against the sheriff *quod reddat ei tot. averia.* *Combes v. Cole, H. 10 G. 2. B. R. H. 352.*]

(3 K 32.) Recaption.

So, if pending replevin for a former distress the lord distrains his tenant again for the same cause, he shall have a *recaption*. *F. N. B. 71. E.*

To *recaption* the defendant does not avow as in replevin, but justifies; for the plaintiff shall not recover damages for the taking or detaining of his cattle, but only damages for the defendant's contempt against law. *1 Rol. 320. l. 10.*

(3 L) Pleading in *Scire Facias*.

(3 L 1.) When it lies.

(3 L 1.) By the **BY** the common law a *scire facias* lies after a year and a day after judgment given in a real action, to execute such judgment. *2 Inst. 469. Adm. 1 Sal. 258. Vide Execution, (1 4.)*

So, to execute a fine. *2 Inst. 470. Vide Execution, (A 6.)—Fine, (E 15.)*

And upon a judgment in ejectment. *R. Sal. 258. 600.*

So, in annuity. *1 Sal. 258. 600.*

So, in personal actions, if the plaintiff or defendant die within a year and a day, there cannot be an execution before a *scire facias* by or against the executor or administrator. *1 Rol. 900. l. 15. 20.*

So, if one plaintiff die, the survivor shall not have execution before a *scire facias*. *Mo. 367. R. cont. Noy, 150.*

The survivor shall not have an execution by *elegit*, for the heir shall be contributory. *Per Holt, 1 Sal. 320.*

So, if a recognizance is given for good behaviour, he cannot be indicted for a breach of the recognizance before a *scire facias* upon it; for he may have a plea for his excuse. *1 Rol. 900. 5.*



So, a *scire facias* lies upon a judgment in annuity. *Per Holt, Sal. 600.*

So, if a conufee dies, his executor cannot sue upon the recognizance, to have an *elegit*, without a *scire facias* against the conufor, tho' it is within the year. *F. N. B. 267. D.*

Nor, if the conufor dies within the year, against his executor, heir, or *terretenant*. *Ibid.*

But by the common law a *scire facias* does not lie in personal actions after a year and a day after judgment. *2 Inst. 469. Dub. per Holt, Sal. 600.*

Nor, upon a recognizance acknowledged. *2 Inst. 469.*

So, it is not necessary where the king was plaintiff. *Sal. 603.*

(3 L. 2.) *By the st. W. 2. 45.]* Yet, by the *st. W. 2. 45.* a *scire facias* was given to have execution upon a judgment in personal actions after a year and day. *Co. Lit. 290. b.*

And by the same statute a *scire facias* lies after the year and day upon a recognizance. *2 Inst. 470.*

But a *scire facias* is necessary where the judgment is superseded by error, tho' the year and day pass. *Vide post. (3 L. 4.)*

So, it is not necessary where no alteration of parties is made; as, if one plaintiff dies after judgment, execution may be sued in the name of both without a *scire facias*. *Noy, 150.*

So, if error is sued and judgment affirmed, and afterwards one of the plaintiffs dies. *R. Mo. 367. Adm. 5 Mod. 339.*

So, if one plaintiff dies, the survivor alone may sue out execution, without a *scire facias*; for he is party to the judgment. *Cont. Mo. 367. R. acc. Noy, 151. Adm. Sho. 404. Adm. Cart. 194.*

So, if error is brought by several defendants, and afterwards one dies, whereby the error is abated, execution may be sued against the others without a *scire facias*. *Dub. Sho. 404. Semb. 5 Mod. 339. 1 Sal. 319.*

So, if two sue execution by *scire facias* and one dies after an *elegit* awarded, the survivor shall have an *alias elegit* without a *scire facias*. *R. Cart. 113. 123. 180. 194.*

Yet, where judgment is given and execution delayed beyond the year and day by injunction in *Chancery*, there must be a *scire facias*. *R. 1 Sal. 322.*

If execution is sued after the year and day without a *scire facias*, the execution shall be superseded upon motion. *Mod. Ca. 288.*

But if execution is sued after a year and day without a *scire facias*, it is not void but voidable by error. *R. 3 Lev. 404. 1 Sal. 261. R. Cont. 4 Leo. 197.*

A *scire facias* lies of course within 10 years after judgment; but after ten years it must be upon motion. *Pr. Reg. 209.*

### (3 L. 3.) *Scire Facias* upon Judgment.

(3 L. 3.) *How it shall be sued.]* A *scire facias*, tho' it is but a judicial writ, is in the nature of an action, and a release of actions or of executions discharges it. *Co. Lit. 290. b. [2 T. R. 46.] Vide Bail, (R. 1, &c.)*

[It is a *personal* action, and therefore requires bail on a writ of error. 2 Bl. 1227. 2 Ld. Raym. 1048. 1253.]

[A *scire facias* to revive a judgment entred on a bond for securing an annuity granted before the 17 Geo. 3. c. 26. s. 2. commanding that no *action* shall be brought on any judgment altered, (unless certain requisites were complied with,) is an action within that clause. 1 T. R. 267.]

[And a plea to a *scire facias* must conclude "if the plaintiff ought to have or maintain his *action*." Ibid. Grey v. Jones, C. P. T. 4 G. 3. 2 Will. 251.]

[And a *scire facias* to revive a former judgment is so far a continuation of the same action, that if the plaintiff's testator had agreed not to bring a writ of error in that former action, such agreement shall bind his executors on the *sci. fa.* being brought against them. 1 T. R. 388.]

If it is to have execution of a judgment, the judgment must be entred upon record before the *scire facias* sued; and it is not sufficient that it is signed by the officer. Per Glinn. Pr. Reg. 494.

If judgment was given 10 years before, it shall not be awarded without motion in court. Pr. Reg. 495. Sal. 598.

And the record of the judgment must be in court; for it is the foundation and warrant for the *scire facias*. Pr. Reg. 495.

If it was seven years before, there must be a motion at the side bar. Sal. 598.

If after judgment revived by *scire facias*, the defendant dies before execution, there shall be another *scire facias* without motion. Ibid.

A *scire facias* against a defendant says *in hac parte*. Sal. 599.

Against the bail it says *in eâ parte*. Ibid.

The *scire facias* must be sued in the same court where judgment was given, if the record remains there. Vide Execution, (I 1.)

And to the sheriff of the same county where the original action was. Pr. Reg. 495. R. Hob. 4. Tel. 218.

And upon return of *nulla bona* in the same county, there may be a *testatum scire facias* to the sheriff of another county. 2 Leo. 67.

But if a debt, after recovery in B. is assigned to the king, a *scire facias* may issue out of the Exchequer. Ibid.

A *scire facias* ought to be as short as possible. Pr. Reg. 496.

And therefore it is sufficient, tho' it be as general as the record upon which it is founded. Mod. Ca. 296.

And an immaterial variance from the record does not prejudice; as, an omission in the style of the king. R. 3 Mod. 227.

So, *scire facias executor*. of such an one is sufficient without naming him. 1 Leo. 17.

But it must recite the judgment that was given. Cro. El. 817.

And before what judge. Pr. Reg. 497. R. Sal. 517.

If the record is special, it is safe to recite it as it was pleaded. Dy. 34. b.

It must be against all the defendants together. R. Sal. 598.

A *scire facias pro valore et dampnis* upon a judgment in dower must mention the recovery of seisin. Off. Br. 303. 305.

By the st. Mert. 1. she may recover the value and damages, *usque diem quo seisinam recuperavit*. 2 Inst. 80.



If a recognizance was taken before a judge, and not entred in court, and the plaintiff declares upon a recognizance in court, it is variance. *R. Sal. 564. 659.*

And such variance cannot be amended. *R. Sal. 52.*

If the *scire facias* be upon a judgment in ejectment for two messuages where the judgment was of one messuage. *Ibid.*

So, it ought to conclude, *quare executio fieri non debet*; and therefore if *non debet* is omitted it is bad. *Lut. 1282.*

If the judgment be against two and one dies, it shall be against the survivor, *quare* execution against his goods, and a moiety of his lands, and against the heir and *terretenants* of the deceased, *quare* execution against them for a moiety of his lands *habere non debet*. *R. Carth. 107.*

[If defendant dies after writ of inquiry executed, and before the return, and the *sci. fa.* is to shew cause why new writ of inquiry should not be awarded, it shall be quashed; for it should be to shew cause why the damages assessed should not be recovered. *R. on demurrer, Compton v. Leeds, 13 G. 1. C. B. Goldsworthy v. Southcott, H. 22 G. 2. B. R. H. 1 Wilf. 243.*]

If it be by an executor, it must make a *profert* of the letters testamentary in the middle or at the end. *R. Carth. 69.*

But a *scire facias* against *terretenants* need not shew by what title they entred. *R. 1 Lev. 312.*

It need not recite all the proceedings upon which the judgment was given, but the judgment only. *R. Carth. 149.*

The term of the recovery need not be inserted. *Barnes, 431.*

The *scire facias* must not be tested on a Sunday; for it is not *dies juridicus*. *Dy. 168. a.*

There ought to be seven days between the *teste* and return of every *scire facias*; and therefore 14 days between the *teste* of the first and return of the second *scire facias*. *R. 2 Jon. 228. R. 9 W. 3. B. R. (Com. 53.) Sal. 599. Skin. 633.*

So, a *scire facias* must be delivered to the sheriff four days at least before the return. *2 Jon. 228. [4 T. R. 583.]*

A convenient time. *Sal. 599.*

[If it has lain four days in the office, summons upon it may be made any time before the court is up, on the return-day. *Obrian v. Frazier, M. 12 G. Str. 644.*]

[The sheriff's return of *scire feci* does not estop the bail from shewing that they were summoned so late on the return-day that they could not bring in their principal before the rising of the court. *2 T. R. 737, 738. n.*]

By rule in *B. R.* the second *scire facias* ought not to be sued out till the first is returned. *Sal. 599. Cont. Skin. 633.*

[Declaration may be entitled of the term generally, tho' the *sci. fa.* is returnable the last return, *Ward v. Gansell, H. 11 G. 3. 3 Wilf. 154.*]

It may be quashed on plaintiff's motion, after appearance, without costs. *Barnes, 431.*

(3 L 4.) Upon what judgment.] A *scire facias* lies *quare executionem non* upon every judgment, upon which execution is not sued within a year

a year and a day, if the judgment was not given with a *cesset executio* to such a time, for then the year shall be computed from that time. *Mod. Ca.* 288.

Tho' execution be sued in part. *Lut.* 1264.

So, tho' execution is sued, but not continued for a year and a day.

*2 Leo.* 77, 78. *Carth.* 2.

It lies upon a judgment in a real action. *Vide Execution, (A 4.)—*  
(I 4.)

Upon a judgment in ejectment, where a stranger enters after judgment. *R. Lut.* 1268. *3 Lev.* 100. *Clift.* 676, 7.

So, it lies upon a judgment *quod computet.* *1 Vent.* 258.

So, if error is brought of the judgment after the year, which is quashed and void, there ought not to be execution, without a *scire facias*; for the writ of error being void, does not revive the judgment. *R. 1 Rol.* 899. *l.* 40.

So, if there is an injunction out of *Chancery*, whereby execution is stayed for a year, there shall not be execution afterwards without a *scire facias.* *R. Mod. Ca.* 288.

[If on judgment of *Michaelmas* term, execution is stopt by injunction, and afterwards taken out tested the last day of the subsequent *Michaelmas* term; it is irregular, without *sci. fa.* A writ of error is matter of record, which the court can take notice of, but an injunction is not. *Winter v. Lightbound, P. 6 G. Str.* 301.]

Therefore it is not necessary, where the judgment was suspended by error, tho' a year and a day are passed before judgment affirmed. *R. Cro. El.* 416. 706. *R. 1 Rol.* 899. *l.* 20. *R. 1 Sal.* 261. *R. Lane,* 20. *R. Godb.* 372.

Nor, where the judgment is affirmed within the year, tho' the execution is sued out of the court where the judgment is affirmed. *R. 5 Co.* 88. *a. Cont. Pr. Reg.* 208.

Nor, where the judgment is affirmed, or the plaintiff is nonsuited, or discontinues in error, tho' the year was expired before error brought. *R. 1 Rol.* 899. *l.* 25. 35. *R. 2 Cro.* 364. *Lane,* 20.

[If a delay of execution for a year has arisen from the defendants by bills for injunctions, and by obtaining time for payment, execution may be sued out without a *scire facias*; and if a rule to shew cause why it should not be set aside is obtained, the court will discharge it with costs. *Mickel v. Cue, M.* 32 *G. 2.* *2 B. M.* 660.]

(3 L 5.) *By whom.*] After the year and day a *scire facias* lies between the same parties as were parties to the judgment. *Thes. Br.* 224.

If the plaintiff dies, *scire facias* lies by his executor or administrator within a year. *2 Inst.* 395. *Th. Br.* 240. *Vide Execution (E).*

If the judgment is by an executor or administrator *durante minori aetate*, the executor at his full age may have *scire facias*; for he is privy to the judgment. *R. 1 Rol.* 889. *l.* 2.

Or, by an executor, upon condition that upon such an act *B.* shall be executor. *Dub 1 Rol.* 889. *l.* 5.

So now, by the *st.* 17 *Car.* 2. 8. if an executor or administrator obtains judgment, and dies before execution, an administrator *de bonis*



*non*, &c. shall have a *scire facias* upon such judgment: *Vide Administration* (G).

So, if he dies after the money levied by the execution, and it remains in the sheriff's hands, he may perfect the execution. *R. 1 Sal. 323.*

[If an executor bring a *scire facias* on a judgment or recognizance, and obtain judgment *quod habeat executionem*, and die intestate, the administrator *de bonis non* must bring a *scire facias* on the original judgment, and cannot proceed upon the judgment on the *scire facias*. *Semb. Ld. Raym. 1049.*]

[If the plaintiff in an action, after judgment and a writ of error allowed, become bankrupt, his assignees cannot sue out a *sci. fa.* in their own names to compel an assignment of errors, till some judgment be given; and then it must be done immediately after such judgment; but they should go on with the writ of error in the bankrupt's name till judgment. *1 T. R. 463. Vide 3 T. R. 437.*]

[The husband cannot have execution for the costs on a plea of *coverture found* for the defendant, without a *scire facias*. *Doug. 637. (614.)*]

(3 L 6.) *Against whom.*] So, if defendant dies after judgment, a *scire facias* lies within a year against his executor or administrator. *Lut. 1273, 4. Th. Brev. 241.*

So, in ejectment it lies against an executor and a stranger who entered after judgment. *R. Lut. 1268. 3 Lev. 100. Vide ante, (3 L 4.)*

Or, against *terretenants* generally, or by special name. *Sal. 600.*

If it be against *A. tenen. pramissorum*, it shall be intended tenant at the time of the *liberate*. *R. Jon. 90.*

So, if judgment is recovered against an executor or administrator, who dies, a *scire facias* lies upon it against the administrator *de bonis non*, &c. being also administrator of the executor. *R. per three J. Jon. 214. R. 1 Rol. 890. l. 35. Cro. Car. 167.*

So, against the executor of an administrator against whom the judgment was given, if he has wasted the goods of his intestate. *Clift. 679.*

(3 L 7.) *When it does not lie.*] But a *scire facias* does not lie, where there wants privity; as, by an administrator *de bonis non*, &c. and upon a judgment by an executor or administrator till the *ss. 17 Car. 2. 8. Jon. 248. Vide ante, (3 L 6.)—Administration* (G).

Nor, by the heir, where his ancestor had sued an *elegit*. *R. Lane, 16.*

Nor, by the administrator of an administrator upon a judgment by his intestate, for a debt due to the first intestate; tho' the debt is brought into court he cannot take it; tho' he also obtained judgment by mistake, for it is erroneous. *Latch, 140.*

So, it does not lie, tho' there is privity by him who has no interest in the thing recovered: as, if husband and wife recover land in right of the wife, and the wife dies, the husband shall not have a *scire facias* upon the judgment. *Jon. 248.*

So, if husband and wife as executrix or administratrix recover. *R. Jon. 248. 1 Rol. 899. l. 10. Vide Baron and Feme* (Z).

Yet,

Yet, where husband and wife have a judgment for a debt to the wife, the husband alone shall sue execution without a *scire facias*. R. Mod. 179. Vide *Baron and Feme*, (E 3.—Z).

So, it does not lie against the heir and *terretenants* of the tenant in dower, after judgment against him and seisin awarded, if he dies before inquiry of damages. R. 3 Lev. 275.

Nor, by the administrator of the demandant in dower, if she dies before damages and costs assessed. Dub. *Ibid*.

(3 L 8.) *Judgment in scire facias upon default.* When without two *scire facias*.] If upon a *scire facias* the sheriff returns *scire feci*, and the defendant makes default, there shall be judgment against him.

[But execution will not be permitted to issue on a *sci. fa.* to revive an old judgment, till a *scire feci* returned or an affidavit of notice. 2 Bl. 1140.]

So, in C. B. if a *scire facias* goes upon a judgment for debt and damages against the defendant himself, who was party and privy to the judgment, and the sheriff returns *nichil*, and the defendant makes default, there shall be judgment against him without awarding a second *scire facias*. Dy. 168. a. 2. Inst. 472. Sal. 599.

(3 L 9.) *When not.*] But in all cases where the sheriff returns *nichil* upon a *scire facias* in B. R. another *scire facias* shall be awarded. 2 Inst. 472. 2 Mod. Ca. 227.

And if upon the second *scire facias* the sheriff returns *nichil*, and the defendant does not appear, there shall be judgment against him. Dy. 168. a. 198. a. 172. a. 201. a.

So, in a *scire facias* upon a recognizance in C. B. there shall not be judgment against the defendant upon his default till two *nichils* are returned. Dy. 168. a.

Nor, in a *scire facias* upon a judgment in C. B. where the defendant was not party to the record; as, if it be against an executor or administrator, &c. *Ibid*.

So, if the defendant after judgment takes husband, and the *scire facias* is against her husband and her. Per C. B. P. 9 An.

Nor, in a *scire facias* in C. B. for any cause, except upon a recovery for debt and damages against a party to the record. Dy. 168. a.

As, if *nichil* is returned upon a *scire facias* against a conusee after judgment in *audita querela* to be relieved from a recognizance by an infant, there must be a second *scire facias*. R. 2 Cro. 59.

So, if the *scire facias* is against two, and the sheriff, as to one, returns *scire feci*, and *nichil* as to the other, there shall be a second *scire facias* against both. Per tot. Cur. 1 H. 4. 5. a.

If there is judgment against the defendant by default after a *scire feci* returned, he is without remedy, tho' there was no judgment originally given. R. 1 Lev. 41.

So, if the *scire facias* is against an heir, who, being warned, suffers judgment by default, he shall have no remedy in law, tho' his father was only tenant for life, remainder to him in fee. *Ibid*.

So, if the remainder was to him in tail. R. 1 Lev. 41. 1 Sid. 54. Ray. 19.



So, in any case, where he has matter pleadable to the *scire facias*,  
1 *Sal.* 264.

But after judgment upon two *nichils* returned, the defendant may  
be relieved upon motion without an *audita querela*. 1 *Sal.* 93. 264.

[After two *nichils* and *scire fieri* inquiry, *devastavit* returned, and  
traversed; if the defendant does not apply in a reasonable time, the  
court will not relieve on motion. *Wharton v. Richardson*, T. 11 G. 2.  
*Str.* 1075.]

(3 L 10.) *Pleas to a scire facias. What are allowed.*] To a *scire*  
*facias* the defendant may plead in abatement or in bar. 2 *Inst.* 470.

[But he can plead nothing in bar which he might have pleaded to  
the original action. *Corup.* 728.]

To *aid*, *receipt*, and *age*, shall be allowed. 2 *Inst.* 470.

But process of summons, attachment, and for a view, are ousted  
by the *st. W.* 2. 45. *Ibid.*

So, *essoin* of the tenant, defendant, *protee in aid*, or plaintiff him-  
self. *Ibid.*

So, protection shall not be allowed. *Ibid.*

So, the defendant cannot plead matter contrary to the title upon  
which the recovery was obtained. *Ibid.*

Nor, a thing which proves the judgment only erroneous and void-  
able. *Ibid.*

Nor, error pending of the same judgment. 4 *Mod.* 248. *Semb.*  
*cont. Sbo.* 186.

[If defendant pleads to *sci. fa. quare*, &c. that plaintiff should not  
have his action, (instead of execution,) it is well enough. *Grey v.*  
*Jones*, T. 4 G. 3. 2 *Wilf.* 251.]

(3 L 11.) *To a scire facias upon a judgment. In abatement.*] And  
therefore to a *scire facias* upon a judgment the defendant may plead in  
abatement, that there are not fifteen days between the *teste* and return.  
*Lut.* 25. *Vide Abatement*, (H 14.)

*Quod non tenet* specially: as, that he has only for years. R. 3 *Lev.*  
205. Co. Ent. 620. 624. a. *Vide Abatement*, (F 13.)

But general *non tenure* is no plea. R. 3 *Lev.* 205. Yet it was  
pleaded generally, tho' nothing done upon it. 2 *Sand.* 12. R. no  
plea. Cro. El. 872. R. Sal. 601.

So, where tenants are returned tenants of several parts, they cannot  
join in a plea of *seisin* in another. R. Sal. 601.

So, they cannot plead *non-tenure* by implication: as, *that such a one*  
*is seised of the freehold.* *Ibid.*

*That he holds jointly with B.* R. Mo. 524.

*That there was no scire facias against the other defendant.* Sal. 598.  
R. 2 Cro. 506, 507.

*That there are other terretenants not named.* R. 2 *Sand.* 8. 23. R. Mo.  
525.

Or, if the return does not say that A. B. &c. are all the terre-  
tenants, it is bad. R. Sal. 598.

*That there are terretenants in another county against whom there is no*  
*scire facias.* R. 2 *Vent.* 104. *Clift.* 672.

But such plea shall conclude, *si respondere debet*; for it is not directly  
in abatement. 2 *Sand.* 8. R. 2 *Vent.* 105. R. Sal. 601. *Mod. Ca.*  
236. And

And if it be that there are other *terretenants* in another county, it shall not say, *not named, nor returned.* R. 2 Vent. 105.

So, this plea, after a plea in bar, does not avail. Jon. 319.

Upon such plea the plaintiff may take a new writ against other *terretenants.* 2 Sand. 23.

(3 L 12.) *In bar, by an executor or administrator.*] So, to *scire facias* against an executor or administrator the defendant may plead in bar that he had fully administered *die impetrationis* of the *scire facias.* Off. Br. 253. 2 Sand. 220. *Vide ante,* (2 D 9.)

[A *scire facias* on a judgment must pursue the terms of the judgment. And therefore where an executor pleads *plene administravit*, and the plaintiff does not take issue on it, but takes a judgment of assets *quando acciderint*, the *scire facias* on that judgment must pray execution of such assets only as have come to the executor's hands since the former judgment; and if it prays execution of assets generally, without confining it to that time, it cannot be supported. *Mara v. Quin*, B. R. M. 35 Geo. 3. 6 T. R. 1.]

*Ne unques executor.* Mod. Int. 367.

So, judgment against him upon a prior *scire facias*, upon a *scire fieri* inquiry and *devastavit* returned. Cro. El. 886.

Or, such prior *scire facias* pending, and no subsequent assets. *Ibid.*

But *plene administravit* and *nulla bona* will be bad upon a special demurrer. R. 4 Mod. 296. 1 Sal. 296. Semb. Al. 48. Off. Br. 302. R. Cro. El. 575. He ought to plead, *Nothing in his hands.* Skin. 565.

So, he may plead *nullius record.* Mod. Int. 368. *Vide ante,* (2 W. 13.)

So, by the *st.* 4 & 5 An. 16. *payment*, if the defendant has paid the money due on such judgment.

So, a thing which shews the writ to be mistaken: as, if a *scire facias* upon a judgment against *A.* and *B.* is brought against the administrator of *B.* as survivor, the defendant may say that *A.* survived. R. 1 Sal. 262.

So, he may plead a release to the testator or himself. 3 Lev. 272. *Vide ante,* (2 W 30.)

Or, a release by the executor of the plaintiff.

Or, by one executor or administrator, or, to one executor or administrator. 3 Lev. 272.

But it is no plea, that by deed the plaintiff agreed that, if he obtained judgment, he would not take out execution if the defendant paid 100*l.* which money he has paid; for there can be no defeasance of a judgment before it is given. R. Cro. El. 837.

It is no plea in a *scire facias* upon a judgment against himself, that there is another judgment against the testator unsatisfied; for he might have pleaded it to the first action against him. Dy. 80. *a in marg.* R. 1 Sal. 315.

That the bond, upon which the judgment was obtained, was upon an usurious contract. R. 1 Sid. 182.

So, he may plead outlawry of the plaintiff before the first judgment in battery, &c. for tho' it was no bar to the action, because the damages were uncertain, yet it shall be a bar to the *scire facias* when the judgment has ascertained the damages. R. Jon. 239.

So,



So, he may plead that the plaintiff's testator became *felo. de se.*  
1 Sand. 355.

That error is depending upon the original judgment. Skin. 590.

So, he may plead that the plaintiff levied debt and damages by *fieri facias* against the testator. Clift. 675. R. 4 Leo. 194. Cro. Car. 328.

But it is no good plea, that the plaintiff levied part by *fieri facias*, and agreed to accept 10 l. at such a day for satisfaction of the residue, which was paid accordingly; for payment is no plea to a debt upon record. R. 3 Lev. 119. Lev. Ent. 164.

*Quod testator cepit per ca. sa.* in execution, and afterwards permitted him *ire ad largum.* Off. Br. 300. Sal. 271.

That he obtained judgment in C. B. upon the same judgment. R. Cro. El. 7, 8.

So, it is no plea, *quod cepit testator. per ca. sa.* who died in execution. Off. Brev. 245.

That he paid the money recovered without acquittance. Jon. 326, 7.

(3 L 13.) By an heir.] So, to a *scire facias* against an heir, he may plead, *riens per discent.* Semb. Dy. 334. Cro. Car. 295.

Or, pray that the *parol* may demur, if the heir is within age. 2 Inst. 396. Cro. Car. 295.

And if it is found against the heir, there shall be execution against him for a moiety only, and not for the whole; for the heir is charged only as *terretenant.* R. Cro. Car. 296. 313. R. Jon. 87. Poph. 154.

If there are several heirs, as *parceners*, in *gavelkind*, &c. and a *scire facias* is against one only, he shall have contribution against the others. 3 Co. 12. b.

So, if part of the land descended to the heir of the part of the father, other part to the heir *de parte matris.* 3 Co. 13. a.

But, it is no plea, that before the *scire facias* the heir levied a fine to the use of himself in fee. Semb. Co. Ent. 622. b.

So, if the heir alone is charged, he shall not have a *scire facias* against a purchaser. R. 3 Co. 12, 13.

So, if there be a *scire facias* against an heir, or *terretenants*, after judgment against the ancestor, he shall not plead any matter in avoidance of the judgment, tho' the judgment was by *nil dicit*: as, that *A.* for whose sufficiency the ancestor was bound, was sufficient. R. Sav. 25. b.

So, if judgment be against *A.* and *B.* and one dies, a *scire facias* lies against the survivor; and it is no plea that the deceased has an heir to whom assets descended. R. 1 Lev. 30.

So, if the *scire facias* be against both, he may take execution, after judgment against both by *elegit*, or by *fieri facias* against the survivor only. 1 Lev. 30.

(3 L 14.) By *terretenants.*] So, to a *scire facias* against a *terretenant*, he may plead in bar any thing which shews his lands not liable to execution: as, that the defendant in the original action enfeoffed himself, or others, under whom he claims, before the judgment, with traverse of the *seisin tempore judicii aut unquam postea.* Off. Brev. 251.

If there be a traverſe of the ſeiſin and iſſue thereon, he ſhall be adjudged to be ſeiſed, tho' he made a feoffment, if it was with an intent to defraud creditors. *R. Hob. 72.*

So, *terretenants* may plead, that the heir has ſufficient by deſcent, whereof the plaintiff might have execution. *Co. Ent. 620.*

*That the original defendant was not ſeiſed of the lands in their poſſeſſion.*

*That the original defendant was tenant in tail and died, and his iſſue levied a fine to the terretenant.* *Co. Ent. 621.*

*That the defendant in the judgment was not ſeiſed in fee.* *Tb. Br. 272, 273. 289.*

*That he enfeoffed the terretenant, and before judgment diſſeiſed him, whereupon the terretenant after judgment re-entered.* *Off. Br. 302.*

So, *terretenants* may plead that they have nothing but a reversion after a term of years, and pray *judicium ſi executio* during the term. *Clift. 671.*

So, a *terretenant* may plead *nul tiel record.*

A releaſe to him by the plaintiff.

But it is no plea for a *terretenant*, that the heir has aſſets; for tho' the plaintiff may ſue execution againſt the heir alone, without naming the purchaſer; yet it is not of neceſſity. *2 Inſt. 396. Semb. Co. Ent. 620.*

*That no ſcire facias was awarded againſt the executors; tho' they have aſſets.* *Semb. Dy. 208. a.*

Nor, no ſcire facias againſt him as heir but as *terretenant* only; tho' he was heir. *R. Cro. El. 896.*

(5 L 15.) *By the defendant himſelf.*] So, to a *ſcire facias* after the year and day againſt the defendant himſelf, he may plead *nul tiel record.* *Off. Br. 279.*

*That the debt was levied by fieri facias.* *Clift. 675.*

[He cannot plead that the warrant of attorney was given on an uſurious contract. *Buſh v. Gower, P. 9 G. 2. Str. 1043. B. R. H. 233.*]

### (3 L 16.) *Scire Facias* upon a Recogniſance.

So, a *ſcire facias* may be ſued, upon a recogniſance given in Chancery, againſt the conuſor himſelf. *2 Sand. 6.*

Or, againſt his heir, or *terretenants*.

So, againſt them upon a recogniſance in *B. R.* or *C. B.*

Or, before the chief juſtice or other judge out of court.

So, after the debt ſatiſfied, a *ſcire facias ad computandum* lies by the conuſor againſt the conuſee. *Vide Statute-Staple (G).*

So, if a conuſor dies, a *ſcire facias* may be ſued againſt his heir. *1 Rol. 900. l. 35.*

And it may be ſued againſt him without the *terretenants*; for he ſhall have no contribution any more than the conuſor himſelf. *Ibid. l. 37. 2 Inſt. 396.*

Or, it may be ſued againſt the heir and *terretenants*. *Cic. Car. 295.*

And if it be returned that there is no heir, or that the heir is dead, or that he was warned, and not otherwiſe, it may be ſued againſt the *terretenants*. *1 Rol. 900. l. 45.*

So,



So, if the conusee extends part of the lands of the conusor only, the *terretenant* may have a *scire facias* in the nature of an *audita querela* against him, or an *audita querela* at his election. *R. Jon.* 90.

A *scire facias* upon a recognisance must pursue the recognisance.

[It cannot be tested the same day the party makes default. *Rex v. White*, *H.* 18 G. 2. *Str.* 1220.]

[*Scire facias* against bail in error on a judgment for damages, must be to shew cause why plaintiff should not have execution of the debt aforesaid, (the specific sum in the recognisance,) not of the damages. *Barlow v. Evans*, *T.* 18 G. 2. *Wilf.* 98.]

But if it concludes, *quare executionem non*, &c. *juxta formam recuperation. prædict.* instead of (*recogn.*) it shall be amended, for it is surplusage. *R.* 3 *Mod.* 251.

[*Scire facias* in the Petty-bag will lie on a bond given to the late king, his executors, and administrators. as within 33 *H.* 8: c. 39. *Rex v. Bradford*, *H.* 1 G. 2 *Ld. Raym.* 1327. in *Chancery*.]

### (3 L 17.) *Scire Facias* for other Causes.

So, if a judgment be reversed after execution, a *scire facias* lies for the defendant against the plaintiff for the money recovered. *Jon.* 326.

If there be judgment in error to reverse a fine, a *scire facias* lies against the *terretenants*, and it lies before or after judgment in the discretion of the court. *Hard.* 163, 4.

If there be judgment for the plaintiff in replevin, and a return is not made, a *scire facias* lies against the pledges. 2 *Mod. Ca.* 313. *Vide ante*, (3 K 5.)

[*Scire facias* in replevin will lie on plaint, or on writ. One may be bail with others for himself; if *elongat.* is returned for the principal the pledges may be sued; if the writ of inquiry is reducible to a certainty, it is enough; and discontinuance is nothing in this suit, unless it had been void or a nullity. *Mulso v. Shere*, *T.* 4 G. *Fort.* 330.]

### (3 L 18.) Judgment in a *Scire Facias*.

if Judgment in *scire facias* depends upon the original judgment; for 3 this is reversed, the judgment in *scire facias* does not stand in force. *Mod.* 187. *Vide ante*, (3 L 8, 9.)

[Judgment on a *scire facias* cannot give damages for delay of execution; but if it does, it may be reversed for that, and affirmed *pro residuo*. *Str.* 807. *Ld. Raym.* 1532.]

[But if it is found that plaintiff is *damnified*, and put to costs to 6d. it is well; for it is only meant as a foundation for the costs *de incremento*. Damages may mean costs. *Knox v. Costello*, *M.* 6 G. 3. 3 *B. M.* 1789.]

### (3 M) Pleading in Trespass.

#### (3 M 1.) The Original.

**T**RESPASS is *vicontiel*, which gives commission to the sheriff to hear and determine in his county. *F. N. B.* 85. *F.*

And thereon he may determine trespasss to any value. *Ibid.*

And

And it shall say *vi et armis*. *F. N. B.* 85. *F.*

Or, trespasss may be sued by a writ directed to the sheriff, and returnable in *B. R.* or *C. B.* *F. N. B.* 86. *H.*

And this writ shall always say, *vi et armis*. *Ibid.*

If it be for taking a live chattel, the writ usually says, *cepit et abduxit*. *F. N. B.* 88. *B.*

If for a dead chattel *cepit et asportavit*. *Ibid.*

If for moveable chattels, *pretii*, &c. *Reg.* 93. *b.*

If for immoveable, *ad valentiam*, &c. *Ibid.*

But *cepit et abduxit*, or *asportavit*, may be used promiscuously for live or dead chattels.

So, *pretii* or *ad valentiam* may be used promiscuously for a live or dead thing. *F. N. B.* 88. *M.* *Dy.* 121. *b.* 2 *Cro.* 307. 2 *Vent.*

174. So, if it be omitted in trespasss for taking cattle, it is not fatal; for they may be returned. *Reg.* 97. *b.*

So, the omission does not prejudice in any case after verdict. *R.* 1 *Sid.* 39. 2 *Vent.* 174.

Nor, upon a general demurrer. *Semb.* 2 *Cro.* 147. *Cent.* 2 *Lev.* 230.

### (3 M 2.) Process.

The process in trespasss is attachment and distress; and if upon the attachment or distress the sheriff returns *nichil*, a *capias*, *alias*, *pluries* and *exigent*, and process to outlawry. 1 *Brownl.* 193.

If, at the return of the attachment, the defendant does not appear, nor cast an essoin, he shall lose the goods attached. *Ibid.*

If he casts an essoin, he shall have a writ to the sheriff for restitution of his goods. *Ibid.*

Tho' he does not appear at the day to which the essoin is adjourned. *Ibid.*

When trespasss lies or not, and by or against whom, *vide Trespasss*, (A 1, &c.)

When with a *simul cum*, &c. *vide Trespasss*, (C 1.)

### (3 M 3.) Declaration.

(3 M 3.) *In what county alleged.*] Declaration in trespasss *quare clausum fregit*, must be alleged in the county where the land lies.

So, for any local trespasss.

But for battery, taking of goods, &c. it may be in any county. *Vide Action*, (N 12.)

(3 M 4.) *Must be direct and positive.*] It must be direct and positive; and therefore, if the plaintiff declares, *quod cum* defendant, &c. it is bad; for nothing is directly affirmed. *R. Cro. El.* 507. *Noy*, 58. *R. after verdict*, 2 *Bul.* 215. *Semb.* 2 *Lev.* 193. 106. *F.* g. 256.

Tho' the defendant confesses and justifies the trespasss. *K.* 2 *Jon.* 197.

So, since the *st.* 4 & 5 *An.* 16. for this does not enlarge the former statutes, after verdict. *R. in C. B. P.* 2 *Geo. R. ibm.* *M.* 5 *Geo.*

So, if the plaintiff declares *quare cum*, &c. *R. Sal.* 636.

[But *nec non de eo quod*, &c. after a *quod cum*, is a positive charge. *Dobbs v. Edmonds*, *H.* 12 *G.* *Str.* 681. 2 *Ld. Raym.* 1413.]

[*Quod*



[*Quod cum* is well enough after verdict, though possibly it might be bad on demurrer. *Douglas v. Hall*, T. 18 G. 2. 1 *Wils.* 99.]

[*Quod cum* is well on special demurrer, where the writ is set forth in the declaration. *White v. Shaw*, M. 4 G. 3. 2 *Wils.* 293.]

(3 M 5.) *Must be certain.*] It must be certain, and therefore must shew the quantity and quality of the cattle or goods taken. R. 5 Co. 34. b. *Vide ante*, (C 21.)

[The goods must be specified, for otherwise defendant could not justify, nor could the recovery be pleaded in bar to another action, *Bertie v. Pickering*, T. 9 G. 3. 4 B. M. 2455.]

If the word is general; as, *tres pullos*, &c. it must give an *Anglicè*. *Lut.* 1492.

But it is sufficient that the quantity, &c. is ascertained by a thing to which it refers: as, a declaration, *quare cistam cepit et diversa vestimenta in cista prædicta*, is good, without saying what clothes he took. R. Al. 9. *Vide ante*, (C 27.)

[And in trespass *quare clausum fregit* the declaration may be general, without naming the closes which draws on the common bar, and new assignment. 2 Bl. 1089.]

It must allege the time of the trespass before the declaration filed; and therefore, if the declaration is filed in *Trinity* term, and the trespass alleged after the term and before trial, it is bad. 1 *Sid.* 308.

If it is alleged after the declaration filed, at any time, it is bad upon demurrer.

If it is alleged after the declaration and before trial, it is bad after verdict, except where the jury find specially that the defendant was guilty before the declaration filed. R. 1 *Sid.* 308. R. M. 8 W. 3. B. R. *Blackhall v. Heale*, (Com. 12.) *Sal.* 662.

But, if it is alleged at a day after trial, it will be aided by verdict. *Ibid.* *Vide ante*, (C 19.)

Or, at an impossible day. R. M. 8 W. 3. B. R. *Wall v. Duke*, (Com. 13.)

If it is alleged that such a day the defendant imprisoned him, and detained him twenty-four days, without saying when, it shall be intended immediately after the imprisonment. R. 2 *Cro.* 664.

If it alleges *et alia enormia eis intulit* instead of *ei*, it is not material. *Ibid.*

So, if it alleges the trespass in a close *vocat. A. abuttan. super terras B. in D.*, the close shall be intended in *D.* R. 2 *Rol.* 251. l. 45.

(3 M 6.) *Must be conformable to the original.*] It must be conformable to the original; and therefore, if the declaration is *quare clausa*, when the original was *quare clausum fregit*, it is bad. R. *Cro. El.* 185. *Vide ante*, (C 13.)

If the declaration is *quare clausum*, omitting *fregit*, and the writ *quare clausum fregit*. *Per two J. Vent. cont.* 2 *Vent.* 153.

But an immaterial variance, or what may be supplied by intendment, does not prejudice. *Ibid.*

Nor, a mistake of *summon.* for *attach.* *Vide ante*, (C 13.)

(3 M 7.) *Must be vi et armis.*] It must be *vi et armis et contra pa-*

cent; for the omission is substance. *R. 2 Cro. 443. 526. 536. Adm. Cro. Car. 325. R. that it was form. 2 Cro. 130. R. Sal. 636. 640. Carth. 66.*

But now, by the *st. 16 & 17 Car. 2. 8.* it is aided after verdict.

[This statute applies to those cases only which appear on the face of the declaration to have been intended to be actions of trespass, and not where the memorandum is of "an action of trespass on the case." *Savignac v. Roome, B. R. M. 35 Geo. 3. 6 T. R. 125.*]

And by the *st. 4 & 5 An. 16.* upon a general demurrer.

So, if it is recited in the writ, it is sufficient; tho' it is omitted in the declaration. *R. Lut. 1509. Semb. Sti. 408. Dub. F, g. 256. Vide ante, (C 12.)*

(3 M 8.) *Must be contra pacem.*] It must be *contra pacem nuper regis & regis nunc*, if the trespass is alleged in a former reign. *R. Sho. 28. Adm. 2 Vent. 49. 2 Cro. 377. R. Sal. 636. R. that it may be so. 11 H. 4. 15. b.*

But *contra pacem nuper regis et regis nunc*, where the whole was in a former reign, is surplusage as to the words *regis nunc*, and shall be aided. *R. 2 Cro. 377. 3 Bul. 82. R. Carth. 95.*

So, *contra pacem regis nunc*, if trespass is such a year, which was in a former reign; for the court takes notice of the king's demise. *R. Sal. 640.*

It must mention the goods to be so much *pretii*, or *ad valentiam*, &c. *2 Lev. 230. Vide ante, (3 M 1.)*

But it is sufficient if it is in the writ, tho' omitted in the declaration. *R. 1 Sid. 150. Vide ante, (C 13.)*

And shall be aided after verdict, and upon a general demurrer, for it is form only. *2 Cro. 148. Vide ante, (3 M 1.)*

(3 M 9.) *Must shew a property or possession in the plaintiff.*] So, the declaration must say that the property, or at least the possession, of the land or goods, &c. is in the plaintiff; and therefore, if in trespass *ipsius quer.*, or *sua*, is not inserted, it is bad. *R. 1 Sid. 184.*

And it will be bad after verdict. *Ibid.*

Tho' it is *quare clausum fregit* of the plaintiff, and *5 carectat. fœni ibidem cepit*, omitting *sui*; for it shall not be intended the plaintiff's hay, tho' it is in his close, without being alleged. *R. 2 Lev. 156.*

So, a declaration by husband and wife for taking the wife's goods, is not good, without saying that they were the goods of the husband; for it shall not be intended. *R. 2 Lev. 20.*

So, a declaration for taking goods *a personâ* of the plaintiff shall not be intended in his possession. *R. per three J. two cont. Yel. 36. 2 Cro. 46. 1 Brownl. 192.*

So, trespass by dean and chapter for entering the close of the dean, is not good. *R. Cro. El. 200.*

So, trespass for taking *triticum* out of his close in *D.*, and such a thing *de bonis* of the plaintiff in *D.*; for *de bonis* of the plaintiff does not extend to the *triticum*. *R. Mod. Ca. 15.*

So, trespass *quare equos in clauso suo existen., et 10 congios tritici de bonis* plaintiff *existen.*, does not shew a property in the horses. *R. Sal. 640.*

But if *ipsius querentis* or *sua* is in the original recited, it is sufficient, tho'



tho<sup>o</sup> omitted in the declaration. *R. 1 Sid. 187. R. Lut. 1509. Vide ante, (C 12.)*

So, if the defendant by his plea shews the goods to be in the possession of the plaintiff, this aids the declaration. *R. 1 Sid. 185. Vide ante, (C 85.)*

And, in trespasss for things which are *fera natura*, and not reclaimed, the plaintiff must not say *suos*. *R. 22 H. 6. 59. b.*

As, in trespasss *quare cuniculos, damas, pisces, &c. cepit*, he must not say *suos*, or *ipsius*. *R. 3 Lev. 227.*

Yet, in trespasss for taking animals which were *fera natura*, if he shews them to be reclaimed, he may say *suos*. *22 H. 6. 59. b.*

Or, for taking monkies, parrots, &c.; for they are merchandize, and valuable. *2 Cro. 262.*

Or, for taking *feras natura* in his soil, park, or warren, for he has the possessory property: as, *quare clausum fregit*, or *parcum*, or *warrennam fregit et cuniculos suos, damas suos, &c. ibidem invent. cepit, &c.* *R. 22 H. 6. 59. b. 2 Cro. 195. R. Cro. Car. 553. 7 Co. 17. b. R. 9 W. 3. B. R. Sutton v. Moody. (Com. 34.) Dub. 3 Lev. 227. R. Sal. 556. (Vide 1 Ld. Ray. 250.)*

So, in trespasss *quare cuniculos suos, &c. cepit*, generally is well after verdict; for they shall be intended to be tame, or reclaimed, or dead. *R. Cro. Car. 18. R. Ray. 16. D. Cro. El. 125. Owp. 93. R. 5 Mod. 375.*

So, *quare canem suum*. *R. cont. 3 Leo. 219.*

So, *quare pisces suos in separali piscaria querentis cepit*. *R. Jon. 440. Cro. Car. 553. 4.*

So, if the plaintiff declares *quare clausum in usu et occupatione* of the plaintiff, it is well. *R. P. 3 W. & M. Reynolds v. Chubbs.*

Or, *quare bona sua, viz. unam carectat. fœni in stabulo defendentis cepit*, tho' he does not say *sui*, for the *viz.* makes it a particular of *bona sua*. *R. 3 W. & M.*

So, if he declares *quare 10 carectat. soli ad valentiam 100 l. and 10 pecias maherem. ipsius querentis ad valentiam, &c.* it is sufficient; for *ipsius querentis* refers to both. *R. 2 Rol. 250. l. 40.*

[3 M 10.] *When it may be with a continuando.*] A declaration in trespasss may allege it to be committed *continuando* from such a day to such a day. *2 Rol. 545. l. 15.*

And this in trespasss *quare clausum* or *domum fregit*, as well as for spoiling his grass, or cutting his corn. *F. N. B. 91. L. 2 Rol. 549. l. 37. 40. 1 Sid. 319.*

Or, for cutting down several acres of wood. *1 Sid. 319.*

Or, for *mesne profits*, and *assport. 500 carectat. frumenti.* *Semb. Ibid.*

[Trespases on different days may be laid in one count, for breaking, &c. on such a day, with a *continuando*; and if there are more counts, the court, on application, will reduce them to one. *Barnes, 360.*]

And the *continuando* may be for any trespasss which does not import repugnancy, tho' the act was not continued; as, for trespasss *pedibus ambulando*, tho' it be the act of a man. *Mod. Ca. 39, 40. Semb. 5. Mod. 179. Vide infra.*

Entering his close and killing his conies, *R. Mod. Ca. 39.*

Entering

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Entering and hunting. *R. Sal. 639.*

And the *continuando* may be alleged for several years, for 10, 12, or 500 years. *2 Rol. 549. l. 47. 3 Mod. 110. 1 Sid. 253.*

It may be to a day after the term began, if it be before the bill filed. *D. 1 Vent. 264.*

But, regularly, a *continuando* cannot be alleged in a trespass which has not continuance: as, for a single act; as, in trespass *quare arbo-rem succidit, equum cepit, &c.* *R. 2 Rol. 549. l. 41. 1 Sid. 319. R. Sal. 639.*

Nor, for the act of a man, tho' the act in its nature may be done upon several days; for a man cannot act continually several days without interruption by sleep, meals, &c.: and therefore trespass, *quare ejecit billers super solum suum continuando ejectionem, &c.* is bad. *R. 1 Sid. 224. 249. R. 1 Vent. 363. Vide supra.*

So, trespass *quare grana cepit et asportavit continuando asportation.* *Semb. 1 Sid. 319.*

*Quare occidit 20 cuniculos, &c. continuando.* *Mod. Ca. 39. Sal. 639.*

So, the *continuando* ought to be certain; and therefore *continuando piscation.*, without saying the quantity and quality of the fish, is bad. *R. after verdict by three J. Scrogs cont. 1 Vent. 329. 2 Jon. 109.*

So, *continuando usque diem exhibitionis bille*, without saying what day, is bad; tho' it appears upon the record. *Semb. 2 Rol. 135.*

So, *continuando* to a day after the commencement of the action, and entire damages, is bad after verdict. *D. 1 Vent. 104. R. 1 Vent. 264.*

Yet *continuando transgression. predict.*, generally, is good. *1 Sid 224. 5 Mod. 179.*

And if the declaration is for one trespass, which may, and another which cannot be with a *continuando*, the *continuando transgress. pred.* shall be restrained to the trespass only, which may, after verdict. *R. 1 Sid. 249. 319. 379. R. 1 Vent. 363. 2 Jon. 194. 3 Lev. 94. R. Sal. 639.*

So, *continuando transgr. quoad, &c.* which is expressed *minus certe*, shall be aided after verdict. *R. 1 Sid. 249.*

So, a *continuando* to a day impossible, or after trial. *Vide ante, (3 M 5.)*

So, the plaintiff may allege the trespass with a *continuando*, or that *diversis diebus et vicibus inter* such a day and such a day, &c. *Sal. 639.*

So, the plaintiff may allege a matter for aggravation of the trespass, tho' an action is not maintainable for it by itself: as, entry into his house, and battery of his wife and children, &c. tho' trespass does not lie for this without special damage. *Sal. 642.*

Entry into his close *continuando usque 6 Nov.* if the king pardons the trespass as to him to 25 Sept., no *capiat.* is necessary, the *continuando* being alleged for aggravation. *R. 2 Cro. 207.*

[But, in an action of assault and battery, a declaration that the defendant on the 6th of May, and on *divers other days and times between* that day and the commencement of the suit, assaulted the plaintiff, is bad. *Michell v. Neale, B. R. T. 18 Geo. 3. Corp. 828.*]

(3 M. 11.) Pleas in Trespass.

(3 M 11.) *Not guilty.*] To trespass the defendant may plead the general issue, *not guilty.*

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3 D

Not



Not guilty *infra sex annos*. Lev. Ent. 203.

Or, *infra quatuor annos*.

Tho' he was indicted and found guilty, or submitted to a fine for the same trespass. 1 Rol. 863. l. 2.

And in trespass for battery of his servant, *per quod servitium amisit*, generally, *not guilty*, is a proper plea; for he cannot justify by *molliter manus*, &c.; for this would not be a loss of service. 1 Rol. 393, 4. Per Powell, Lut. 1497. Semb. 1 Rol. 19.

But in battery, *not guilty within six years*, instead of four years, is bad. R. Mod. Ca. 40. Sul. 423.

[On not guilty pleaded, a freehold may be given in evidence. Bartholomew v. Ireland, H. 11 G. 2. Andr. 108. Dodd v. Kyffin, 2 Kel 154. B. R. T. 37 Geo. 3. 7 T. R. 354. Argent v. Durant, B. R. M. 40 Geo. 3. 8 T. R. 403. *Infra*, (3 M 24.)]

(3 M 12.) *In discharge. A release.*] Or, he may plead specially; and this in discharge, or in excuse or justification.

In discharge he may plead a release by the plaintiff. *Vide ante*, (2 V 11.—2 W 30.)

If the action be by executors for goods of the testator, a release by one of the executors. Win. Ent. 1005. (or 1119. edit. 1680.)

So, if there are several defendants in trespass, a release by the plaintiff to one of the defendants. 2 Rol. 412. l. 20. 2 Bro. Ent. 151.

Or, in trespass against B., he may plead that the trespass was committed with A., and the plaintiff released to A., *absque hoc* that it was done by him alone. R. 1 Brownl. 193. R. Hob. 66.

If the release be upon a day before the trespass alleged, he must traverse the trespass after. R. 4 Mod. 182.

[If a release is pleaded, defendant must traverse that he was not guilty at any time after, and before the bringing the action. Creed v. Lappan, P. 6 G. Fort. 359.]

If a release is pleaded, he need not plead *not guilty* to the *vi et armis*. 1 Brownl. 196.

[A release in pursuance of an award cannot be pleaded if defendant is not party thereto, but it may be given in evidence in mitigation of damages; and if the words are general, the plaintiff shall not shew that the cause of action was not included. Skelling v. Farmer, M. 12 G. Str. 646.]

(3 M 13.) *Accord or arbitrament.*] Accord and satisfaction. Win. Ent. 961, 962. (or 1075, 1076. edit. 1680.) *Vide Accord*, (A 1, &c.)

Or, arbitrament. Bro. V. M. 429. Cl. Aff. 179.

So, an accord or arbitrament between the plaintiff and one defendant, if it is performed. 2 Rol. 412. l. 22. R. 9 Co. 79. b.

So, satisfaction, tho' it is illegally obtained. 2 Rol. 569. l. ult.

*Replication.*] To accord pleaded, the plaintiff may reply *nul tiel accord*. Win. Ent. 961. (or 1075. edit. 1680.)

Accord for another matter with traverse of the acceptance in satisfaction of this trespass. Bro. V. M. 444.

*That he is guilty after accord made.* Win. Ent. 962. (or 1076.)

So, to arbitrament the plaintiff may reply *nul tiel award*.

Or,

Or, *nullum fecerunt arbitrium.* Bro. V. M. 430.

That the arbitrators were discharged. Cl. Aff. 180.

So, to trespass with cattle the defendant may plead that the plaintiff distrained the cattle *damage-feasant*, and impounded them.

But it is a good replication, that the cattle died in the pound before satisfaction.

Not, that they escaped out of the pound without his consent. Per three J. 1 Sal. 248.

(3 M 14.) *Recovery in another action.*] Recovery in another action. Vide *Action*, (K 1, &c.)

(3 M 15.) *In excuse or justification.* To an assault and battery. De son assault.] In excuse or justification of an assault or battery, the defendant may plead *son assault demesne.* Co. Ent. 644. a. Lut. 1431.

Or, assault of her husband, where the trespass is for battery of the wife. R. Sal. 407.

Assault by the plaintiff upon his wife, or son, or father. Win. Ent. 1007. (or 1121. edit. 1680.) Cl. Aff. 90.

Assault upon his master or servant. 2 Rol. 546. D. Ow. 150. Lut. 1483. 1 Sal. 407. Bro. V. M. 484.

[If servant justifies, for that plaintiff having assaulted his master, he, in defence of his master, struck him, it is ill; it should be, that plaintiff would have beat his master if he had not interposed. *Barfoot v. Reynolds*, M. 7 G. 2. Str. 953.]

Assault by the plaintiff upon the defendant to take his dog, goods, &c. to intrude into his house, &c. 2 Bro. Ent. 144.

So, he may plead *son assault* in trespass for wounding. R. 1 Sid. 240. 1 Rol. 19.

Or, in *mayhem*, tho' every assault is not sufficient to maintain it. Sal. 642.

So, in assault against two, they may jointly plead *son assault.* R. Mo. 704.

So, he may plead *son assault ad interficiendum*, or *mayhemandum*, in trespass for *mayhem.* 2 Rol. 547. l. 40. Co. Ent. 52.

But the defendant cannot justify a battery in defence of the goods or possession of his master. Semb. Lut. 1483. 1 Sal. 407.

*Replication.*] To this plea the general replication is *de injuria sua propria*, &c.

Or, he may reply that he *pacifice arrestavit*, upon which the defendant assaulted him.

That the defendant would have assaulted her husband, father, son, &c. R. 1 Sal. 407.

(3 M 16.) *Molliter manus imposuit.*] So, the defendant may plead that he *molliter manus imposuit* to prevent mischief: as, if two contend, that he *molliter manus imposuit ad eos separand.* 2 Bro. Ent. 143.

*Quod molliter manus imposuit* upon the plaintiff (who assaulted another) to keep the peace. 2 Bro. Ent. 137, 8.

And *molliter manus imposuit* goes to the justification of the battery, as well as the assault. Dub. Lut. 929. 3 Lev. 404. Semb. cont. Cro. El. 94. 2 Vent. 193. R. acc. Skin. 387.



*A fortiori* it does not go to the wounding. *R. Cro. El.* 94. *Semb. Cro. El.* 243. *Skin.* 387.

So, that the plaintiff set a dog upon such a one, and he *molliter manus imposuit* to restrain him. *2 Rol.* 546. *l.* 40.

That the defendant *molliter manus imposuit* upon the plaintiff to restrain him from pulling down his stall in a fair. *2 Rol.* 547. *l.* 15.

To restrain him from diverting his water-course. *Ibid.* *l.* 10.

From taking or destroying his goods, &c. *2 Rol.* 549. *l.* 7. *2 Bro. Ent.* 143, 144.

From taking cattle, &c. in his custody upon a distress. *2 Rol.* 549. *l.* 10.

Or, rescuing them. *2 Bro. Ent.* 260.

From taking his dog, horse, &c. *Cl. Aff.* 92. *Bro. V. M.* 486.

From rescuing goods taken in execution, and he need not say by the bailiff's command. *R.* 3 *Lev.* 113.

*Quod molliter manus imposuit*, to remove him out of his house or close. *Lut.* 1435.

[That plaintiff entred his house without his leave, and there disturbed him; and because he would not go out, therefore *molliter*, &c. *Tottage v. Petty*, *H. 10 G.* 2. *B. R. H.* 358.]

And he must shew a title to the house or close; for it is not sufficient to say that he was possessed. *R. Mo.* 846. *Semb. Lut.* 1497. *Vide ante*, (C 39. 41.—E 19. 21.) *Vide infra*.

To detain him *quod non exiret* a tavern before he had paid his reckoning. *Cl. Aff.* 100.

To restrain him from disturbing a parson at a funeral. *R.* 1 *Mod.* 168.

*Quod molliter manus imposuit* to bring him before a justice of peace for cheating at cards. *R.* 2 *Rol.* 546. *l.* 30.

To arrest him upon a justice of the peace's warrant. *2 Rol.* 546. *A.*

So, if an officer, or any one in his aid, arrests upon process of law.

[A battery cannot be justified by *molliter manus* on an arrest only, but defendant must shew resistance, or an attempt to rescue. *Williams v. Jones*, *T. 9 G.* 2. *Str.* 1049. *B. R. H.* 298.]

[A defendant may justify a battery by pleading *molliter manus*, &c. in order to arrest, &c. *Rowe v. Tutte*, *C. P. T.* 11 & 12 *Geo.* 2. *Willes*, 14. *Titley v. Foxall*, *C. P. T.* 31 & 32 *Geo.* 2. *Willes*, 688.]

[To trespass, assault, and false imprisonment, three defendants pleaded a joint plea of justification under process, &c.; in which one said that he, as attorney for the party suing out that process, delivered the warrant to the other two defendants (to whom it was directed) to be executed, &c.; and the two others that they executed, &c.; and it was holden a good plea. *Ibid.*]

If there was actual force, he may use actual force to remove, without a request to depart. *R. Sq.* 641.

Otherwise, where only force in law. *Semb. Ibid.*

If the defendant pleads *molliter manus* in defence of his possession, he need not shew by what title he was possessed; for it is only inducement to the plea. *R. Cro. Car.* 138. *R. cont. Mo.* 846. *Semb. cont. Lut.* 1497. *Vide supra—vide ante*, (E 19. 21.)

But a man cannot plead that he threw stones *molliter* against a trespasser to remove him, &c. *R.* 2 *Rol.* 548. *l.* 45.

Nor, justify a wounding by a *molliter manus*. *Semb.* 2 *Rol.* 548. *l.* 35. *Lut.* 1436. 1483. 1 *Rol.* 19. [A plea

[A plea of *molliter manus imposuit*, in order to turn the plaintiff out of the defendant's house where she continued against his will, is no answer to a charge against the defendant for striking the plaintiff repeated blows, and with great force and violence several times knocking her down. *Gregory v. Hill*, B. R. T. 39 Geo. 3. 8 T. R. 299.]

And, if he concludes *et sic molliter insult. fecit*, for *manus imposuit*, it will be bad. R. 1 Sid. 441. 1 Mod. 36.

So, a defendant cannot justify *man. imposition.*, because the plaintiff would have struck his horse, &c. without saying that he assaulted or beat. R. Lut. 1483.

Or, to remove him from his land, without saying he was upon it. R. Lut. 1497.

Or, that he removed him from off a horse, which he had borrowed for two days, because he went out of his way. R. 1 Brownl. 218. 2 Cro. 236.

So, he cannot justify the battery of a servant, by which the plaintiff lost his service, by *molliter manus imposuit*. Lut. 1497. *Vide ante*, (3 M 11.)

*Replication.*] To *molliter manus* the plaintiff may reply *de son tort demefne*. Tho. Ent. 422.

Or, an outrageous battery *absque hoc molliter*, &c. Lut. 1436. Skin. 387.

(3 M 17.) *Defence of his possession.*] So, the defendant may plead to an action for assault and battery that it was in defence of his house; for that is his castle. 2 Rol. 548. l. 43. 2 Bro. Ent. 138.

So, in defence of his possession. 2 Rol. 548. l. 25. *Cont. per Twissd.* 1 Mod. 36. *Vide Lut.* 1483.

In defence of his servant. 2 Rol. 546. l. 52.

In defence of his dog, cattle, &c. Ow. 150. *Qu.* If it is not to be understood by *molliter manus imposuit*. *Vide Lut.* 1483.

[To trespass for an assault and battery, the defendant may plead that the plaintiff with force and arms, and a strong hand, endeavoured forcibly to break and enter the defendant's close, whereupon the defendant resisted and opposed such entrance, &c.; and, if any damage to the plaintiff, it was in the defence of the possession of the said close. *Weaver v. Busb*, B. R. M. 39 Geo. 3. 8 T. R. 78.]

But a man cannot justify a wounding in defence of his possession. R. 2 Rol. 548. l. 35.

Nor, a battery for disturbance in erection of a booth. *Ibid.* l. 40.

Nor, for being in a park in the night, if he does not resist or fly from the keeper. *Ibid.* l. 30.

Nor, in defence of his master's goods. *Per Powell*, Lut. 1483.

(3 M 18.) *Amicable contest.*] So, the defendant may plead that he wrestled with the plaintiff for a wager.

(3 M 19.) *Due correction.*] So, the defendant may plead that the plaintiff was a lunatic, &c. and he chastised him in order to bring him to sound mind. 2 Rol. 646. l. 25. 559. l. 50. Pl. Com. 18. 6.

That the plaintiff was his scholar, and he corrected him.



Or, his servant, son, or wife, and he corrected. 21 Ed. 4. 6. a. 53. a.

But it is no plea to trespass for a battery that the defendant was a lunatic. 2 Rol. 547. l. 1.

(3 M 20.) *Inevitable necessity.*] So, the defendant may plead that he did it through inevitable necessity against his will: as, that at a muster he (being a soldier) discharged his musket, and the plaintiff suddenly crost him, whereby he was inevitably struck, against his will. R. 2 Rol. 548. l. 10. Mo. 864. *Vide post.* (3 M 30.)

But the plea is not good, if it does not appear to the court that it was inevitable without the defendant's default or negligence; as, if he says the plaintiff casually had the gun discharged in his face. R. 2 Rol. 548. l. 10. Mo. 864. Ray. 423.

*That A. assaulted him, and in lifting up his stick for his defence he casually struck the plaintiff.* Ray. 423.

So, in trespass for assault and battery, plea, that the horse upon a fright run against the plaintiff, who upon being called to, would not get out of the way, is bad: for it does not answer the battery. R. 4 Mod. 405.

So, plea, that he shot an arrow at butts, and wounded the plaintiff against his will. 21 H. 7. 28. a. Ray. 423.

*That he cut down his hedge, and the branches of the trees; ipso invito, fell upon the land of the plaintiff.* Ray. 422.

Or, *fell into the river*, whereby the watercourse to the plaintiff's mill was stopped. Ray. 423.

*That in building his house timber ipso invito fell upon the house of another.* Ibid.

(3 M 21.) *To an assault per quod consortium, &c. amisit.*] So, to trespass *per quod consortium*, or *servitium amisit*, the defendant may plead *not guilty*.

So, he may say, that the wife or servant made the first assault; for if he justifies the battery, it will be an answer to the loss of service, &c. which is consequential. *Per two J.* 1 Rol. 393. Tho. Ent. 390.

(3 M 22.) *To false imprisonment.* By his own authority, as an officer, &c.] To trespass for false imprisonment, the defendant may plead that he did it *virtute officii*: as, that he, being constable, saw the plaintiff break the peace, and therefore he put him in the stocks. Cl. Ass. 99.

That, being constable, he put the plaintiff in the stocks for making *hue and cry* without cause. Bro. V. M. 479.

For keeping a house of bad fame. Ibid.

But now, by the *st.* 7 J. 5. a constable for any thing done by virtue of his office, may plead *not guilty*.

So, the defendant may plead, that he, being governor of the plantations, committed, till he was brought to the court of *oyer and terminer*. Ca. Parl. 25.

So, the defendant may plead that he did it to prevent apparent mischief, which might ensue: as, to restrain the plaintiff, *non sane*, from killing himself, or others, burning a house, or other mischief. 2 Rol. 559. l. 35. *Vide ante*, (3 M 19.) *That*

*That the plaintiff and another were fighting, and he restrained him from fighting till the rage was over.* 2 Rol. 559. l. 40.

*That the plaintiff was a cheat, and played with false dice, and the defendant took him to carry him before a justice of peace.* Jon. 249.

*That the plaintiff would have left a child in the parish, and he took him before a justice.* 1 Leo. 327.

But it is no plea, that he apprehended and detained him till he consented to remove a misdemeanor, nuisance, &c. *Ibid.*

The defendant cannot justify a restraint (because they threatened to fight) to prevent it. 2 Rol. 559. l. 45.

Or, by prescription to imprison for a day or two at discretion, if any one *contemptuous se gesserit* towards bailiffs of the corporation, &c. R. 2 Leo. 34.

*That he, being constable, took away salmon taken contrary to the st. 1 El. 17.* is not good, without the warrant of a justice of peace. R. 1 Sal. 407.

(3 M 23.) *By warrant of a justice of peace.*] But by the st. 7 Ja. 5. in an action against a justice of the peace, mayor, bailiff, constable, &c. for any thing done by virtue of their offices, or against any others in aid, or by command of such officers, (which act is made perpetual by the st. 21 Ja. 12.) the defendant now may plead *not guilty*, and give the special matter in evidence. *Vide ante*, (3 K 26.)

And therefore, if a man seizes a gun, &c. of a person not qualified, by a justice's warrant, he may plead *not guilty*. Lut. 1506.

So, if the defendant justifies, as judge or officer, he must shew his authority. Ca. Parl. 29.

And that the matter was within his constance or jurisdiction. *Ibid.*

So, if the defendant justifies an arrest by command of a justice, or mayor, he must shew in certain for what cause it was. R. 2 Cro. 81.

If he justifies by command of a dean and chapter, he must shew a precept, or warrant. R. Carth. 74.

[One warrant of distress for the amount of several duties imposed by different acts of parliament, each giving a power of distress, is legal, and may be pleaded to an action of trespass. *Patchett v. Bancroft*, B. R. T. 37 Geo. 3. 7 T. R. 367.]

[The judgment of the commissioners of land tax on appeal is conclusive in an action of trespass brought against the officers for levying under a warrant of distress. *Ibid.*]

(3 M 24.) *By process.*] So, the defendant may plead that he did it by *mesne* or judicial process out of the king's court: as, upon a *ca. sa.* after judgment in B. R. or C. B. 2 Bro. Ent. 284. 2 Vent. 190.

[That he re-took the plaintiff before the return of the writ on *mesne* process, tho' he had voluntarily permitted him to go at large, after the first arrest. *Semb.* 2 T. R. 172.]

[If a declaration for false imprisonment against A. and B. contain two counts, to both of which the defendants plead not guilty, and justify the first under *mesne* process, A. as the plaintiff in that action, and B. as the bailiff: and the plaintiff, by new assignment admitting the arrest to be lawful, reply that B. with the consent of A. voluntarily released him, and that they afterwards imprisoned him, for the time mentioned in the first count; the plaintiff having failed in prov-



ing the new assignment, by not shewing the consent of *A.* shall not be permitted to prove the same trespass against *B.* under the other count. *Semb. 2 T. R. 172.*]

[*A ca. fa.* on a judgment afterwards set aside for irregularity, is no justification to the plaintiff; but, on an erroneous judgment, it is. *Philips v. Biron, H. 8 G. Str. 509.*]

Or, upon a *fieri facias* or *ca. fa.* after judgment in an inferior court. *Lev. Ent. 176. 206.*

Or, upon *mesne* process out of *B. R.* or *C. B.* 3 *Lev. 62. Tho. Ent. 315. 344. 1 Bro. Ent. 219.*

Or, an attachment of privilege.

Or, by *homine replegiando.* *Lut. 1430.*

Attachment, &c. out of *Chancery.* *Lev. Ent. 191.*

Or, upon process from a county palatine.

Or, out of an inferior court of record. *Tho. Ent. 341.*

Or, out of the court of *Admiralty.* 2 *Lev. 131.*

Or, of a county or hundred court, &c. *Lev. Ent. 212. Lut. 1440.*

Or, by the command of the *chief justice* to deliver him to the *marshal* according to custom. 2 *Rel. 558. l. 35.*

If the defendant justifies by a judicial process out of a superior court, it is sufficient to allege the judgment, writ of *ca. fa.* and warrant thereon to the officer.

And the officer himself need not allege the judgment, only the writ and warrant. *R. 3 Lev. 20. 1 Sal. 409.*

So, if by *mesne* process out of a superior court, it is sufficient to allege the writ to the sheriff and warrant upon it.

So, it is sufficient to shew a writ to the sheriff, and a warrant to the defendant before the arrest, tho' there was not an actual delivery of the writ to the sheriff before the arrest, if the defendant had not notice of the non-delivery. *R. 3 Lev. 93. Dub. Med. Ca. 70. R. 2 Lev. 19.*

[A defendant in an action for false imprisonment, pleading a justification under *mesne* process sued out by him in a cause in which he was plaintiff, may state that the writ issued upon an affidavit to hold to bail, without setting forth the cause of action. *Bilk v. Broadbent, B. R. E. 29 Geo. 3. 3 T. R. 183.*]

[And if the writ be pleaded as sued out on a day between the *essoign* day and the first day of term, and there be a special demurrer for that cause, the objection will not prevail, tho' the court do not sit in fact till the *quarto die post.* *Ibid.*]

[If the officer joins in the same plea with defendant, for whom the warrant is no justification, he forfeits the benefit of it. *Philips v. Biron, H. 8 G. Str. 509. Smith v. Dr. Bouchier, M. 8 G. 2. Str. 993.*]

[If plaintiff in an action in an inferior court, and officer, jointly justify under a process returnable at next court, they must shew a return made; or officer trespasser *ab initio*, and plaintiff by joining in plea is equally affected. *Middleton v. Price, P. 16 G. 2. Str. 1184. 1 Wilf. 17.*]

[A principal officer, to whom returnable process is directed, must shew that it is returned, but a subordinate officer need not. *Moravia v. Sloper, C. P. M. 11 Geo. 2. Willes, 30. Merse v. James, C. P. M. 12 Geo. 2. Willes, 122.*]

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[An officer of an inferior court may justify acting under process which is only voidable, but not under void process. *Willes*, 122.]

[Officers justified under a precept stated to bear date 26th February, issuing out of a court held 24th February, and it was holden that the process was void, and the justification bad. *Ibid.*]

[*Quere.* Whether it be not necessary for the officer of an inferior court, to whom its precepts are directed, to shew a precept, under which he justifies, returned? *Ibid.*]

[If in such case he do not, but rely merely on the precept itself, whether it be necessary for him to conclude the plea *prout patet per recordum.* *Quere. Ibid.*]

[But if he do shew the return, as well as the precept, the plea must so conclude. *Ibid.*]

[When an officer of an inferior court justifies under a precept to take the goods of A. in execution, the precept and return are not merely inducement, but of the substance of the justification. *Ibid.*]

[Tho' an officer is justified in acting under erroneous process, it must be in a case where the court, out of which it issued, had jurisdiction. *Ibid.*]

[Defendant justified as an officer of an inferior court for trying, &c. causes touching mines and miners within a certain district; the plea was holden bad because it did not allege that the defendant below was a miner "at the commencement of the suit below," but only, "when the execution issued." *Ibid.*]

[If the plaintiff in an action in an inferior court, or a mere stranger, justify under process, he must set forth the proceedings at length, otherwise the plea is bad not only as it respects him, but the officers of the court also, who join with him in the plea. *Ibid.*]

[*Quere.* Whether a person, who acts at the request of the officers and in their aid, in executing civil process of an inferior court, be such a stranger? *Ibid.*]

[Plea of justification under the process of an inferior court, holden "at the forest of D.," which contains many thousand acres, without stating in what particular part of the forest, good. *Semb. Ibid.*]

[The proceedings of an inferior court may be pleaded by "*taliter processum est*," &c. in the case of officers of the court; and in the case of the party also. *Semb. Johnson v. Warner*, C. P. H. 18 Geo. 2. *Willes*, 528.]

[If it be stated in a plea that a precept issued out of an inferior court, it will be taken that it was issued by the judge of that court. *Ibid.*]

[A precept out of an inferior court, "to attach or distrain" the goods of the defendant, to compel his appearance, is good. *Ibid.*]

[In case, against an officer for false imprisonment on 12 G., if he pleads process of an inferior court, it is an excuse good enough for him. *R. Rycraft v. Calcraft*, Fort. 344.]

But, if the justification is by *mesne* or judicial process out of an inferior court, he must shew all the proceedings at large, regularly. *Vide ante*, (E 18.)

And therefore, if a good authority does not appear for holding the court, it is bad. *Lut.* 918. *R.* 3 *Lev.* 141. 243. *Lut.* 1464. 1457. 2 *Jon.* 165.



If he shews an authority by patent and prescription, it is not good. *Semb. Mod. Ca. 70.*

[In trespass for taking goods, if defendant justifies for that *according to custom* of city, he levied a plaint, &c. it is good; tho' he does not say the court was held according to custom, tho' it is of horses or geldings, tho' he does not aver they were taken within the jurisdiction, (if it appears they were,) tho' he mentions only one sheriff of London. *Williams v. Jones, T. 9 G. 2. B. R. H. 298.*]

[In trespass for breaking and entering the plaintiff's close and taking his goods, the defendant may justify under a sufficient legal process, if he had it in fact at the time, altho' he declared then that he entered for another cause. *Crowther v. Ramsbottom, B. R. E. 38 Geo. 3. 7 T. R. 654. Granvelt v. Burwell, B. R. T. 12 Will. 3. (Com. 78.) 1 Ld. Ray. 466.*]

So, if a plaint was alleged, upon which *taliter processum fuit* that judgment, &c. it was not sufficient antiently. *Lut. 918.*

But now it is sufficient. *Semb. 3 Lev. 243. R. 3 Lev. 404. Lut. 1413, 1414. Vide ante, (E 18.)*

[If defendant justifies under a *capias* out of a base court, in action of debt, and shews that a plaint was levied, *et taliter processum fuit*, that a *capias* issued; it is well without shewing that a summons issued before the *capias*. *Adams v. Freeman, P. 26 G. 2. 2 Wilf. 5. Moravia v. Sloper, C. P. M. 11 Geo. 2. (Com. 574.) Willes, 30. S. C. Titley v. Foxall, C. P. T. 31 & 32 Geo. 2. Willes, 688.*]

So, if it does not appear that the cause of action arose within the jurisdiction of the inferior court it is bad. *3 Lev. 243. [Moravia v. Sloper, (Com. 574.) Willes, 30.] R. cont. in Ex. M. 2 Geo.*

[*Quere.* Is it necessary to state the nature and extent of the jurisdiction of the court below? *Willes, 30.*]

And therefore, it must be alleged at what place it arose. *Semb. Lut. 1413.*

And tho' the plaint there mentions it to be *infra jurisdictionem*, it is not sufficient. *R. 3 Lev. 243, 4. Cont. Lut. 937.*

So, if it does not appear that the plaint was levied, or the defendant impleaded there. *3 Lev. 404.*

Or, before whom the plaint was levied. *R. Lut. 1526.*

Or, in what county the court was. *Ibid.*

Or, out of what court the process issued. *Lut. 1460. R. Sal. 517.*

If he justifies trespass till he paid 11 *l.* 10 *s.* by process of execution for 11 *l.* only. *R. 2 Mod. 177.*

So, if he alleges a mandate by the court to *B.*, to carry to the comptroller, *B.* must shew that he was detained there; for that he took and detained him generally is not sufficient. *R. 1 Sal. 408.*

If he alleges an attachment out of an inferior court, this does not justify the carrying away goods. *Mod. Ca. 71.*

Yet, if the defendant justifies by process out of the *Admiralty*, which recites it to be a maritime cause, the defendant need not aver that the cause arose *super altum mare*. *R. 2 Lev. 131.*

If he justifies by process of a court leet, he need not shew that it was held by grant or prescription. *R. 1 Sal. 200.*

So, if the defendant pleads a judgment in *B. R.* he must shew where *B. R.* then was, for that court is removable. *R. Cro. El. 504.*

So,

So, if the defendant justifies by a sheriff's warrant, he must shew his warrant specially. *R. 4 Mod. 378. Vide ante, (E 17.)*

He must shew that the warrant was directed to the defendant, for to *D.* without saying the aforesaid *D.*, is not sufficient. *Semb. Lut. 1465.*

[If a warrant on a *capias* has two bailiffs' names inserted by the under-sheriff, and a blank left for a third, is sealed, and sent to plaintiff's attorney, who inserts another bailiff's name in the blank, it is a bad warrant, and no justification of the third bailiff who arrests. *Burslem v. Fern, H. 30 G. 2. 2 Wils. 47.*]

That he is an officer, to whom the warrant ought to be directed. *R. Lut. 1464.*

If he alleges a sheriff's mandate to a bailiff of a franchise, he must say it was sealed. *2 Vent. 193.*

If the sheriff or officer himself, to whom process is directed, justifies imprisonment by force of such process, he must shew the writ to be returned. *2 Rol. 563. l. 10. 20. R. 1 Sal. 409. R. 16 H. 7. 14. 21 H. 7. 22.*

So, if he justifies by *sevi facias*, *pluries replevin*, or other process returnable. *R. 1 Sal. 410.*

But the bailiff of a franchise need not. *2 Rol. 563. l. 25.*

Nor, a bailiff who has a warrant from a sheriff, or the party, or any other who acts in aid of him. *R. 2 Rol. 562. l. 45. 50. Cont. 2 Rol. 563. l. 30. 40. R. acc. Cro. Car. 446. Jon. 378. R. in C. B. M. 10 An. R. 1 Sal. 409.*

So, the sheriff, or principal officer, need not in *replevin*, or *alias*; for they are not returnable. *R. 1 Sal. 210.*

Nor, where he pleads that the defendant was rescued, whereby he could not make a return. *R. in Exch. M. 2 G. 2.*

But an officer cannot justify taking upon a *habeas corpus*, after a *cepi* returned, where the party is let to bail; but he ought to aid himself upon the bail. *R. 2 Rol. 558. l. 25.*

So, he cannot justify by an order of *Chancery*, but it must be by attachment. *R. 1 Mod. 272.*

[A warrant to arrest the party, "to the end that he may become bound, &c. to appear at the next sessions, &c." means the next session after the arrest, and not after the date of the warrant; an officer therefore executing it may justify an arrest after the sessions next ensuing the date of the warrant. *Mayhew v. Parker, B. R. H. 39 Geo. 3. 8 T. R. 110.*]

[If defendant pleads an outlawry and warrant, he must aver that the *cap. utlagat.* was filed and remained of record, and he must say *prout patet per record.* *R. on demurrer in C. B. and affirmed in error on B. R. Carvil v. Manly, M. 9 G. Fort. 379.*]

[A sheriff's officer cannot justify entering the house of a defendant under a writ of trespass *quare clausum fregit*, and continuing there till the defendant pay him a sum of money, as and by way of surety for his appearance. *Moore v. Beaumont, B. R. H. 35 Geo. 3. 6 T. R. 137.*]

[*Quare.* Can he justify attaching the defendant's property under such a writ? *Ibid.*]

[A plea of justification by an officer, (to trespass for taking the goods of *A. B.*) that he took them under a *distingas* against *C. B.* (meaning



(meaning the said *A. B.*) to compel an appearance, with an averment that *A. B.* and *C. B.* are the same person, cannot be supported, unless *A. B.* appeared in that action, and did not plead the *misnomer* in abatement. *Cole v. Hindson*, *B. R. E.* 35 *Geo.* 3. 6 *T. R.* 234.]

[If he had appeared in that action, and had omitted to plead in abatement, he would have been concluded by it. *Ibid.* *Crawford v. Satchwell*, *B. R. M.* 18 *Geo.* 2. 2 *Str.* 1218.]

(3 *M* 25.) *To trespass for cattle or goods. Distress for rent, &c.*] To trespass for taking cattle, or other goods, the defendant may plead that he took them as a distress for rent and services. *Vide ante*, (3 *K* 15.)

[Where defendant justifies (in trespass for taking the plaintiff's goods, and converting them, &c.) taking them as a distress for rent, the taking and converting are considered as the same thing; and therefore it is not inconsistent to plead a justification to the taking and converting all the goods, as a distress, and afterwards to say that he left part of them in the plaintiff's possession. *Cooper v. Monke*, *C. P. H.* 11 *Geo.* 2. *Willes*, 52.]

Or, for a rent charge. *Vide ante*, (3 *K* 18.)

Or, for rent reserved upon a lease for life or years. *Vide ante*, (3 *K* 19.)

Or, for relief, amercement, &c. *Vide ante*, (3 *K* 17. 27, 28.)

Or, for toll. *Lut.* 1520.

[For toll; without saying how much the toll was. *Morgan v. Skinner*, *T.* 1722, *Bunb.* 114.]

For toll or stallage in a fair or market. *Lut.* 1517. 1499.

So, he may justify as an officer by the *st.* 1 *Ja.* 22. for searching and seizing leather not tanned.

[The defendant may plead that they took the goods, as searchers of tanned leather, appointed by virtue of the *stat.* 2 *Ja.* 1. c. 22. the goods being insufficient, and within the meaning of the statute, and that they had given notice of the seizure to the lord mayor, that triers might be appointed. *Blackwell v. Asdill*, *C. P. T.* 11 *Will.* 3. 1 *Lutw.* 181. *Cade v. Hillary*, *C. P. T.* 7 *Will.* 3. 2 *Lutw.* 1402.]

[But a plea that the defendant had seized the goods, as searchers to seize leather *insufficiently dried*, the goods in question being *insufficiently dried in the judgment of the defendants*, is bad. *Warne v. Varley*, *B. R. M.* 36 *Geo.* 3. 6 *T. R.* 443.]

[A condemnation by four out of the six triers of leather, (the whole number being met for the purpose of trying,) must be considered as a condemnation of all six, on the principle of the act of the majority in a power of a public nature binding the minority. *Grindley v. Barker*, *C. P. E.* 38 *Geo.* 3. 1 *Bos. and Pull. Rep.* 229.]

As a gamekeeper, for seizing the gun, &c. of a person not qualified. *Lut.* 1505.

For seizing a heriot, &c. due by custom. *Lut.* 1310. *Win. Ent.* 62. *Vide ante*, (3 *K* 28.)

[That the property of the horse at the time of the surrender was not in the tenant, is a good replication. *Kit.* 271.]

Where the land is copyhold.

Or, due by tenure, or reserved upon a demise.

If the defendant justifies as servant or bailiff to another, when he is not so, the plaintiff may reply *de son tort*, &c. *Cro. El.* 14.

(3 M 26.) *Damage feasant.*] So, the defendant may plead, that the place where, &c. was his freehold, and he took *damage feasant*. *Vide ante*, (3 K 21.)

That it was the freehold of B. and he took as his servant the cattle, &c. *damage feasant*.

That B. was seised and demised to him for years, who took *damage feasant*. *Lev. Ent.* 209.

That the plaintiff used nets to fish in his several fishery, for which he took them *damage feasant*. *Cro. Car.* 228.

[In trespass for impounding cattle, and *keeping them so close that one died*, not guilty, and justification for *damage feasant*; verdict for plaintiff on first; for defendant on second; there shall be judgment for defendant; for the justification covers the whole; the death of the beast being only *gravamen*, and need not be answered. Plaintiff might have had *case* for the death. *Gates v. Bayley*, T. 6 G. 3. 2 *Wilf.* 313.]

The defendant must shew by what title he was seised, or possessed; for it is not sufficient to say, that he was possessed, or that it was his close, without more. *R. upon special demurrer*, 4 *Mod.* 419. *R. Lut.* 1492. *R. cont.* 2 *Mod.* 70. 3 *Mod.* 132. if it is not trespass *quare clausum fregit*: but these cases are denied. *Lut.* 1492. *R. Carth.* 10. *Vide ante*, (C 41.)

But the defendant cannot justify destroying the goods, &c. found *damage feasant*.

Nor, the cutting nets or oars to prevent fishing in his fishery. *R. Cro. Car.* 228.

Nor, chasing of ewes whereby *deteriorat. fuerunt*. *R.* 3 *Leo.* 15.

Nor, cutting the wood of a seat erected in a church without licence, &c. tho' removed by the *churchwardens*. *R. Noy*, 108.

[In trespass for breaking and entering a house, and taking away goods, and converting them to his own use; if defendant pleads, that he took them *damage feasant*, and removed them to the pound, and left them for plaintiff's use, it is bad; for it is no answer to the conversion to his own use. *Wright v. Penn*, M. 4 G. 2. *Fort.* 381.]

[It is a good replication, that after the taking *damage feasant*, defendant converted the beast to his own use. *Dye v. Leatherdale*, M. 10 G. 3. 3 *Wilf.* 20.]

So, the plaintiff to a taking *damage feasant*, may say that the taking was in another place. *R.* 2 *Cro.* 141.

(3 M 27.) *For prevention of damage.*] So, the defendant may plead that he took to avoid damage otherwise inevitable: as, that he took out of the house to preserve from fire. *Semb.* 21 H. 7. 27. b. *Vide Trespass (D).*

That he chased cattle *damage feasant* with a dog. *R.* 4 Co. 38. 2 *Rol.* 566. l. 20. *R. Jon.* 131. *Popb.* 162. *Vide post.* (3 M 38.)

That he removed iron, &c. which the plaintiff had broke down his fences, &c. with and left upon his land, to the land of the plaintiff, and gave him notice thereof; for he need not take it *damage feasant* and impound it. *R.* 2 *Rol.* 566. l. 35. But



But it is no plea that he took for the safety of his goods, where the owner may have remedy if they are destroyed: as, that he took corn, severed for tithes, and carried them to the barn of the plaintiff, the parson, to save them from the cattle going in the same close. *R.* 21 *H.* 7. 27. *b.*

That he took the plaintiff's horse going in the field for fear it should be stolen. *Ibid.*

[3 *M.* 28.) *Default of the plaintiff himself.*] So, the defendant may justify for the plaintiff's own default: as, if the plaintiff puts his grain or money with those of the defendant, he may justify taking the whole. *R.* 2 *Roll.* 566. *l.* 15. 2 *Bul.* 323. 2 *Cro.* 366.

Or, if the plaintiff takes a handful of grain from the defendant and mixes with his own, the defendant may take a handful of his. 2 *Roll.* 566. *l.* 12.

So, if before execution against *A.* he puts the goods of *B.* amongst his by *covin*, that an action may be brought for the taking by *B.* *Per Ley, C. J.* 2 *Roll.* 393.

[3 *M.*) *Defect of fences.*] So, the defendant may plead that the defendant by prescription ought to repair the fences between the closes of the plaintiff and defendant, and for want of repair, his cattle escaped and did the damage alleged. 19 *H.* 8. 6. *a.* 2 *Roll.* 565. *l.* 30. *Tho. Ent.* 304.

That the plaintiff ought to repair the fences between his close and the highway, and for want thereof his cattle escaped out of the highway. 10 *Ed.* 4. 7. *b.*

Or, between his close and the place where the defendant has common. *Win.* 996. or 1110. edit. 1680. *Lut.* 1357.

That the plaintiff, or a stranger by his command, threw down the fences, whereby the cattle escaped.

And it is sufficient for the defendant to say that he is possessed of a close adjoining to the plaintiff's close, without saying by what title, or for what term. *R. Tel.* 74.

That all occupiers ought to repair. *Semb.* 1 *Sal.* 357. 1 *Vent.* 97. *Ray.* 192.

So, the defendant may justify entring to rechase cattle that escaped for want of fences. 2 *Roll.* 565. *l.* 35. 40.

But it is not sufficient to say the plaintiff *reparare debet*, without shewing by what title, to wit, by prescription, or otherwise. *R. Tel.* 75.

That by agreement the plaintiff ought to repair; for he may have a remedy upon his covenant. *Per three J.* *Cro. El.* 709.

So, it is no plea, if he suffers his cattle to continue there after notice, tho' the fences are not in repair. *Semb.* 2 *Leo.* 93.

Or, if his cattle escape out of the highway into his land, because there is no fence; if he is not bound to maintain it. 2 *Roll.* 565. *l.* 47.

So, he cannot allege a custom to repair, but must prescribe that such an one ought. 1 *Vent.* 97.

So, it is no plea, that a forester, &c. entred to rechase deer, &c. that escaped by the plaintiff's neglect in maintaining the fence, &c. for

for when it is out of the forest, park, &c. the property is gone. *R. Kelw. 30. Manw'd. 106.*

*Replication.*] To this plea the plaintiff may reply *de son tort*, and traverse the prescription. *Rast. 621. b.*

Or, *de son tort*, and traverse the want of repair. *Win. 999. (or 1113. edit. 1680.)*

Or, *de son tort*, and traverse the escape *modo & forma.* *R. Lut. 1358, 9.*

Or, *de son tort demesne* generally. *Rast. 621. a.*

So, that the fences were sufficient, but the defendant's cattle threw down all the fences. *Ibid.*

(3 M 30.) *Necessity.*] So, the defendant may justify for unavoidable necessity: as, that he threw goods (being in a common barge upon the *Thames*) into the water, in a tempest, to save the passengers' lives. *R. 2 Rol. 567. l. 5. R. 12 Co. 63.*

That he pulled down the house to extinguish the fire. *12 Co. 63. Vide ante, (3 M 20.)*

(3 M 31.) *Involuntary accident.*] So, the defendant may plead that it was not in his power to prevent it; as, that the cattle going in the road by the plaintiff's close *raptim & sparsum* against his will depastured the plaintiff's grass or corn. *2 Rol. 566. l. ult.*

That he chased sheep mixt with his own to a place where he might separate them. *Per Rede, 21 H. 7. 28. a. Latch, 13.*

That the executor took goods mixt with the testator's goods, till he had knowledge of the mistake. *21 H. 7. 28. a.*

So, the defendant may plead, that his dog chased the plaintiff's sheep out of his land, and pursued them against his will into the plaintiff's land. *R. Lut. 13. 119.*

That a horse, being unruly, violently carried the plough into the plaintiff's land adjoining. *Latch, 13.*

That trees were blown down by the wind into the plaintiff's land, and he entred to remove them. *Ibid.*

That driving sheep in the highway, they against his will escaped into the plaintiff's land. *Ibid.*

That fruit fell from his trees into another's land adjoining, and he picked it up. *Latch, 120.*

But it is no plea, if the accident was by a voluntary act, or neglect of the defendant; as, if a man lets a falcon go at a pheasant in his own land, and pursues it into the land of another, trespass lies. *Latch, 13.*

If he cuts down a tree, which falls into another's land, and he enters to remove it. *Ibid.*

(3 M 32.) *To trespass pro bonis cum uxore abductis.*] To trespass for taking goods, *cum uxor.* the defendant may plead that she was the wife of the defendant. *2 Rol. 551. l. 10.*

That he took her by leave of her husband. *R. 1 Ed. 4. 1. a.*

But the defendant cannot plead *ne unques accouple.* *2 Rol. 551. l. 5.*

(3 M 33.)



(3 M 33.) *To trespass for killing a dog, &c.*] So, to trespass for killing his dog, the defendant may plead that the dog chased the conies in his warren, &c. R. 2 Cro. 44. Agreed 1 Sid. 336. Cont. 2 Rol. 567. l. 35.

Or, that he killed the deer in his park. 3 Lev. 28. 35.

And, he need not say that the plaintiff knew of the quality of the dog to haunt the warren, &c. 2 Cro. 45.

Or, that there was a necessity to kill it. 1 Sid. 336. 3 Lev. 28.

So, the defendant may plead that the plaintiff's mastiff came into the defendant's court, to the terror of his family, and therefore he killed it. R. Lut. 1494.

Or, fastened upon his dog, and he could not otherwise part them. Adm. 1 Sand. 84.

But if the defendant pleads, that the plaintiff's dog fastened upon the defendant's dog, for which he killed it, he must shew that he could not otherwise part them. R. 1 Sid. 336. 1 Sand. 84.

So, it is no plea, that the dog chased a hare into his land, and therefore he killed, or took it. R. 2 Cro. 463.

So, if the plaintiff replies, that he chased conies, deer, &c. in his own land, and the dog pursued into the park, &c. he must say he endeavoured to restrain him from going into the park, &c. R. 3 Lev. 28.

So, if trespass be for taking a dog with a collar, it is no bar to say he was courting a hare in his soil, and he took him, and led him away. R. 2 Cro. 463.

(3 M 34.) *To trespass quare clausum fregit. The common bar.*] To trespass *quare clausum aut domum fregit*, &c. the defendant may plead the common bar, viz. that the close or house in the declaration was the defendant's own freehold. Win. Ent. 961. (or 1077. edit. 1680.) 14 H. 8. 24. b. Supra, (3 M 11.)

[*Quere.* When the plaintiff names his close in the declaration, can the defendant plead this plea? *Lambert v. Stroother, C. P. M.* 14 Geo. 2. Willes, 218.]

If the defendant pleads the common bar, he must name the lands, which are his freehold, otherwise, if the plaintiff has lands in the same place, as well as the defendant, the trespass cannot be proved in the defendant's land, for it shall be intended in the plaintiff's land, and he shall not be put to a new assignment till the defendant ascertains another place by name. R. Dy. 23. b.

Yet if trespass is *quare clausum* in *D.* &c. it is sufficient for the defendant to prove he has a freehold in *D.* Sal. 453.

If it is *quare clausum vocat. A.* in *D.* he must prove title in a close of the same name. *Ibid.*

If upon the common bar there is a new assignment, where it is not necessary, it will be good by the statute of *jeofaile* after verdict. R. 1 Brownl. 200.

So, a new assignment may be made, tho' the defendant justifies in the former place. R. Sal. 453.

To freehold pleaded, the plaintiff may say that before the defendant had any thing, *A.* being seised, leased to him. Jon. 352.

But if to a common bar, the plaintiff replies, that the place is such, the

the defendant cannot rejoin that it is the same place as in the bar; for the replication says *al.* than in bar, and therefore the plaintiff will be estopped to give evidence of a trespass there. *R. Cro. El.* 492.

So, if trespass be for goods taken in *D.* the defendant cannot plead the common bar; for *D.* is named only for a *venue.* *R. upon general demurrer.* *Sal.* 453. *Mod. Ca.* 117. *Carth.* 176.

If the defendant agrees in the name of the place, and varies in quantity, or other description, the plaintiff cannot assign a different quantity to the place where, &c. but must say there are two places of such name, &c. and that the trespass was in this. *R. Tel.* 166. *Cro. El.* 897.

If the defendant names a place, which contains the land in the declaration and more, the plaintiff shall say that the trespass was in such land, without answering to the other quantity. *R.* 27 *H.* 8. 22.

If the declaration is, in a market in *B.* if the defendant justifies in *B.* it is sufficient, tho' he does not answer to the market; for if the place makes the justification bad, the plaintiff must shew it. *R.* 2 *Jon.* 207.

If the common bar is pleaded, the plaintiff may reply that it is his freehold, and join issue upon it. *Ass. Ent.* 504. for *per two J. Hought. cont.* 2 *Cro.* 594. he cannot traverse that it is the defendant's freehold. So, by *Levinz, Lut.* 1401. 1419. 27 *H.* 8. 22. *b.*

[The plaintiff may reply that the place in question is the soil and freehold of the plaintiff, and not the soil and freehold of the defendant. *Lambert v. Stroother, C. P. M.* 14 *Geo.* 2. *Willes,* 218.]

Or, may make a new assignment of the place, where the trespass was done. 2 *Cro.* 594.

If the writ is general, and the declaration for *una rodâ terra*, by a new assignment he may say an acre. *Win. Rep.* 65.

If the declaration is *quare clausum fregit*, a new assignment in a barn, &c. is bad. 4 *Leo.* 16.

But *quare domum fregit* is sufficient for a barn, &c. *Ibid.* 2 *Leo.* 185.

The new assignment must ascertain the place, and therefore two acres of land, *sive prati*, is bad. *R. Dy.* 264. *a.* *Bendl. pl.* 222. 1 *And.* 31.

So, if it does not give a name to the place, or the abutments, it is bad. *Semb. Dy.* 264. *a.*

And if it gives the abutments, they must be proved. *Semb. Dy.* 161. *b.*

To a new assignment the defendant may plead, *not guilty*, or justify. 14 *H.* 8. 4. *a.*

And may justify for another cause than his bar. *R. Mo.* 540.

To the new assignment the defendant must plead, *not guilty*, or justify; for he cannot say that the place assigned and the place in bar are the same. *R. Dy.* 161. *b. in marg.* *R. Mo.* 463.

(3 *M* 35.) *Licence.*] So, to *clausum fregit* the defendant may plead, entry by the plaintiff's licence. *Win. Ent.* 1099.

[If *A.* licence *B.* to enter his house to sell goods, *B.* may take assistants,



ants, if necessary, for the purpose of selling them. *Dennet v. Grover*, C. P. H. 13 Geo. 2. *Willes*, 195.]

[And if it be pleaded that *B.* and also *C.* and *D.* his servants, and by his command entred for that purpose, and necessarily continued there so long, it will be understood, that it was necessary for them all to enter. *Ibid.*]

And licence at a day before is sufficient, without saying it continued; for it shall be intended, if the contrary does not appear. *Semb. Cart.* 218.

So, licence by the plaintiff may be given in evidence upon not guilty. *Per Rede*, 21 H. 7. 28. a. [*Bennet v. Alcott*, B. R. M. 28 Geo. 3. 2 T. R. 166.] *constr.*

So, he may plead licence by the bailiff of the owner, and it will be aided after verdict. *R. 2 Cro.* 377.

So, an implied licence: as, entry *ad auxilium in puerperio ferend.*

Continuance after the death of lessee for life for six days, before which time he could not remove. *R. 2 Cro.* 204.

So, if *A.* licenses *B.* to put trees, &c. in his garden, and afterwards sells the garden to *D.* who continues them there without seizure. *Mod. Ca.* 171.

Or, licence by law; as, that *domus fuit communis taberna.* *Win. Ent.* 1087, 1088. 1097.

That he entred to shew the sheriff the cattle upon replevin. 2 *Rel.* 553. l. 12. *Vide post.* (3 M 39.)

To view waste.

[So, for breaking, &c. a man's house, and debauching his daughter, *per quod servitium amisit*, license to enter, if pleaded, is a good bar, but cannot be given in evidence under the general issue. *Bennet v. Alcott*, B. R. M. 28 Geo. 3. 2 T. R. 166.]

But entry by licence of the plaintiff's wife, or servant, is not sufficient. *R. Cro. El.* 876.

Nor, entry to take his goods, or his falcon that pursued a pheasant there. *R. 2 Rel.* 567. l. 30. *Vide post.* (3 M 39.)

Nor, entry to visit his sick daughter, being servant to the plaintiff. *R. 2 Rel.* 567. l. 20.

Or, to demand his debt, if he does not say that the owner was then there. *R. Cro. El.* 876.

So, the licence will be determined by sale of the land wherein it was given. *Per Holt*, *Mod. Ca.* 171

(3 M 36.) *Tender of amends.*] So, to an involuntary trespass the defendant may plead a tender or sufficient amends. 1 *Bro. Ent.* 332. *Tho. Ent.* 304.]

And by the *st.* 21 Ja. 16. to trespass *quare clausum fregit*, the defendant, disclaiming title to the land, and shewing it to be an involuntary trespass, may plead tender at any time before action brought.

So, to a negligent trespass by escape of cattle, &c. 2 *Rel.* 570. l. 20.

But tender after action brought is too late.

So, after a *latitat* sued out; for the plaintiff may by his replication aver that he sued out a *latitat* with intent to declare in trespass. *R. Cro. Car.* 264. 1 *R. l.* 538. l. 3.

So,

So, to avowry for *damage feasant* in replevin, tender must be pleaded before impounding; for it is not within the *ſt.* 21 *Ja.* 16. which goes only to trespass. 3 *R. Lut.* 1596.

So, tender must be of a sum certain; for he is a wrong doer. *Sal.* 686.

So, to a voluntary trespass, tender before action brought is no plea: as, for putting cattle in his close. *R.* 2 *Rol.* 570. *l.* 25. *Noy*, 12.

Or, for breaking his hedges, &c. 2 *Rol.* 570. *l.* 25.

So, to trespass by mistake, tender before action is no plea; for, if the act was voluntary, it cannot be known whether it was by mistake, or how intended: as, that he cut down the plaintiff's hay by mistake for his own. *R.* 3 *Lev.* 37.

[It cannot be pleaded in trespass for taking goods. *Bailee v. Vivaſh*, *P.* 9 *G. Str.* 549.]

To tender of amends the plaintiff may reply *quod non obtulit*. *Tho. Ent.* 304.

Or, that the amends were not sufficient.

(3 *M* 37.) *Public good*.] So, the defendant may justify a private trespass for the public good: as, entering the plaintiff's close to make a bulwark in defence of the king and kingdom. 21 *H.* 7. 27. *b.*

Pulling down a house to save others from fire. 21 *H.* 7. 27. *b.* 2 *Rol.* 566. *l.* 2.

To remove a nuisance. *Sal.* 458.

So, an entry upon fresh suit of a felon, or goods stolen. 2 *Rol.* 564. *l.* 42.

Or, to make a distress. 2 *Rol.* 566. *l.* 10.

In such case he need not say he did as little damage as possible. *R.* *Sal.* 458, 9.

But he cannot justify entering a close, or digging up the soil to hunt or take a fox, badger, &c. tho' it be for the public good. *R.* 2 *Rol.* 558. *l.* 10. *D. cont. Lut.* 120. *R. acc.* 2 *Bul.* 60.

[But a person may justify trespass in following a fox with hounds over the grounds of another, if he does no more than is necessary to kill the fox. *Gundry v. Faltham*, *B. R. T.* 26 *Geo.* 3. 1 *T. R.* 334.]

Nor, entry to take his goods, which a trespasser carried to *B.*'s house. *R.* 2 *Rol.* 564. *l.* 35. *D. Mo.* 20.

Or, to search for his goods stolen, in another's land. *R.* 2 *Rol.* 565. *l.* 15. 1 *Brownl.* 199.

(3 *M* 38.) *Prevention of damage to himself*.] So, he may justify for removal of a trespass from himself, tho' damage thereby happens to another: as, if *A.* erects a dam, wall, &c. upon his soil and the soil of *B.* if *B.* throws down the wall upon his soil, it will be well, tho' thereby the whole wall, &c. upon the soil of *A.* also falls. *R. Cro. El.* 269.

So, he may enter the land of another to remove a nuisance there to himself. 2 *Rol.* 565. *l.* 50.

He may break a house where he is wrongfully imprisoned, to make his escape. 2 *Rol.* 566. *l.* 5. *Vide Execution*, (C 5.)

He may chase cattle *damage feasant* with a dog to remove them. 2 *Rol.* 566. *l.* 20.



But it is no plea that he took the plaintiff's horse to fly from the assault of *B.* and others. *Ray.* 423.

(3 M 39.) *Using or securing his property.*] So, the defendant may justify an act for the security of his estate, or interest: as, if he has a fishery in another's soil, he may justify putting pales, or other things there. 2 *Rol.* 564. l. 27.

If *A.* takes *B.*'s goods, *B.* may justify the taking, tho' there is an alteration of the form: as, if timber taken is cut into boards. *R. Mo.* 19.

If cloth is made into clothes. *Mo.* 20.

So, if a man has goods, timber, &c. in a house or upon the land of another, his executor may justify the taking. 2 *Rol.* 564. l. 25.

If a trespasser puts the goods upon his own land, the owner may enter to take them. 2 *Rol.* 565. l. ult. 2 *Rol.* 56.

Otherwise, if a tenant in common takes all the goods which he has in commons, and puts them on his separate land, the other cannot enter his separate land to retake them, tho' he may retake his part, where he can do it without a trespass. *R.* 2 *Rol.* 560. l. 30.

So, the vendee of goods, timber, &c. may justify an entry to take them. 2 *Rol.* 567. l. 40.

So, the owner of a water-pipe by grant or prescription, &c. may justify entering into the land, where it lies, to repair it. *R.* 2 *Rol.* 567. l. 45. 50.

So, a forester may justify entering into land, next the forest, by prescription to recharge deer to the forest. *R.* 13 *H.* 7. 16.

So, if goods are stolen and left in *B.*'s house, the owner may enter to take them. 2 *Rol.* 55, 6.

So, a sheriff or his officer may enter, where the door is open, to do execution upon the goods there. *R. Cro. El.* 759.

So, *A.* may justify entering the house of *B.* then there to demand his debt of him. *Semb. Cro. El.* 876.

But if *A.*'s goods are in *B.*'s house or land without his own act, *A.* cannot justify entering to take them, without *B.*'s licence. *Semb. Cro. El.* 246. *R.* 2 *Rol.* 55. *Vide supra.*

Tho' he has licence from *B.*'s wife in his absence. *R. per three J. Cro. El.* 246.

So, he cannot take his goods where they are substantially altered; as, if timber is used to build a house. *Mo.* 20.

So, if the defendant has a right to dig and take clay, &c. as tenant, he cannot take that dug by another, tho' no tenant. *R. Cro. El.* 434.

(3 M 40.) *Title with colour to the plaintiff.* When colour shall be given.] So, the defendant may plead title in himself by descent, fine, feoffment, devise, &c. and give colour to the plaintiff.

Colour is a feigned title given by the defendant to the plaintiff in assise, trespass, &c. when the defendant would refer his title to the court without sending it to *lay gens*; for without such colour his plea will amount to the general issue. *D. & St. l. 2. c. 53. R.* 10 *Co.* 90. *Dr. Leyfield.*

And colour must be always given, when the defendant's plea goes only

only to the possession; for, notwithstanding, a right may remain in the plaintiff: as, if the defendant pleads a descent. 10 Co. 90. b.

So, if the defendant pleads that *A.* was seised in fee or of the freehold, and he as servant and by his command entred; for the plaintiff may have a right by lease for years or otherwise. 10 Co. 89. b. Cro. El. 76.

So, if the defendant pleads that the goods were waived in his manor, or sold in market overt, being stolen *de quodam ignoto*, he shall give colour; for *ipse ignotus* perhaps was the plaintiff. 10 Co. 90. b.

But when the defendant's plea bars the plaintiff's right and property, no colour is necessary: as, if the defendant pleads a collateral warranty, and relies upon it. 10 Co. 90. a.

Or, an estoppel, or fine with proclamations. *Ibid.*

Or, an act of parliament; for in these cases the plaintiff will be barred, tho' he had a right before. 10 Co. 90. b.

So, if the plea bars the plaintiff and his blood for ever. *Ibid.*

So, if the plea goes to the plaintiff's right or property: as, if the defendant pleads that *A.* was possessed of goods, and sold them in market overt, there needs no colour; for the plea avoids the plaintiff's property. *Ibid.*

Or, that *A.* was possessed, and *B.* stole and waived them in his manor. 10 Co. 90. b.

That the goods were wreck. *Ibid.*

That they were tithes severed from the nine parts; for this takes away the property of every other. R. 10 Co. 91. a.

So, that *A.* enfeoffed *B.*, and he as his servant entred; for when he shews how *A.*, who had the fee or freehold, was intitled, the right shall not be intended in the plaintiff. 10 Co. 90. a.

That *A.* lord of the manor approved the common, is a good plea to an assize for common, without colour.

So, if the defendant intitles him by the plaintiff himself, colour is not necessary. 10 Co. 91. a.

As, by a lease for life or years from the plaintiff.

So, if the plea is to the writ or the action of the writ, colour is not necessary. 10 Co. 91. a.

So, if the defendant pleads a general bar, no colour is necessary.

So, where the defendant admits that the plaintiff had an estate, which is now defeated by condition, entry, &c.

[In trespass, if plaintiff declares on his possession, and defendant makes title, and gives colour, and plaintiff replies *de injuria*, &c. and traverses defendant's title, it is sufficient; for he need not reply a title, possession being enough against wrong-doer. *Cary v. Holt*, M. 19 G. 2. Str. 1238.]

(3 M 41.) *What colour shall be good.*] Every colour must be matter of law, which does not lie in the knowledge of *lay gens*: as, a claim by colour of a charter of feoffment by which nothing passed, &c. 10 Co. 91. b. 2 Cro. 122.

By a grant of a reversion to which there was no attornment. 2 Cro. 122.

So, it must be a matter which would be a good title if it was real. 10 Co. 91. b.

It must be matter which has the appearance of a continuing title:



and therefore, if it is by colour of a lease for the life of *A.*, it must say, *now living*; for if he is dead, there is no appearance of title. 10 Co. 91. *b.*

So, colour must be given from him who first conveyed, otherwise all prior conveyances are waived. 10 Co. 89. 91. *b.*

But default of colour is form only, and aided upon a general demurrer. 10 Co. 95. *a.* R. 2 Cro. 229.

So, if the defendant gives the plaintiff a real title, it is bad; for it ought to be colour of title only: as, in trespass for goods, if the defendant pleads that *A.* possessed gave them by deed to the plaintiff, who claiming by it, the defendant retok them, it is bad; for a gift by deed is a good title. R. 2 Cro. 122.

So, if the defendant pleads that the plaintiff by colour of a lease for years, &c.; for a lease gives a title to the possession. *Ibid.*

By colour of letters patent. *Ibid.*

(3 M 42.) *Other justifications.*] So, the defendant may justify trespass *quare clausum* or *domum fregit*, by entry to execute process. *Vide ante*, (3 M 24.)

Or, to make a distress. *Vide ante*, (3 M 25.)

To make use of his way. *Lut.* 1427.

In the highway. *Win.* 1004. *Vide Chimin*, (D 1, 2.) *Vide ante*, (3 K 25.)

Or, common,—[The defendants justified in trespass under a right of common of pasture: the plaintiff replied an inclosure and improvement of the place where, &c. by the lord of the manor averring a sufficiency of common left for the defendant, “and all other persons of right having and using common,” &c.; the defendant traversed the sufficiency in those words; and after verdict for the plaintiff on an issue on that traverse, the court refused to grant a repleader, saying those words meant “all persons having a right to use the common.” *Parnham v. Pacey*, C. P. H. 18 Geo. 2. *Willes*, 532.]—*Vide Common*, (F 1, &c.)—*Vide ante*, (3 K 24.)

To make perambulation. *Co. Eht.* 651. *b.*

To take his corn, cattle &c.

To repair his house, watercourse, &c. or to remove a nuisance.

To fish in his several or free fishery. *Hard.* 407. *Vide Piscary* (A—B).

So, the defendant may justify by command of another defendant who pleads *not guilty*; for his plea shall not take away from his servant his justification. R. 2 Mod. 67.

So, to trespass by *B.*, the defendant may plead in bar a recovery by himself against him in ejectment. R. 1 Leo. 313. 3 Leo. 104.

Or, a recovery or bar in another action for the same trespass. *Vide Action*, (K 1, &c.)

If the defendant justifies by title to a manor, house, &c. it is not sufficient to say *unde locus in quo*, &c. is parcel, without saying that *fuit tempore transgressionis supposit.* 1 Leo. 75.

[If the *locus in quo*, in trespass *quare clausum*, &c. is the inheritance of the crown, (as *Windsor Great Park*,) defendant, on not guilty pleaded, cannot give in evidence that it was a common highway. *Marlborough v. Grey*, M. 1728, *Bunb.* 259.]

[Bail above may justify the breaking and entering the house of *A.*,  
(the

(the outer door being open,) in which the principal *resides*, in order to seek for him, for the purpose of rendering him. *Sheers v. Brooks, C. P. M. 33 Geo. 3. 2 H. Bl. 120.*

[Such a justification is good without averring that the principal was in the house at the time. *Ibid.*]

[And in such a plea an averment that the defendants *duly became bail and entred into a recognizance*, is sufficient, without stating that the principal was delivered to their custody. *Ibid.*]

[Justification under a custom for all the inhabitants to walk and ride over a close of arable land at *all seasonable times* in the year, was holden bad, because it appeared that the trespass was committed when the corn was standing, tho' the defendant averred it was a seasonable time. *Bell v. Wardell, C. P. E. 13 Geo. 2. Willes, 202.*]

[What is a *seasonable time* is partly a question of law, and partly of fact. *Ibid.*]

### (3 N) Pleading in *Warrantia Chartæ*.

#### (3 N 1.) When it lies.

A Writ of *warrantia chartæ* lies when a man by deed enfeoffs another with warranty, the feoffee may have this writ against the feoffor or his heir. *F. N. B. 134. D.*

And the writ says, *quod iuste warrantizet manerium de D. quod tenet & tenere de eo clamat, & unde chartam suam habet, or chartam A. patris sui cuius heres ipse est, &c. Ibid. E.*

But it is not material whether he holds of the defendant or another. *Ibid.*

So, it is not necessary that the plaintiff had a charter of warranty, tho' the form is such; for the plaintiff shall have a *warrantia chartæ*, where he holds by homage *ancestral*, which imports warranty. *Ibid. F.*

Or, if he claims by exchange, without express warranty in the deed. *2. F. N. B. 135. B.*

So, a lessee for life, or donee in tail, rendring rent, shall have a *warrantia chartæ*; for by the statute *de bigamis ch. ult.* the reversion and rent contain warranty. *F. N. B. 134. G.*

So, a *warrantia chartæ* lies *quia timet*, before action sued, as well as after. *Ibid. K. 135. L. Hob. 21.*

So, it lies before action sued, tho' the plaintiff may be impleaded in an action in which voucher lies; and if he is afterwards impleaded in such action, he must vouch, or have a *scire facias* upon the judgment in *warrantia chartæ*. *F. N. B. 134. K. 135. A. Bo. R. Art. 240. R. Mo. 859.*

So, it lies *pendente placito* in an action in which voucher lies, and if the plaintiff recovers his warranty, and afterwards loses his land, he shall have an *habere facias ad valentiam* without a *scire facias*. *F. N. B. 135. D.*

So, if the vouchee does not appear upon the *sequat. sub suo periculo*. *Co. Lit. 102. a.*

So, if a man is impleaded in assise, writ of entry in the nature of an assise, &c. where voucher does not lie, and loses his land, he may afterwards have *warrantia chartæ*. *F. N. B. 134.*

But if he loses his land in an action in which he may vouch, and



he does not vouch, he cannot afterwards have a *warrantia charta*. *F. N. B. 134. I.*

*A fortiori* if he vouches and has judgment to recover in value. *Ca. Let. 102. a.*

So, he shall not have a *warrantia charta*, if there be no warranty in the conveyance by which the land passed, or in the release or confirmation of it. *Hob. 21. Vide supra.*

So, no one shall have a *warrantia charta* if he is impleaded, when he is only pernor of the profits, and not *terre tenant*. *F. N. B. 135. C.*

If he is in of another estate by which the warranty is determined. *Ibid. G.*

### (3 N 2.) Process.

The process in *warrantia charta* is summons, attachment, and distress infinite.

And if *nihil* is returned, a *capias* lies, as in covenant.

### (3 N 3.) Count.

The count in *warrantia charta* must shew the specialty of the warranty and lien. *Hob. 21.*

And therefore, if it is upon a warranty in a fine, it must shew the fine, and to whose use it was, and the default in the defendant to warrant. *Hob. 20.*

So, the count and writ must shew the special case for warranty. *R. Mo. 360.*

*Warrantia charta* lies in whatever county the plaintiff pleases, if no place is mentioned where the deed was dated; if it is mentioned, it must be in that county; and in warranty by reason of homage *auncelstrel*, where the land lies. *F. N. B. 135. F.*

But, if it shews a joint warranty by *A.* and his son, it may charge the son as heir to *A.* *Mo. 20.*

So, the count concludes *ad damnum* of the plaintiff. *Hob. 23.*

Tho' the writ be *quia timet*, in which case he shall not recover damages. *Ibid.*

### (3 N 4.) Plea.

The defendant may plead that the plaintiff is not yet impleaded, on which the plaintiff shall have his judgment immediately; for it admits his lien to warranty. *Hob. 23. F. N. B. 134. K.*

So, the defendant may plead that the plaintiff was not tenant of the land the day of the writ purchased, for *warrantia charta* lies only by the tenant of the land. *Hob. 22. Mo. 860.*

But tenant by admittance is sufficient; for the vouchee may have a *warrantia charta* to deraign the warranty *paramount*. *Hob. 22.*

So, he may plead the general bar *non dedit* or *non concessit*, &c.; for if nothing passed by the deed, the warranty does not bind. *Hob. 22. Mo. 860.*

### (3 N 5.) Judgment.

All the lands which the defendant had at the time of the writ shall be bound by the judgment, tho' aliened afterwards. *F. N. B. 134. I.*

If there is judgment for the plaintiff, and he is afterwards impleaded for rent, he may have a *scire facias* upon the judgment. *Mo. 860.*

But

But tho' the plaintiff has judgment in a *warrantia charta*, whereby the land which the defendant had at the time of the writ purchased, is bound; yet, if the plaintiff is afterwards impleaded for the land warranted, and loses it, if he does not vouch the warrantor, he shall not have the benefit of his judgment in *warrantia charta*. *F. N. B.*

134. *K.*

So, if he is impleaded in assise, or *scire facias*, &c. in which he cannot vouch, he ought to give notice to him who made the warranty, and inquire what defence he shall make, otherwise he shall have no advantage of his recovery in *warrantia charta*. *2. F. N. B.*

135. *a.*

### (3 O) Proceeding in Wast.

#### (3 O 1.) Process.

THE original in wast is a summons, which was given by the *st. W. 2. 14.* instead of a prohibition at common law. *2 Inst.* 389.

And if it be against a tenant in dower, or guardian, it does not recite the statute. *F. N. B. 55. C. Lut. 1548.*

But a writ against tenant for life or years recites the statute. *Ibid.*

So, if it is against tenant by the curtesy. *F. N. B. 56. C.*

If the statute is recited, it is sufficient, tho' it is not exactly recited. *Lut. 1548. Vide Action upon Statute (1).*

'Tho' the conclusion of the writ is larger, or less than the recital: as, if [*terris*] is omitted in the recital, and at the conclusion the wast is alleged in *terris*. *Lut. 1548. F. N. B. 56. I.*

Or, if the statute is recited in *terris, domibus, boscis, et gardinis*, and wast is alleged in *terris* only, or a house only, &c. *Lut. 1548.*

At the return of the summons, the defendant may cast an essoin.

After return of the summons, or if an essoin is cast, at the day to which it was adjourned, by the *st. W. 2. 14.* the plaintiff shall have an attachment. *Clift. 825.*

If an essoin was not cast upon the summons, it may be at the return of the attachment.

By the *st. W. 2. 14.* if the defendant does not appear upon the attachment, a *distringas* goes. *Clift. 828.*

If the defendant does not appear upon the *distringas*, by the *stat. W. 2. 14. mandetur vicecom. quod in propria persona assumpt. secum duodecim, &c. accedat. ad locum vastat. & inquirat de vasto, & post inquisitionem retorn. procedat ad iudicium secundum quod continet., in stat. de Gloc. 5.*

The judgment shall be *quod recuperet locum per vis. jur.* *R. Ow. 12. Pop. 24. Co. Ent. 696. b.*

'Tho' all the processes are returned *nihil*, so that it may be that the defendant was never summoned, nor any writ served, yet if he does not appear upon the *distringas*, an inquiry of the waste shall be awarded. *2 Inst. 389.*

If default be by tenant by the curtesy, or in dower, as well as for life or years. *Win. Ent. 1046. (or 1160. edit. 1680.)*

And there shall be an inquiry of the damages, as well as of the wast. *R. Cro. El. 18. R. Hutt. 44.*

But if the defendant appears upon the *distringas* and pleads, tho' he



he afterwards makes default, there shall be no inquiry of waft; for this case is not within the purview of the statute. 2 *Inst.* 390.

So, if there be judgment by confession, *nil dicit*, or *non sum informatus*, there shall be inquiry of damages only; for the waft is confessed. *R. Cro. El.* 18. *Hut.* 44.

And if he releases his damages, the plaintiff shall have judgment immediately for the place wasted. *Hut.* 44.

And the sheriff need not go to the place wasted in person. *R. Poph.* 24.

Yet judgment may be entred *per visum juratorum*. *Ow.* 12. *Poph.* 25.

And if the inquiry is by more jurors than twelve, it will be good. *R. Cro. Car.* 414.

And they may find entire damages for all the waft assigned. *R. Cro. Car.* 414.

A writ for waft *in dote* must be against the wife. *Reg.* 72. a.

And it shall not be said waft by *exile*, except where the *villains* of a manor are expelled from the manor. *Ibid.* *F. N. B.* 55. C.

So, a writ by him in remainder executed by the statute of uses must be special. *R. Dal.* 5.

### (3 O 2.) Count.

(3 O 2.) *Must shew the plaintiff's title.*] By whom waft shall be brought, *vide Waft*, (C 2, 3.)

In waft the plaintiff must shew how he is entitled to the inheritance. 2 *Rol.* 832. l. 40. *Hob.* 84. *Vide ante*, (C 34.)

And therefore, if he counts upon a lease by himself, he must shew his seisin in fee and demise to the defendant. *Yel.* 140.

If upon a lease by his ancestor, he must shew seisin, a demise to the defendant, and descent to the plaintiff. *Co. Ent.* 708. b.

If the plaintiff claims by fine, he must plead the fine, and the uses of it. *Co. Ent.* 700, 701. *Clift.* 819.

If by common recovery, he must shew the recovery and uses. *Win. Ent.* 1025. (or 1139. edit. 1680.) *Lut.* 1541. *Clift.* 814.

If by grant of the reversion, he must shew how he claims *ex assignatione*. 2 *Rol.* 831. l. 40. 2 *Sand.* 230. 234. *Co. Ent.* 603. *Win. Ent.* 1050, 1051. (or 1164.) *Lut.* 1543.

If the plaintiffs sue as parceners or joint-tenants, the declaration shall shew that they are so. *Win. Ent.* 1049. (or 1163.)

If the plaintiff sues as rector, &c. *in jure ecclesie*, he must shew that he is so. *Win. Ent.* 1047. (or 1161.)

If husband and wife in right of the wife sue, they must allege the reversion in both. *R. Hob.* 1.

But if he concludes *ad exheridationem*, it supplies the omission of what estate he was seised after a verdict. *Per two J. Cro. El.* 57.

So, if he counts of a feoffment to *A.* to the use, &c. it is sufficient without saying that it was to *A.* and his heirs. *R. Hob.* 84.

If the plaintiff shews the special matter it is sufficient, tho' he does not name himself assignee. *R. 2 Rol.* 831. l. 50.

So, if the writ is general, *cujus heres* the plaintiff is, tho' he has a special inheritance. *R. 1 Leo.* 48.

So, if the plaintiff shews a fine to the use of *B.* for life, and afterwards

terwards to *A.* and the heirs of his body, and afterwards to the plaintiff in fee, and that *A.* died, *per quod* *B.* was seised for life, remainder to the plaintiff, and that *B.* committed wast to his disherison, this supplies the omission that *A.* died without issue. *R. Crb. Car.* 401.

If the plaintiff has the reversion, he shall say that the defendant holds of him. *2 Rol.* 830. *l.* 36.

Otherwise, if wast is brought by him in remainder. *Ibid.* *l.* 38. 40. *Dal.* 5.

Or, by the lord who has by elcheat, for there is no tenure of him. *Hut.* 110.

(3 O 3.) *How the wast shall be charged; in the tenet or the tenuit.* Against whom wast shall be brought, *vide Wast*, (C 4, 5.)

The plaintiff must always charge the defendant in the *tenet* or in the *tenuit*; for there is no other form. *R. Cro. El.* 356.

And must charge him as assignee, executor, &c. *Co. Ent.* 693. 695.

And must charge him by virtue of the lease by which he is possessed; as, if he be in, in his remitter, he must charge him as tenant by his ancient lease. *2 Rol.* 831. *l.* 7.

If the defendant is in by devise, he must charge him as tenant *ex legatione*. *Ibid.* *l.* 21. *R. Hut.* 110. *Co. Ent.* 700.

If the defendant claims by a remainder for life or for years, which is now in possession, he may be charged upon a demise to him. *2 Rol.* 831. *l.* 25.

But, if the defendant is in by the statute of uses, it is sufficient to charge him generally, without saying of whose demise. *R. 2 Leo.* 222.

Wast by an infant against his guardian shall be always in the *tenet*. *2 Rol.* 829. *l.* 51.

So, against tenant for life it shall be in the *tenet*, for there is no other form. *2 Rol.* 830. *l.* 3.

Tho' after the wast he granted over his estate. *2 Rol.* 829. *l.* 45.

Or, the lessor had entred for forfeiture or condition broken.

So, if a woman tenant for life commits wast, and assigns her estate, and takes husband, it shall be against them that *tenent*. *2 Rol.* 829. *l.* 53.

But wast by an heir after full age against his guardian, shall be in the *tenuit*. *2 Rol.* 830. *l.* 18. 20. *Co. Lit.* 54. *a.*

So, against a tenant for another's life after the death of *cestui que vie*. *2 Rol.* 830. *l.* 15.

Or, against tenant for years after the term expired. *2 Rol.* 830. *l.* 10.

Or, after forfeiture. *Ibid.* *l.* 16.

So, if a woman commits wast, and then *cestui que vie* dies, or the term expires, and she takes husband, the declaration shall be *quod tenuerunt*. *Ibid.* *l.* 25.

Or, that the wife, *sum sola, tenuit*. *Ibid.* *l.* 30.

The declaration shall suppose that the defendant *tenet ad terminum annorum*, tho' he holds only for one year, or half a year. *Co. Lit.* 54. *b.*

If the lease is to two, and the writ supposes *quod tenet* or *tenuerunt*, which imports a joint estate, it is good; tho' one of the defendants has it by assignment from the lessee. *R. 3 Leo.* 48. If



If he declares upon several demises, it will be good. *R. Ow. 11. Poph. 25.*

(3 O 4.) *Conformable to the writ.*] The declaration must assign the waſt conformable to the writ; for if the writ is for waſt in land, and it is assigned in cutting wood, it is bad. *Mo. 73. Vide ante, (C 13.)*

If it is for three *vills*, and the declaration is for waſt in one or in another *vill*. *R. Mo. 862.*

(3 O 5.) *Particulariſing the quantity and quality, &c.*] So, it muſt particulariſe the quality or quantity of the waſt; as, if it is in cutting trees, he muſt ſhew the number of the trees. *2 Rol. 832. l. 50.*

If waſt conſiſts in quantity, it muſt ſay ſo many *carectat*. *Ibid. l. 52.*

If waſt is assigned *in domibus*, it muſt ſhew the particular defects.

If it is assigned in land, it muſt ſay in what pariſh it lies. *R.*

*3 Leo. 9.*

If the demise is of a moiety of a manor and other lands, and the waſt assigned in wood, parcel of the premiſes, it is bad; for it cannot be parcel of the manor, and alſo of the other lands. *Ibid.*

So, it is ſufficient to assign waſt directly without ſhewing the particular manner in which it was committed; as, if the waſt is by a ſtranger, it is ſufficient to ſay that the defendant committed waſt in cutting, &c. without ſaying *in permittendo* the ſtranger. *2 Rol. 833. l. 7.*

If it is in *germins*, it is ſufficient to ſay that he deſtroyed the *germins* generally, without ſaying that he ſuffered the hedges of the wood to be neglected, whereby cattle entred and eat the *germins*. *Ibid. l. 5.*

(3 O 6.) *Muſt be ad exhæreditationem querentis.*] So, the declaration muſt be *ad exhæreditationem* of the plaintiff.

If the plaintiff is ſeiſed in right of his wife, it ſhall be *ad exhæreditationem* of the wife. *2 Rol. 832. l. 15. 20.*

If waſt be by an abbot, prior of an hoſpital, &c. it ſhall be *ad exhæreditationem domus, hoſpital., abbat., or eccleſiæ*. *Ibid. l. 30.*

So, if there are ſeveral plaintiffs in waſt, there may be ſummons and ſeverance; for it is real action, and is *ad exhæreditationem*. *2 Inſt. 307.*

### (3 O 7.) Pleas.

(3 O 7.) *No waſt committed.*] To an action for waſt the general iſſue is *no waſt done*. *2 Sand. 238. Co. Ent. 700. 708.*

And this admits nothing, but puts the whole declaration in iſſue. *R. Lut. 1547.*

And it may be pleaded in all caſes where there is no waſt; as, if deſtruction happens by tempeſt, lightning, enemies, &c.

But it is no plea where the defendant has matter of juſtification or excuſe.

So, if there is a leaſe to *A.* for two years, and afterwards a leaſe to *B.* for ten years, in waſt againſt *B.* for waſt during the two years, he cannot plead *no waſt done*. *R. 3 Leo. 203.* So,

So, he may plead as to part of the wafts assigned, *no waft done*.  
*Co. Ent. 702, 3.*

If several wafts are assigned, and the defendant is not guilty of part of any, he may plead *no waft done* to all together, and need not say to every part severally *no waft*. *Lut. 1550. Win. Ent. 1168.*

(3 O 8.) *Release.*] So, the defendant may plead in bar a release from the plaintiff, or one of the plaintiffs. *9 H. 5. 15. Vide post.*  
 (3 O 16.)

(3 O 9.) *Accord.*] To waft in the *tenuit*, accord with satisfaction.  
*R. Cro. El. 357. Co. Ent. 707. b. Vide Accord, (A 1.)*

(3 O 10.) *Pleas in abatement.*] So, the defendant may plead in abatement to the plaintiff's title: as, if he entitles himself to the reversion in fee by descent, the defendant may plead a devise to the plaintiff in tail. *Lut. 1557.*

And need not traverse the descent: but if he does, it will be good upon a general, tho' not upon a special demurrer. *R. Lut. 1558.*

So, the defendant may plead that the plaintiff has nothing in reversion. *Yel. 141.*

But he ought to shew how the reversion is divested, for *nothing in reversion* generally will be had. *Co. Lit. 356. a.*

Except where waft is brought by a grantee of the reversion. *Ibid.*

So, if the plaintiff's title fails *pendente lite*, the defendant may plead it after the last continuance.

As, if his reversion fails. *Yel. 141.*

If he becomes tenant in tail after possibility. *1 Rol. 106.*

(3 O 11.) *In justification. For repairs.*] So, the defendant may plead in justification, that he took for repairs. *Co. Ent. 703. a. Win. Ent. 1029. (or 1142. edit. 1680.) Vide Waft, (E 1, &c.)*

*That he pulled down, to rebuild and repair the house, fences, &c. Win. Ent. 1029. 1067. (or 1142. 1182.)*

*That he took for repair of the fences and other necessary uses. Ibid. 1029. or 1142.)*

But it is not sufficient to say, that he took for repairs, if he does not add that he used or keeps for repairs. *R. 3 Lev. 323.*

(3 O 12.) *For boots.*] So, he may plead that he took for other necessary boots: as, for fuel. *Co. Ent. 703. a. Win. Ent. 1032. or 1144. Vide Waft, (E 1, &c.)*

Or, for necessary wainboot, cartboot, or plowboot. *Win. Ent. 1030. 1055. (or 1144. 1169.)*

Or, for gates, stiles, &c. *Ibid. 1031. (or 1145.)*

Or, for making utensils of husbandry. *Ibid. 1055. (or 1169.)*

Or, for hedgeboot. *Co. Ent. 703. a.*

[But these justifications must be pleaded; they cannot be given in evidence under the general issue. *Reg. Plac. 272.*]

(3 O 13.) *Arida mortua.*] So, he may plead that they were *arida mortua, nec fructum nec folia portan.*

But, it is not sufficient to say *qua fuerunt arida, cava, in columnis putrida,*



*putridæ, Anglice pollards, non habent. sufficiens maberemium pro aliquibus edificiiis. R. Mo. 101.*

(3 O 14.) *Lease without impeachment, &c.*] So, he may plead that the lease was without impeachment of waste. *R. 2 Rol. 835. l. 10. 15. Co. Ent. 694. b. Vide Waste, (E 3.)*

*That the plaintiff's ancestor made a bargain and sale of the trees to him. Win. Ent. 1043. (or 1157. edit. 1680.)*

That the lessor covenanted that the lessee might cut down trees. *Hard. 113. 1 Leo. 117.*

But it is no bar, that the lessor covenanted to repair, and that he did it for him. *R. Mo. 23.*

(3 O 15.) *In excuse. Reparavit.*] So, the defendant may plead in excuse *quod reparavit* before the action brought; for the jury must view the place wasted. *5 Co. 119. b. 2 Inst. 307.*

*Quod re-edificavit*, and since kept in repair. *2 Leo. 189.*

But *reparavit pendente lite* is no plea. *2 Inst. 307.*

(3 O 16.) *A release.*] So, the defendant may plead a release from the plaintiff.

And if the waste is by two plaintiffs in the *tenuit*, a release by one is a bar to both. *2 Inst. 307.*

But where waste is in the *tenet*, a release by one plaintiff bars himself only. *Ibid. Vide ante, (3 O 8.)*

(3 O 17.) *Repari non potuit.*] So, the defendant may plead that it was so ruinous at the commencement of his lease *quod reparari non potuit. Mo. 54. Win. Ent. 1045. (or 1159. edit. 1680.) Vide Waste, (E 4.)*

(3 O 18.) *No demise.*] So, the defendant may plead, *no demise made to him.*

Or, *no demise as to part. Co. Ent. 697. b.*

Or, that wood was excepted by the demise. *Win. Ent. 1062. (or 1176.)*

Or, *nihil habet ex assignatione de B. Ibid.*

So, that, after the demise, the defendant assigned, before which assignment no waste was done. *Co. Ent. 697. b.*

*Replication.*] To assignment before waste done, the plaintiff may reply, that the assignment was by fraud, and he afterwards took the profits. *Ibid. 698. a.*

And if the defendant rejoins he must traverse the pernancy of the profits, not the fraud. *R. 5 Co. 77. b.*

(3 O 19.) *A mesne remainder-man alive.*] So, the defendant may plead, *a mesne remainder-man still alive. Win. Ent. 1019. (or 1132. edit. 1680.)*

(3 O 20.) *Venire facias.*

After issues joined upon several pleas, if the *venire facias* recites the issues, and commands *quod venire fac. duodecim, &c. ad inquirendum*  
*si de-*

*si* defendant *fecit vastum*, as the plaintiff alleges, it is sufficient; for this implies *quod inquir.* of the several issues. *R. Cro. Car.* 381.

## (3 O 21.) View in Wast.

In wast, if issue is joined, the jury ought to have a view of the place wasted, otherwise the trial shall be staid. *Lut.* 1558. 2 *Sand.* 254.

And therefore, if wast is assigned in several places, the jury may find *no wast done* in a place of which they had no view. *Per Dy.* 1 *Leo.* 267.

And they ought to have a view, tho' the issue is upon a collateral point, and the wast is confessed. *Per two J. Glanv. cont. Noy,* 5.

The *venire facias* shall be, that the jury shall have a view. *Win. Ent.* 1039. (or 1153. edit. 1680.)

And six jurors at least must have the view. 2 *Sand.* 254.

And, if it is not returned, the court may examine whether the jurors have viewed or not. *Ibid.*

So, if it is returned, the court may examine; for the return does not conclude the parties. 2 *Sand.* 255.

But, if the wast is assigned in a wood *sparfim*, it is sufficient, if the jury view the wood, tho' they do not enter into it. *R.* 1 *Leo.* 267.

So, if it be in several rooms of a house, it is sufficient, if they have a general view of the house. *Ibid.*

So, it is not necessary, that the officer return, upon the *distringas juratorum*, that the jury have viewed. *R.* 2 *Sand.* 254.

Or, that he be present at the view. 2 *Sand.* 255.

## (3 O 22.) Judgment in WASTE.

What shall be recovered, *vide Wast.*

If there be judgment for want of an appearance upon the *distringas* by the *st. W.* 2 14. the sheriff taking twelve, &c. shall go to the place wasted and take an inquisition of the damage, and upon the return thereof there shall be judgment. *R. Ow.* 12. *Vide ante,* (3 O 1.)

If the defendant suffers judgment by confession, *nil dicit*, or *non sum informatus*, there shall be inquiry of the damages only. *Vide ante,* (3 O 1.)

If the judgment is against the defendant in the *tenet*, it shall be *pro loco vastato*, and for damages.

If the judgment is against the defendant in the *tenuit*, it shall be for damages only.

If the verdict is for the defendant, the judgment shall be *quod querens nil capiat*, &c. and the defendant *eat sine die*. 2 *Sand.* 247.

And if the defendant will not pray judgment, to avoid a writ of error, it may be entred, upon the prayer of the plaintiff, against himself. *R.* 2 *Sand.* 253.

## P L E D G E.

*Vide Chancery,* (4 A 1, &c.)—Mortgage.

## P L E D G E S.

*Vide Bail (C).*—Pleader, (C 16.—3 K 5.)



## PLENARTY.

*Vide Abatement, (H 26.)—Esplife (M).—Pleader, (3 I—8.)—Quare Impedit.*

## PLENE ADMINISTRAVIT.

*Vide Pleader, (2 D 9.)*

## PLURALITY.

*Vide Esplife, (N 5, &c.)*

## THE END OF THE FIFTH VOLUME.